Access to Justice and Choice of Law Issues in Multi-Jurisdictional Class Actions in Canada

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This article first examines the treatment of choice of law in multi-jurisdictional class action cases in Canada. More specifically, it looks at Ontario, the province that has the longest experience with these cases. Analysis of the Ontario case law reveals that the courts are divided in their treatment of choice of law in such class actions. It also reveals that there is serious reason to believe that the Ontario courts often duck the issue. They do so either by ignoring it altogether, by acknowledging the dimension but adopting a "wait and see" approach by invoking the facultative choice of law doctrine, or by neglecting to assess this component at the settlement approval stage. The author then tries to determine whether this practice jeopardises the furtherance of access to justice by studying the apparent opposition between the facultative choice of law doctrine and adequate representation. However, the author notes that none of the jurisprudential trends can obviously be qualified as furthering or frustrating access to justice. This is because justice is multifaceted and also because the nature of the choice of law rules varies. The non-application of multilateral conflicts rules does not deprive non-resident members of their rights, whereas the non-application of conflicts rules that embody a material justice ideal appears problematic. Therefore, the author concludes that the facultative choice of law doctrine should not be abandoned completely in the class actions context. Instead, the judge should be alert to the applicable area of law and the nature of the choice of law rules that apply.

Cet article examine en premier lieu le traitement réservé au choix de la loi applicable dans le cadre des recours collectifs multi-territoriaux au Canada. Il se penche en particulier sur le cas de l'Ontario, soit la province qui possède l'expérience la plus longue dans ce domaine. L'analyse de la jurisprudence ontarienne révèle que les tribunaux sont divisés quant au traitement qu'ils réservent au choix de la loi applicable lors de recours collectifs de ce type. Il en ressort en outre que les tribunaux ontariens ont plutôt tendance à esquiver la question. Ils agissent ainsi soit en faisant fi de la demande, soit en reconnaissant cette dimension mais en adoptant une attitude prudente, passive consistant à invoquer le caractère facultatif de la doctrine du choix de la loi applicable, ou en omettant d'évaluer cette composante à l'étape de l'approbation du règlement. L'auteur tente ensuite de déterminer dans quelle mesure cette pratique compromet la poursuite de l'accès à la justice en étudiant l'opposition apparente entre le caractère facultatif de la doctrine du choix de la loi applicable et une représentation adéquate. L'auteur note toutefois qu'aucune des tendandes jurisprudentielles ne peut prétendre favoriser ou entraver l'accès à la justice. On peut l'expliquer par le caractère multiple de la justice et aussi du fait que la nature des règles régissant le choix des lois applicables varie. La non-application des règles relatives aux différends multilatéraux ne prive nullement les membres étrangers de leurs droits, tandis que la non-application de ces règles, lesquelles incarnent une sorte d'idéal de la justice matérielle, pose certains problèmes. L'auteur conclut par conséquent que l'on ne devrait pas complètement renoncer au caractère facultatif de la doctrine du choix de la loi applicable dans le cadre des recours collectifs mais plutôt faire en sorte que le juge soit informé du domaine de droit applicable et de la nature des règles régissant le choix de la loi applicable.

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I. INTRODUCTION

Class actions are now an essential procedural vehicle through which consumers with fragmented and diffuse interests gain access to justice. Over the years, market globalization has profoundly modified consumerism. In response to this phenomenon, "opt-out" jurisdictions have been requested to certify multi-jurisdictional class actions.

A priori, multi-jurisdictional class actions seem to have a positive impact on access to justice. Indeed, more class members access the judicial system, the costs of the action for each member are reduced and the class gains more weight in the negotiation of a settlement. It also increases the likelihood of behaviour modification, is judicially more efficient[1] and finally, for defendants, multi-jurisdictional class actions offer complete closure.

However, there remains a divide between the national exercise of legislative and jurisdictional powers and a cross-border market. In Canada, the relationship between private international law and class actions is "still in its infancy."[2] Courts of opt-out jurisdictions[3] have been certifying multi-jurisdictional class actions

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1 Uniform Law Conference of Canada, Civil Law Section, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations* (Vancouver: March 2005) at para 17.

2 Barry Glaspell, "The Extra-Territorial Reach of Canada's Provincial Class Action Statutes" in *Actes de la formation juridique permanente 2008 volume 2: Troisième colloque sur les recours collectifs* (Cowansville, QC: Yvon Blais, 2008) 131 at 136.

3 Today, all but one province (Prince Edward Island, where class actions can be "certified" under the common law) have class proceedings legislation, most of them permitting inclusion of non-residents on an opt-out basis: *Class Proceedings Act 1992*, SO 1992, c 6 (Ontario) [CPA]; book IX CPP (Quebec); *The Class Actions Act*, SS 2001, c C-12.01 (Saskatchewan); *Class Proceedings Act*, SA 2003, c C-16.5 (Alberta); *The Class Proceedings Act*, CCSM, c C130 (Manitoba); *Class Proceedings Act*, SNS 2007, c 28 (Nova Scotia). The opt-in jurisdictions are: *Class Proceedings Act*, RSBC 1996, c 50 (British Columbia); *Class Proceedings Act*, SNB 2006, c C-5.15 (New Brunswick); *Class Actions Act*, SNL 2001, c C-18.1 (Newfoundland and Labrador). The Federal Court of Canada also has rules stating that class proceedings actions in federal courts can only be brought with regard to federal laws. The situation is thus very different from that of the US where, following the adoption of the *Class Action Fairness Act of 2005*, 28 USC (2005) [CAFA], most of the multi-jurisdictional class actions are heard in federal courts. Absent a constitutional amendment, a Canadian version of CAFA could not be adopted. Most multi-jurisdictional class actions involving choice of law issues are heard in the provincial courts, usually the superior courts.

since the 1990s, but questions of private international law only recently came to the fore. Notably, in three prominent decisions, Canadian courts refused to recognise and enforce foreign decisions certifying multi-jurisdictional class actions and approving settlements.[4] According to the courts, these decisions violated the procedural rights of non-resident class members. In the most recent one, the Supreme Court of Canada expressed in *obiter* some concerns regarding national classes, highlighting the need to determine what legal system may apply to subclasses and the duty to take account of each group's specific interests.[5]

This prompted a doctrinal effervescence in Canadian scholarship over multi-jurisdictional class actions. However, most of the attention so far has been directed toward the jurisdictional issue (whether or not these class actions are constitutional) and the attendant recognition/enforcement problems linked with jurisdiction.[6] The question of choice of law has been mostly left out.[7]

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4 *Canada Post Corp v Lépine*, 2009 SCC 16, [2009] 1 SCR 549 [*Lépine*]; *Hocking c Haziza*, 2008 QCCA 800, [2008] RJQ 1189 [*Hocking*]; *Parsons v McDonald's Restaurants of Canada Ltd* (2004), 45 CPC (5th) 304, 128 ACWS (3d) 22 (Ont Sup Ct) [*Parsons*].

5 See *Lépine*, *supra* note 4 at paras 56-57.

6 See Glaspell, *supra* note 2; Michael J Peerless & Michael A Eizenga, "Conflict of Laws and National Class Actions" (2002), online: Siskinds <http://www.derivativelitigation.ca/pdf/publications/National_Class_Actions_and_Conflict_of_Laws.pdf>; Glenn M Zakaib & Tim Pinos, "Multi-Jurisdictional Class Actions and the National Class Debate" (2007) 278 Service de la formation continue du Barreau du Québec : Développements récents en recours collectifs 199; Janet Walker, "Crossborder Class Actions: A View from Across the Border" (2004) 3 Mich St L Rev 755; Peter W Hogg & S Gordon McKee, "Are National Class Actions Constitutional?" (2010) 26 NJCL 279; Janet Walker, "Are National Class Actions Constitutional?–A Reply to Hogg and McKee" (2010) 48 Osgoode Hall LJ 95 [Walker, "Are National Class Actions Constitutional?"]; Colin K Irving & Mathieu Bouchard, "National Opt Out Class Actions, A Constitutional Assessment" (2010) 26 NJCL 111; Tanya Monestier, "*Lépine v Canada Post*: Ironing Out the Wrinkles in the Interprovincial Enforcement of Class Judgments" (2008) 34 Advocates' Q 499; Ellen Snow, "Protecting Canadian Plaintiffs in International Class Actions: The Need for a Principled Approach in Light of *Currie v McDonald's Restaurants of Canada Ltd*" (2005) 2:2 Can Class Action Rev 217; Michel Bédard, "Les recours collectifs et le droit international privé au Québec" (2005) 2 Can Class Action Rev 279; Geneviève Saumier, "Le recourscollectif, la globalisation des marchés et l'accès à la justice pour le consommateur" in Thierry Bourgoignie, ed, Propos autour de l'effectivité du droit de la consommation (Cowansville: Yvon Blais, 2008) 193; Daniel Belleau, Maxime Nasr & Alexandra Scott, "Les recours collectifs nationaux au Québec – Mais de quelle nation s'agit-il?" (2009) 312 Service de la formation continue du Barreau du Québec : Développements récents en recours collectifs 169.

7 See Walker, "Are National Class Actions Constitutional?", *supra* note 6 at 136; Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003) at 159 (where the lack of scholarship on the issue is mentioned). See also Glaspell, *supra* note 2 (where there is a slight mention of the issue). "If a substantial ingredient of a class claim relies on a particular provincial statute, extra-provincial plaintiff classes should not be available. National classes have been seen as viable to date due to an underlying premise, possibly false, that there is a single common law across Canada" (*ibid* at 167). See also Zakaib & Pinos, *supra* note 6 at 208 (where different laws would apply potentially leading to different results, it is inappropriate to certify a national class). The issue is briefly addressed in Bédard, *supra* note 6 at 297-300 (the criteria of art 1003(a) CCQ calls for a nuanced position). The sole existence of common questions of fact relevant to the application of multiple laws can be sufficient to grant certification. See Snow, *supra* note 6 at 229-30 (where it is suggested that it should play a role at the recognition stage); Saumier, *supra* note 6 at 205-7 (mentioning that it could be an obstacle to certification, mostly in contractual cases); *supra* note 1 at para 53 (where the Uniform Law Conference of Canada, in its 2005 report, simply mentions that applicable laws should be a factor in determining whether to certify multi-jurisdictional class actions). See also Uniform Law Conference of Canada, Civil Law Section, The Special Working Group on Multi-Jurisdictional Class Proceedings, *Supplementary Report on Multi-Jurisdictional Class Proceedings in Canada* (Edmonton: August 2006) at para 14.

The importance of this question can be illustrated by the situation in the United States of America (US), which has a longer experience than Canada with class actions generally and multi-jurisdictional class actions specifically. In 1985, in the *Shutts* decision,[8] the Supreme Court of the United States (SCOTUS) considered that giving appropriate notice and offering procedural rights (opt-out and participation) was sufficient to establish jurisdiction over non-resident class members in a multi-jurisdictional class action. However, it considered that the choice of law question could not be eluded by a simple recourse to the law of the forum. This part of the ruling transformed choice of law issues into a major obstacle to certification, with regard to the predominance and superiority (manageability) criteria of Rule 23.[9] Often times, certification will be refused because variations in law result in the predominance of individual rather than common issues or render the class unmanageable.[10]

In 2005, the *Class Actions Fairness Act* (*CAFA*)[11] was adopted in the US to concentrate most class actions in the federal courts. However, the *CAFA* did not solve the choice of law problems because according to the decision of the SCOTUS in *Klaxon*,[12] federal courts sitting in diversity jurisdiction are required to apply the laws of the state in which they sit.

Different solutions have been proposed by scholars: the adoption of federal substantive law, the reversal of *Klaxon* with the adoption of federal choice of law rules to avoid forum shopping, the adoption of choice of law rules at the state and/or federal levels pointing to a single law (such as the place of business of the defendant)[13] and recourse to issue classes and subclassing.[14] The specifics of the American debate are not all relevant for Canada, but the point here is that the discussion south of the border definitely invites us to study the question in the Canadian context.[15]

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8 *Phillips Petroleum Co v Shutts*, 472 US 497 (1985) [*Shutts*].

9 See e.g. Stephen R Bough & Andrea G Bough, "Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)" (1999) 68:1 University of Missouri-Kansas City Law Review 1. See also The American Law Institute, *Principles of the Law: Aggregate Litigation* (Minnesota: American Law Institute Publishers, 2010) at 132 (for an exposition of the current state of the law).

10 See Linda Silberman, "The Role of Choice of Law in National Class Actions" (2008) 156:6 U Pa L Rev 2001 at 2012-13.

11 *CAFA*, *supra* note 3.

12 *Klaxon Company v Stentor Electric Manufacturing Co*, 313 US 487 (1941) [*Klaxon*].

13 See Samuel Issacharoff, "Settled Expectations in a World of Unsettled Law: Choice of Law after the *Class Action Fairness Act*" (2006) 106:7 Colum L Rev 1839 [Issacharoff, "Settled Expectations"] (where he proposes the application of the law of the defendant's place of business because it is in line with the need to facilitate common legal oversight of undifferentiated national market activity).

14 See Silberman, *supra* note 10 at 2010-12 (for a discussion of the proposals).

15 It is important to note that the Canadian provinces can vest their courts with general jurisdiction (i.e. provincial courts can apply and interpret federal as well as provincial law). Furthermore, when federal law is silent as to the forum, the case is heard in provincial courts. The jurisdiction of the federal courts is purely statutory and only extends to federal laws. The relationship between the provincial and federal courts in Canada is consequently very different from that of the state and federal courts in the US. Federal courts have a much more limited competence and they have no diversity jurisdiction. The courts where most of the cases are brought are the superior courts of each province. Consequently, the issue of forum shopping for the best choice of law rules arises in the US and in Canada, but for different reasons.

The choice of law issue is also interesting because there is an apparent contradiction between the class actions requirement of adequate representation, which arguably includes the right of class members to have their claims pursued under the best law available,[16] and the procedural status of the choice of law and foreign law in Canada under the facultative choice of law doctrine.[17]

Finally, the fact that most cases settle, in conjunction with the difficulty of assessing the fairness of class settlements, creates the possibility of courts ducking the issue of choice of law under a general finding of reasonableness. These three elements together suggest that it is worth studying how the choice of law issues are and should be addressed in multi-jurisdictional class actions in Canada.

In Part II, this article will examine the treatment of choice of law in multi-jurisdictional class actions in Canada, specifically in Ontario, the province that has the longest experience with multi-jurisdictional class actions. Part III will study the relationship between choice of law and access to justice. The study will be based on the results of the extensive case law analysis conducted in Part II. The goal is to identify which treatment of the choice of law issues allows the class action vehicle to stay true to one of its fundamental objectives: access to justice. This in turn will shed new light on the apparent opposition between the facultative choice of law doctrine and the class actions requirement of adequate representation. Finally, the article will conclude with an assessment of the Ontario case law and some normative proposals as to how choice of law should be addressed to allow the vehicle of class action to remain true to its foundational goal of promoting access to justice. The analysis could certainly have been done regarding other objectives of the class action vehicle, for example deterrence,[18] but this study is limited to access to justice.

Two reservations must now be expressed. First, the objective is not to argue that choice of law rules should or should not be applied, because this might run into constitutional or ethical problems that are not addressed in detail here. The objective is rather to show how the current treatment of the choice of law dimension in the Ontario case law on multi-jurisdictional class actions relates to the notion of access to justice. Second, this article does not examine the issues that arise from the differences in the choice of law rules between provinces. It is restricted to the legal diversity resulting from the application of the chosen forum's choice of law rules.

II. CHOICE OF LAW IN MULTI-JURISDICTIONAL CLASS ACTIONS IN ONTARIO

Of the common law provinces, Ontario adopted its choice of law legislation first, in 1992. For this reason, joined with the opt-out nature of the proceedings and

16 See Patrick Woolley, "Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)" (2004) Mich St L Rev 799 at 801.

17 See Claude Emanuelli, *Droit international privé québécois*, 2d ed (Montreal: Wilson & Lafleur, 2006) at 232.

18 See Genevieve G York-Erwin, "The Choice-of-Law Problem(s) in the Class Action Context" (2009) 84 NYUL Rev 1793 (for an example of such an analysis in American law).

the fact that Ontario is the most populous and economically important province, it has long been the preferred jurisdiction for the certification of multi-jurisdictional classes. This made the Ontario case law an obvious choice to analyse the treatment of choice of law issues. This article will briefly expose the legal framework within which Ontario courts were operating, followed by an exposé of the various approaches they took.

A. The Legal Framework within Which the Ontario Courts Operate

1. Overview of the Class Proceedings Act and the Facultative Choice of Law Doctrine

Under the *Class Proceedings Act* (*CPA*), one or more members of a class may commence a proceeding in the Superior Court. The person who commences a proceeding must present a motion for certification as a class proceeding and for appointment of a representative plaintiff.[19] To obtain certification, the court must find that the pleadings disclose a cause of action and that there is a class of two or more persons. More relevant to the choice of law issue, the court must also find that the claims or defences raise common issues of fact or law, that the class proceeding would be the preferable procedure and that there is a representative who would fairly and adequately represent the interests of the class.[20]

There is no official requirement of predominance in the *CPA*. According to the Supreme Court, to determine commonality one must ask whether allowing the suit will avoid duplication of fact-finding and legal analysis.[21] However, some kind of predominance analysis is required since the Court also specified that there must be a substantial common ingredient to the claims.[22] This requirement is also introduced into the preferability analysis,[23] which is similar to the superiority criteria of Rule 23 in the US. To find that a class action is preferable, a court must look through the lens of the three advantages of class actions.[24] It must ask whether it is a fair, efficient and manageable method of advancing the claims, and whether it is preferable to other procedures,[25] taking account of various factors (e.g. desire to sue individually, degree of sophistication, size of claims, costs, alternatives, judicial economy, behaviour modification effect, impact on defendant, etc.).[26]

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19 *CPA*, *supra* note 3, s 2.

20 *Ibid*, s 5.

21 *Hollick v Toronto (City of)*, 2001 SCC 68, [2001] 3 SCR 158 at para 18 [*Hollick*].

22 *Ibid*. See also *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 at para 39 [Dutton].

23 See Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Portland: Hart, 2004) at 192, 257.

24 Three objectives are commonly attributed to class actions: (1) judicial economy; (2) access to justice; and (3) behaviour modification. See *Dutton*, *supra* note 22 at paras 27-29; *Hollick*, *supra* note 21 at para 15.

25 *Ibid* at paras 27-28.

26 Mulheron, *supra* note 23 at 226-57.

The *CPA* specifically provides for the possibility to create subclasses where some members have claims or defences that raise issues that are not shared by all and that require separate representation. It is expressly prohibited to deny certification for the reason that the class includes a subclass.[27]

Although the requirement of preferability and the possibility of creating subclasses appear to invite a choice of law analysis, it is important to underline that the facultative choice of law doctrine is applicable in Ontario, as in the rest of Canada.[28] This doctrine, which works hand-in-hand with the adversarial system, refers to the procedural status of the choice of law rules and/or the foreign law in a forum's courts. It expresses the division of roles between the courts and the parties with regard to these rules, and it means that choice of law rules must be pleaded and/or foreign law must be proved as a fact. If not, forum law applies.[29] Once this is done, courts can generally take judicial notice of the law of other provinces and territories, but proof of other foreign law must be made.[30]

This doctrine can be contrasted with that of mandatory choice of law, applicable in many European countries, where the judge is required to apply the choice of law rules and to take judicial notice of foreign law.[31] Although its theoretical foundation is uncertain, the doctrine of facultative choice of law has a lot of practical advantages. It is procedurally efficient, and De Boer notably argues that it increases the quality of the judicial process.[32] In the context of a class action, it also has the practical effect of facilitating certification and permitting the avoidance of a predominance and subclasses debate.

As is the case south of the border, class actions in Ontario settle in an overwhelming majority.[33] Unfortunately, the *CPA* does not address this reality.

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27 *CPA*, *supra* note 3, s 6(5).

28 See e.g. art 2809 CCQ. See generally Emanuelli, *supra* note 17 at 232-35; J-G Castel, *Canadian Conflict of Laws*, 4th ed (Toronto: Butterworths, 1997) ch 7 at 155-62; *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022 at 1053, 120 DLR (4th) 289 [*Tolofson*].

29 See Th M de Boer, "Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law" in *Recueil des cours: Collected Courses of the Hague Academy of International Law*, at 257 (The Hague: Martinus Nijhoff Publishers, 1996) 222 at 259-62, 269, 316.

30 See Castel, *supra* note 28.

31 De Boer, *supra* note 29 at 255-57 (where the author refers notably to Spain, the Netherlands, Austria, Belgium and Italy). See e.g. art 12(6)(1) Spanish Civil Code ("Los Tribunales y autoridad es aplicarán de oficio las normas de conflicto del derecho español").

32 De Boer, *supra* note 29 at 317-22.

33 I did not find any statistics for Ontario specifically. However, in my research of the Ontario cases (completed in March 2011), I did not find a single judgment on the merits of a multi-jurisdictional class action. In Quebec, the Fonds d'aide aux recours collectifs published statistics according to which 15.9 percent of the cases before authorization (i.e. certification) were settled in 2008. This total number of cases included the pending motions and the discontinued actions. If one takes out the pending motions and the ones for which a discontinuance was filed, the percentage goes up to 25 percent. After authorization, 30.4 percent of the actions were settled. Again, if one only counts the actions that were dismissed, granted or settled, the settlement rate goes up to 52.1 percent: Fonds d'aide aux recours collectifs, *Rapport annuel, 2008-2009* (Laval: Gibraltar, 2009) at 17-19. Generally speaking, approximately 90-95 percent of cases that are not dismissed by the courts in the early stages of litigation settle. See Russell Korobkin & Chris Guthrie, "Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer" (1997) 76 Tex L Rev 77 at 77.

Section 29(2) simply provides that a settlement is not binding unless approved by the courts.[34] The criteria for approval of a settlement were developed by the courts[35] and are similar to those applied in the US, with the cave at that there is no counterpart to the landmark decisions of *Amchem*[36] and *Ortiz*[37] in the Canadian case law.

Seven main factors, organised along substantive and procedural components, are taken into account by the courts in the approval of a settlement.[38] Choice of law issues can come up twice in the inquiry. First, the judge needs to conduct a judicial risk analysis. In trying to evaluate the risks of establishing liability and damages, quantify the net expected value of the suit and estimate the range of outcomes, the judge needs to know which law applies to which class members. Second, the judge must determine if there was adequacy of representation (i.e. if there were conflicts of interest among counsel or class members and how these were addressed). A difference in applicable law can create such a conflict.

This area of the law has attracted a lot of criticism from scholars.[39] Indeed, class settlements raise particular problems. Since both defendant and plaintiff argue in favour of the settlement, the court is left on its own, with the help of objectors, to assess the reasonableness of the settlement and protect absent members. Furthermore, the analysis really takes place in the realm of hypotheticals; since the claims have not been tried or contested on the merits, there might have been little discovery, and information about negotiations can be minimal.[40]

Once the settlement of a multi-jurisdictional class action has been approved in one province, there are two main strategies used in order to obtain closure in the other jurisdictions. Often, approval of the settlement is asked simultaneously in all jurisdictions, and the validity of the settlement is conditioned upon its approval by all or a certain number of them.[41] If not, what usually occurs is that the defendant requires recognition and enforcement of the decision approving the settlement in defence to actions commenced in other jurisdictions.[42]

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34 *CPA*, *supra* note 3, s 29(2).

35 See *Dabbs v Sun Life Assurance Co of Canada* (1998), 40 OR (3d) 429, 5 CCLI (3d) 18 (Ont Ct J (Gen Div)) (for the oft-cited decision on this).

36 *Amchem Products Inc v Windsor*, 521 US 591 (1997) [*Amchem*].

37 *Ortiz v Fibreboard Corp*, 527 US 815 (1999) [*Ortiz*].

38 Catherine Piché, "A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness" (2009) 41 Ottawa L Rev 25 at 30. These factors are: judicial risk; future expense and complexity of litigation; class reaction; recommendation and experience of counsel (substantive line of inquiry); adequacy of representation; sufficiency of discovery evidence; and adequacy of notice (procedural line of inquiry).

39 See e.g. *ibid* at 47 (three factors unite in creating a system that is based on guesswork and rough justice: strong public policy in favour of settlement; inconsistent uses and applications of the substantive and procedural criteria for approval; and the uncertain role of judges at the settlement review stage). See also Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (Cowansville, QC: Yvons Blais, 2006) at 171-78 [Lafond, 2006].

40 Piché, *supra* note 38 at 34.

41 See e.g. *Ford v Degussa-Hüls AG*, 2010 ONSC 2787, 97 CPC (6th) 118; *Parsons v Canadian Red Cross Society*, 40 CPC (4th) 151 (available on WL Can) (Ont Sup Ct).

42 See e.g. *Lépine*, *supra* note 4; *Hocking*, *supra* note 4; *Parsons*, *supra* note 4.

2. The Intersection between Class Actions and Private International Law: The Few Guidelines Given by the Supreme Court of Canada

The Supreme Court of Canada has given very few guidelines on the intersection between class actions and private international law. As mentioned above, there are some indications that multi-jurisdictional class actions are constitutional.[43]

On the choice of law issue, the decision most on point is *Lépine*.[44] That case concerned the sale by Canada Post Corporation of a CD-ROM containing Internet-access software and carrying a guaranteed service provision. The early discontinuance of the service prompted three different class proceedings: one in Québec for Québec residents only; one in British Columbia for residents of that province only; and one in Ontario for all provinces except Québec. Before the certification of any of these actions, settlement negotiations occurred, from which Québec's purported representative eventually walked away. A settlement was concluded between the remaining participants. Certification and approval were asked for in Ontario, this time on behalf of a national class that included the Québec residents. The Ontario court granted the request with no consideration of the interests of Québec residents, despite the reception of a letter of objection by Québec's counsel. In defence to the action in Québec, the Ontario judgment was submitted for recognition and enforcement.

The case showed potential to bring light to the intersection between private international law and class actions, but in the end the decision turned on narrow grounds: inadequacy of notice to Québec residents of the Ontario action, *lispendens*[45] and impossibility of conducting a *forum non conveniens*[46] analysis in a recognition action. However, in *obiter dictum*, the Court said:

> The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.[47]

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43 See *Dutton*, *supra* note 22; *Lépine*, *supra* note 4.

44 *Ibid*.

45 See Bryan A Garner, ed, *Black's Law Dictionary*, 9th ed (Minnesota: Thomson West, 2009) (where *lispendens* is defined as "a pending lawsuit." In civil law jurisdictions and in a private international law context, *lispendens* is a doctrine that allows a court to dismiss or suspend an action when another lawsuit between the same parties, based on the same facts and with the same object, is pending before a foreign authority. See e.g. art 3137 CCQ.

46 *Forum non conveniens* is a common law doctrine that allows a court to decline jurisdiction when the court of another jurisdiction is in a better position to decide. This doctrine has been codified in Québec: art 3135 CCQ.

47 *Lépine*, *supra* note 4 at para 56.

The Court therefore suggested that a court has a duty to consider the choice of law issue and possibly to create subclasses (i.e. that the facultative choice of law doctrine should be abandoned in multi-jurisdictional class actions). This is reinforced by the allusions to the potential use of subclasses where different jurisdictions are involved[48] or where various standards of care apply over time.[49]

Other decisions from the highest court also suggest that the law is flexible enough to take into account the specific problems associated with multi-jurisdictional class actions and choice of law more particularly. In *Beals*, the Supreme Court of Canada analysed the grounds for refusal to recognise and enforce a foreign decision. The traditional grounds are violation of fundamental procedural safeguards and public policy.[50] The former is restricted to the form of the procedure and excludes any consideration of the merits.[51] However, the majority decision and one of the dissenting decisions agreed that new defences could be created, while Justice LeBel also argued for an extensive interpretation of the traditional grounds.[52] It is thus unclear whether choice of law can be examined at this stage. The merits of a foreign decision are not supposed to be taken into account, but the distinction between the merits of a settlement and the procedural safeguards is blurry where choice of law and class actions are concerned. Furthermore, the choice of law issues could arguably fall under the procedural fairness grounds in relation to adequacy of representation,[53] or under a new defence created to face the particular challenges raised by multi-jurisdictional class actions.[54]

Finally, in *Unifund*, the Court established constitutional restrictions for choice of law rules.[55] There must be a "sufficient connection" between the jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated. Although the Court suggested that jurisdiction is not a sufficient connection to apply the law of the forum, and especially underlined that the standard is more stringent than the one developed in the US,[56] it also said that the standard is flexible and can vary according to the subject matter.[57] Arguably, the collective nature of an action could be another factor affecting the sufficient

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48 See *Dutton*, *supra* note 22 at para 54.

49 See *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184 at para 32 [*Rumley*].

50 *Beals v Saldanha*, 2003 SCC 72, [2003] 3 SCR 416 at para 64 [*Beals*].

51 *Ibid* at para 64 [*Beals*].

52 *Ibid* at para 42 (majority decision); *ibid* at para 86 (Binnie J and Iacobucci J in dissent). Justice LeBel, writing alone in a second dissent, argued for the creation of a new category of judgments to be denied enforcement—those that shock the conscience of Canadians (*ibid* at para 218). Justice LeBel also argued for the enlargement of natural justice to encompass substantive principles (*ibid* at para 236) and the broadening of public policy to encompass substantive principles that have a quality of essential fairness (*ibid* at para 223).

53 See *Hocking*, *supra* note 4 at paras 222-24 (*obiterdicta* comments of Bich JA).

54 See Snow, *supra* note 6 at 241-44.

55 *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40, [2003] 2 SCR 63 [*Unifund*].

56 *Ibid* at paras 56-58, 74-75. See *Allstate Insurance Co v Hague*, 449 US 302 (1981) [*Allstate*] (for the US standard).

57 *Unifund*, *supra* note 55 at para 65.

connection required. The emphasis put by the Court in *Morguard*, *Hunt* and *Tolofson* on order in the private international law realm would support such a workable solution.[58] This legal uncertainty regarding how to deal with private international law issues arising in multi-jurisdictional class actions, especially regarding choice of law, renders the analysis of the creative solutions given by the Ontario courts all the more interesting.

B. The Approaches Developed by the Ontario Courts: Typology

The objective here was to look at every multi-jurisdictional class action introduced in Ontario since the adoption of the *CPA* to see how the choice of law issue has been addressed, at any stage of a class action.[59] Excluding those in which a common settlement was reached and approval was asked in different jurisdictions simultaneously,[60] twenty-eight cases were found involving multi-jurisdictional class actions.[61]

1. Cases Where No Mention of Choice of Law is Made

Nine out of the twenty-eight cases made absolutely no mention of choice of law.[62] Those cases are hard to analyse because one can think of several hypotheses for why choice of law is not mentioned. For one, the choice of law rule mandated the application of only one law and the courts simply did not recount the analysis in

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58 See e.g. *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256 [*Morguard* cited to SCR] (where the Court stated that rules of private international law are grounded in the need to "facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner" *ibid* at 1096). Order and fairness are now the guiding principles. See also *Hunt v T & N PLC*, [1993] 4 SCR 289 at paras 1, 56, 109 DLR (4th) 16 [*Hunt*] (where the Court specified that this jurisdictional rule is of a constitutional nature and that private international law has the role of coordinating legal diversity).

59 I have found discussion of the choice of law issue at the pre-certification, certification, settlement approval and recognition stages.

60 These cases are numerous. They would warrant further analysis, as the analysis is sometimes very cursory and relies on what has been said in the decisions approving the settlement in other provinces.

61 Producing 143 results, the keywords used were: jur (ontario) & te (class /5 proceedings /5 act) & te (((national OR global) /3 class); "multijurisdictional;" "multi-jurisdictional;" "non-resident;" (non /3 resident); "out-of-province;" ((multipl! OR different) /3 law)) & suj (civil procedure). The following keywords producing 29 results: JUR (ONTARIO) & TE (CLASS /5 PROCEEDINGS /5 ACT) & TE (CERTIFI! SETTLE!) & SUJ (CIVIL /5 PROCEDURE) & TE ((conflict /3 law); (choice /3 law)). This research was completed in March 2011.

62 *Bendall v McGhan Medical Corp* (1993), 14 OR (3d) 734, 106 DLR (4th) 339 (Ont Gen Div); *Nantais v Telectronics Proprietary (Canada) Ltd* (1995), 25 OR (3d) 331, 129 DLR (4th) 110 (Ont Gen Div), leave to appeal to CA refused, (1996), 7 CPC (4th) 206 (available on WL Can) [*Nantais*] (which was a decision on the merits); *Carom v Bre-X Minerals Ltd* (1999), 43 OR (3d) 441, 30 CPC (4th) 133 (Ont Ct J (Gen Div)); *Hague v Liberty Mutual Insurance Co* (2004), 13 CPC (6th) 1, 21 CCLI (4th) 264 (Ont Sup Ct); *Bondy v Toshiba of Canada Ltd* (2007), 39 CPC (6th) 339, 155 ACWS (3d) 1026 (Ont Sup Ct); *Griffin v Dell Canada Inc* (2009), 72 CPC (6th) 158, 174 ACWS (3d) 32 (Ont Sup Ct); *Robinson v Medtronic Inc* (2009), 80 CPC (6th) 87 (available on WL Can) (Ont Sup Ct); *Knowles v Wyeth-Ayerst Canada Inc* (2001), 16 CPC (5th) 330 (available on WL Can) (Ont Sup Ct) [*Knowles*]; *CC & L Dedicated Enterprise Fund (Trustee of) v Fisherman* (2002), 22 CPC (5th) 346, 26 BLR (3d) 281 (Ont Sup Ct) [*CC&L*].

the decision. Second, plaintiffs already pleaded multiple laws in their statements of claims, the defendants did not argue that this bars certification and the courts did not raise the issue on their own. Third, parties ignored the choice of law dimension and the courts either implicitly applied the facultative choice of law doctrine or ignored the dimension as well. Since the facts and the claims are not recounted in detail in the cases, it is impossible to know which one of these hypotheses is right. Nonetheless, it is reasonable to infer that some decisions simply neglect the choice of law issue.

2. Cases Where the Choice of Law Dimension is Acknowledged

Out of the 17 remaining cases that acknowledge the choice of law dimension, only one decision denies certification of a national class owing to the application of multiple laws. The decision is *McNaughton Automotive Ltd v Co-operators General Insurance Co*, a case in which the insured plaintiffs sued their automobile insurers for breach of a statutory condition found in their insurance policies.[63] The defendants made a motion to strike out the claims regarding non-residents. The court refused to assert jurisdiction over the non-residents on *forum non conveniens* grounds, taking account of the materially different laws that applied to the contracts.[64]

On a related note, three *sui generis* decisions are worth mentioning. The first is *Elliott v Boliden Ltd*,[65] an action for misrepresentation brought under the securities legislation of different provinces on behalf of approximately 2500 purchasers across Canada. Certification and approval of a settlement were granted for a class that excluded the purchases made in New Brunswick, where legislation does not include a deemed reliance provision, and Alberta, where a one-year limitation period applies. The Ontario court approved of a British Columbia decision excluding these two groups from the class because the different laws applicable caused them to have a different cause of action.[66]

Second, there is *obiter dictum* by the Court of Appeal for Ontario and the Ontario Court of Justice in a relatively recent decision. In *Nantais*, there is support for the idea that a national class could be redefined if it was shown that the different laws applicable (products liability and negligence claims) presented substantial differences.[67]

Finally, in *Coulson v Citigroup Global Markets Canada Inc*,[68] a securities class action was brought on behalf of all purchasers of shares in Canada for violations of the Ontario securities legislation due to inaccuracies in a prospectus. The court refused to certify because the representative's action was barred. In *obiter dictum*, it said that it would only have granted certification for those who purchased the

63 (2003), 66 OR (3d) 112, 41 CPC (5th) 162 (Ont Sup Ct).
64 *Ibid* at paras 37-38.
65 (2006), 34 CPC (6th) 339, 151 ACWS (3d) 1011 (Ont Sup Ct).
66 *Pearson v Boliden*, 2002 BCCA 624, 222 DLR (4th) 453.
67 *Nantais*, *supra* note 62.
68 2010 ONSC 1596, 92 CPC (6th) 301.

shares as a result of the Ontario distribution because the legislation in Ontario did not reach the other situations. It added that "while an Ontario court as a matter of choice of law, can apply the law of another jurisdiction in Ontario, in the absence of the parties agreeing to be bound by Ontario law, Ontario does not have the jurisdiction to make Ontario law apply extraterritorially."[69] This case is interesting because it illustrates the conflict between the facultative choice of law doctrine—which in this case rendered Ontario law automatically applicable since neither the choice of law rules nor the foreign laws had been pleaded—and the public/constitutional nature of the rules regarding the choice of law/authority to regulate. It is worth noting, however, that the court did not rely on a duty on its part to protect absent class members.

Of the fourteen remaining cases,[70] two subgroups can be created in which the instances where arguments were made will sometimes be counted, rather than the number of cases. The first subgroup includes instances where courts tried to ignore or eliminate the choice of law issue in two different ways.

3. Ignorance or Elimination of the Choice of Law Issue ("Wait and See" Approach)

The most popular approach in this subgroup can be called the "wait and see" approach. In four instances, courts at the certification stage recognised the need for a choice of law determination, or the fact that multiple laws applied, but refused or neglected to make an official finding on the issue.[71] In another three instances, courts invoked the facultative choice of law doctrine and the fact that the defendant has the burden to prove the foreign law or invoke choice of law rules to avoid addressing the issue.[72] To these cases can be added an indeterminate number of those counted above that do not mention choice of law at all, either at the certification or settlement approval stages.[73] This suggests that there are more than seven instances in which choice of law was considered as an unnecessary hurdle in the practical resolution of class actions.

Another approach consists of trying to eliminate the choice of law issue by favouring the application of a single law. This approach, experimented with in the US, is only mentioned once in *obiter dictum* in the Ontario courts.[74]

The best example of this subgroup is the case of *Silver v Imax Corp*, in which certification was sought for a global class of persons that acquired securities of

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69 *Ibid* at para 145.

70 See *Nantais*, *supra* note 62 (which is still counted among these remaining cases because the comments previously mentioned were only *obiter dicta*).

71 *Ibid*; *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219, 49 CPC (4th) 233 (Ont Sup Ct), leave to appeal to Ont Div Ct refused, 52 OR (3d) 20; *LeFrançois v Guidant Corp* (2008), 56 CPC (6th) 268, 166 ACWS (3d) 432 (Ont Sup Ct); *Silver v Imax Corp* (2009), 86 CPC (6th) 273 (available on WL Can) (Ont Sup Ct) [*Silver*].

72 See *Nantais*, *supra* note 62; *McCutcheon v The Cash Store Inc* (2006), 80 OR (3d) 644, 27 CPC (6th) 293 (Ont Sup Ct); *Silver*, *supra* note 71.

73 See *supra* note 62.

74 See *Silver*, *supra* note 71.

IMAX on the TSX and NASDAQ between a certain period.[75] The case involved claims based on the Ontario securities legislation and common law grounds of negligence, misrepresentation and conspiracy. Approximately ten to fifteen percent of the shareholders were Canadian. Defendants argued that a class action was not the preferable route because there was a diversity of applicable laws. The court certified the global class, and opined that potential differences in the law do not bar certification. However, instead of making a finding on choice of law and creating subclasses, the court avoided the issue. First, it suggested that the appropriate choice of law rule was not obviously *lex loci delicti* due to the class nature of the case.[76] Second, it said the issue was premature because the defendant did not prove the foreign law and until then *lexfori* applied.[77] Finally, it decided that the appropriate approach was to wait and see how the choice of law issue would develop in the future.[78]

4. Ensuring that Choice of Law has an Impact on the Resolution of the Dispute

The second subgroup tries to ensure that the choice of law rule has an impact on the structure of the class action or the settlement content. At the certification stage, the first approach is subclassing, which was used in three cases.[79] Two other cases illustrate that some *ad hoc* measures can be tailored to the specific circumstances of a case in order to ensure that the differences in laws will be taken into account. *Sauer v Canada (Attorney General)*[80] is a case brought by cattle farmers against the Government of Canada for alleged negligence in the regulation of the industry, following the mad cow disease epidemic. The Ontario court was presented with a motion by the plaintiff to include the Québec farmers in the Ontario action, which already included all other provinces. The motion was granted, but the court did not find it necessary to create a subclass because it found that, despite the differences in applicable laws, there were no conflicts among the members on common issues: class counsel was bilingual and the Québec class counsel would remain active in the national class action team.[81]

In *Webb v K-Mart Canada Ltd*,[82] the claims were in common law for wrongful dismissal on behalf of employees in all provinces except British Columbia and Québec. The plaintiffs wanted the individual claims to be quantified in a "mini-hearing mediation and determination process, under court supervision...."[83]

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75 *Ibid*.
76 *Ibid* at para 152.
77 *Ibid* at para 153.
78 *Ibid* at para 164.
79 *Wilson v Servier Canada Inc* (2001), 11 CPC (5th) 374 (available on WL Can) (Ont Sup Ct); *Risorto v State Farm Mutual Automobile Insurance Co* (2007), 38 CPC (6th) 373, 47 CCLI (4th) 78 (Ont Sup Ct); *Banerjee v Shire Biochem Inc*, 2010 ONSC 889, 88 CPC (6th) 328.
80 2010 ONSC 4399 (available on WL Can).
81 *Ibid* at para. 12.
82 (1999), 45 OR (3d) 389, 36 CPC (4th) 99 (Ont Sup Ct).
83 *Ibid* at para 3.

Certification was granted, despite the recognition that differences existed within the common law. The differences were held to be minor matters "in relation to the broad overreaching common law approach to claims relating to dismissal without cause."[84] Furthermore, the draft order detailing the individual claims process indicated that local mediators and adjudicators provided assurance, according to the court, that local precedents and statutory requirements would be recognised.

At the settlement approval stage, two cases take into account the differences between laws in assessing the settlement's reasonableness. In *Knowles v Wyeth-Ayerst*,[85] a product liability action concerning the diet drug Pondimin, the court ordered a comparative evaluation of the content of the Canadian settlement whose approval was demanded and an earlier American settlement. Approving the settlement, the court mentioned the differences in applicable laws as one reason that could explain the dissimilarities of the settlements.[86] In *Abdulrahim v Air France*,[87] a case concerning the crash of an Air France flight at a Toronto airport, the court considered the differences in applicable laws between the defendants to assess their contribution and the reasonableness of the settlement. Notably, the contribution made by Air France was evaluated with the knowledge that its liability was limited to bodily injury under the Warsaw and Montreal Conventions.[88] While these cases do not exemplify the most rigorous analysis, they certainly represent an attempt to assess the impact of the differences in applicable laws on the content of the settlement.

Finally, one case suggests that the avoidance of the choice of law issue can constitute a defence to a motion for recognition and enforcement of a decision approving a class settlement (i.e. allow a collateral attack). In *Parsons*, an international class action had been certified and a settlement approved in the US. McDonald's argued that the decision barred a national class proceeding instituted in Ontario.[89] The recognition was refused on the grounds that notice to the Canadian members was inadequate. The Court of Appeal for Ontario mentioned in *obiter dictum* the possibility that plaintiffs' counsel in the US action could accept a discounted rate for the Canadian claims and alerted that "[r]ecognition and enforcement rules must be attentive to these possibilities and retain sufficient flexibility to address concerns of this nature."[90]

In conclusion, it is a fair assessment to say that the law on how to address choice of law in multi-jurisdictional class actions is relatively underdeveloped.[91] The absence of guidance by the Supreme Court of Canada on the matter and the

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84 *Ibid* at para 52.
85 *Knowles*, *supra* note 62.
86 *Ibid* at paras 39, 41.
87 2009 Carswell Ont 8104 (WL Can) (Ont Sup Ct).
88 *Ibid* at para 11.
89 *Parsons*, *supra* note 4.
90 *Currie v McDonald's Restaurants of Canada Ltd* (2005), 74 OR (3d) 321 at para 26, 250 DLR (4th) 224 (CA).
91 Saumier, *supra* note 6 at 205.

flexibility of the law surrounding class actions and conflict of laws have given way to a variety of different approaches by the Ontario courts.

Notwithstanding the early stage of the development of case law on this issue, it is possible to conclude that it is extremely unlikely that certification will be denied in Ontario, even when the applicability of multiple laws is acknowledged. This could be due to many factors: the absence of a predominance criteria in the *CPA*; the fact that unmanageability (under the preferability criteria) is less likely to be pleaded because there are only ten provinces; the homogeneity of the Canadian common law; the greater recourse to subclassing or other management techniques; or the simple fact that Canadian courts are more plaintiffs-friendly than US courts[92] and duck the law in order to favour practical resolution of claims through class settlements.

The results obtained illustrate that courts are not unanimously devoted to the application of choice of law rules in multi-jurisdictional class actions. In other words, courts often appear to be ducking the law, notably when they fail to make a choice of law determination at certification or to assess this component at the approval of settlement stage.[93] This might be because they have an interest in limiting and disposing of mass litigation, and the uncertainty helps courts pressure the parties towards a settlement.[94] It could also be because they do not see it as important considering the fact that an overwhelming number of cases settle[95] and that a settlement is a give-and-take that is hard to assess by the court.

Whatever the reason, the "wait and see" approach at the certification stage might be just as problematic as the non-examination of the choice of law issue in the approval of the settlement. Courts act as facilitators of settlement. For example, when courts identify the norms that are applicable to a dispute, they create what Galanter calls a "bargaining endowment."[96] The different models of settlement behaviour all expect the settlement to reflect partly the merits of the claims.[97] York-Erwin writes, "A court's decision as to which state's laws will govern provides

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92 See Jones, *supra* note 7 at 2, 113.

93 See *Hocking*, *supra* note 4 (where the decision approving the settlement could probably be given as an example). In the Court of Appeal for Ontario's decision, Justice Bich, who had access to the record of the case, mentions that the interests of Québec members in the application of a different law were not taken into account. See also *Lépine*, *supra* note 4 (where the unpublished Ontario decision approving the settlement is probably of the same type). It is also very likely that this was the case in the two cases of settlement approval where no mention of choice of law was made (*Knowles* and *CC&L*, *supra* note 63) and in the cases not analysed in this article asking for approval in multiple provinces simultaneously (*supra* note 61 and accompanying text).

94 Mark A Peterson & Molly Selvin, "Mass Justice: The Limited and Unlimited Power of Courts" (1991) 54 Law & Contemp Probs 227 at 240-41.

95 Jones, *supra* note 7 at 188-89.

96 Marc Galanter, "La justice ne se trouve pas seulement dans les décisions des tribunaux" in Mauro Cappelletti, ed, *Accès à la justice et Etat-Providence* (Paris: Economica, 1984) 151 at 158.

97 See Janet Cooper Alexander, "Do the Merits Matter? A Study of Settlements in Securities Class Actions" (1991) 43 Stan L Rev 497 at 501-3.

crucial shared information regarding the risk-discounted value of a plaintiff's claim."[98] The absence of determination on the choice of law issue might distort the settlement amount[99] and jeopardise the possibility of taking this factor into account at the later stage of settlement approval.

It is true that Ontario courts in certain instances have resorted to managing techniques to ensure that the diversity of laws applicable is taken into account after certification. These methods are more or less convincing as to their ability to bring, or efficiency in bringing about, fidelity to choice of law rules.

The first objective of this article was to identify the treatment by the Ontario courts of choice of law issues in multi-jurisdictional class actions. Now that a general portrait of the approaches developed has been drawn, the next step is to determine which of these are consistent with the goal of access to justice that underlies the class action vehicle. Let us thus examine the relationship between choice of law and access to justice.

III. CHOICE OF LAW AND ACCESS TO JUSTICE

On a theoretical basis, this article will analyse the Ontario decisions from the perspective of access to justice for non-resident class members. Such a perspective will aid in determining which approaches to choice of law in multi-jurisdictional class actions allow the vehicle of class actions to remain true to one of its foundational goals.

Part of this endeavour consists of asking whether the *de facto* facultative choice of law doctrine should or should not be modified in the multi-jurisdictional class actions context. Particularly in Canada, where different applicable laws are not considered to bar certification, is it logical to leave the burden of choice of law on the defendant? The defendant will obviously not complain if a more advantageous law has not been pleaded. Another aspect consists of asking, what is the proper course of action in acknowledging the choice of law dimension? What methods or techniques can ensure that the merits of a settlement reflect the proper applicable laws?

Of course, access to justice is not a notion that is easily defined. It is proposed here, without entering into philosophical debates, to understand access to justice as the possibility to vindicate substantive rights in conformity with fundamental principles of procedure. Using this definition, access to justice has three components.

First is the notion of having the possibility to vindicate such rights. If choice of law analysis hinders certification, and thus the possibility of pursuing a class action for small claims, is access to justice denied? The two other components of the definition concern the treatment of choice of law more generally when certification is granted. First, there is the notion of substantive rights. Should it

98 York-Erwin, *supra* note 18 at 1801.
99 Jones, *supra* note 7 at 188-89.

matter in terms of justice that the rights of class members be determined by the laws of Ontario and not of Québec, even though a choice of law rule points to the laws of Québec? Second, there is the notion of how this vindication is obtained, i.e. in conformity or not with the fundamental principles of procedure. Taken together, these two components bring into question the nature of choice of law rules: are they individual—either substantive or fundamental procedural—rights? Finally, is there a tension between these three components of access to justice and, if so, can these be reconciled?

This part will begin by examining first the 'possibility to vindicate' component (a-1) followed by the individual substantive and procedural rights components (a-2). This operative definition of access to justice can be easily criticised as a strict juridical conception where access to justice is equated with access to state law. As explained by Roderick MacDonald, justice is a legalistic, institutional, individual, professional and state-oriented vision.[100] For this reason, this article will also examine the relationship of choice of law issues in multi-jurisdictional class actions with two extra-judiciary conceptions of access to justice: justice as the choice of an entity (b-1) and *ex ante* justice (b-2).

A. Access to Justice as the Possibility to Vindicate Substantive Rights in Accordance with Fundamental Principles of Procedure

1. The Possibility to Vindicate

Access to justice, in terms of the possibility to vindicate, means that all should have real access to the judicial system, taking account of physical, financial, practical and subjective barriers.[101] For the present purposes, this component of access to justice can only be jeopardised if choice of law constitutes a bar to certification either in legal terms, through the application of the commonality or preferability criteria, or in practical terms,where proving the foreign laws would be so costly as to render impossible the institution of a class action. Furthermore, single-province actions would have to be impossible or clearly disadvantageous to class members.

Unlike the situation in the US, this is no access to justice component involved in the context of multi-jurisdictional class actions in Canada with regard to choice of law. Canadian courts generally lean towards certification.[102] The results obtained concerning multi-jurisdictional class actions in Ontario indicate that certification will be granted despite the acknowledgement of a choice of law

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100 Roderick A MacDonald, "Access to Justice and Law Reform" (1990) 10 Windsor YB Access Just 287 at 294, 326.

101 Pierre-Claude Lafond, Lison Néel & Hélène Piquet, "L'émergence des solutions de rechange à la résolution judiciaire des différents en droit québécois de la consommation: fondement et inventaire" in Pierre-Claude Lafond, ed, *Mélanges Claude Masse: En quête de justice et d'équité* (Cowansville, QC: Yvon Blais, 2003) 181 at 187-90.

102 John C Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39:1 Osgoode Hall LJ 817 at 831. See *ibid* at 831, n 78 (stating that Ontario has a certification rate of 78 percent).

dimension and the applicability of a plurality of laws. The approach taken by the Ontario courts regarding certification thus favours the furtherance of this aspect of access to justice for non-resident class members. Furthermore, courts in Canada can generally take judicial notice of the law of sister provinces and sometimes of foreign law, such that costs associated with the proof of foreign laws should not be a problem.

2. Substantive Rights and Fundamental Principles of Procedure

Under these two components of access to justice, the question is whether choice of law rules create individual substantive rights for non-resident class members or are fundamental rules of procedure at their disposal. Either would arguably require the same thing: at the certification stage, measures taken to ensure the respect of the choice of law rules going forward in the litigation (for example: subclassing); at the approval of settlement stage, consideration of whether differences in applicable law can be traced in the content of the settlement or whether there were structural assurances of fairness; at the judgment stage, a respectful application of foreign law;[103] or at the recognition/enforcement stage, an inquiry into whether there was adequacy of representation or structural assurances of fairness in the foreign proceedings considering the differences in applicable laws, or, if there is an enlargement of the grounds of review to take into account the impact of applicable laws, whether these laws are reflected in the merits of the foreign decision.

In the literature on multi-jurisdictional class actions, this is generally where there is an absence of discussion on the nature of choice of law rules. For example, scholars will assume on one side or the other of the debate in the US that choice of law rules can or cannot be modified in aggregate litigation. Few in the class actions field, however, pause to take a look from a private international law perspective and identify what vision of choice of law supports their position.[104]

Even Professor Larry Kramer, who recognises that the positions taken in this debate are based on different visions of choice of law, argues that these rules are

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103 It might seem obvious, but the American example illustrates the dangers of this. See *Shutts*, *supra* note 8 (where the SCOTUS required the application of choice of law rules in multi-jurisdictional class actions). On remand, the Kansas courts purported to apply the laws of other states, but held that their content was similar to Kansas law. This time, the SCOTUS held that there was no violation of due process or full faith and credit if a state court misconstrues the law of another state, unless the interpretation is truly contradictory to a clearly established law. *Compare Sun Oil Co v Wortman*, 486 US 717 (1988) [*Sun Oil*].

104 See e.g. Issacharoff, "Settled Expetations," *supra* note 13 (in which Professor Samuel Issacharoff proposes to modify the choice of law rules in class actions to provide for a rule that will point to the law of the defendant's place of business). This proposal is implicitly supported by a non-substantive vision of choice of law, which is apparent from the emphasis that is put throughout the article on predictability and settled expectations. See also York-Erwin, *supra* note 18 (which proposes an amendment to ensure that choice of law does not constitute a bar to certification, but refuses to endorse a choice of law rule that would lead to the application of a single law). Her position implicitly relies on a substantive vision of choice of law rules with the rules having the role of protecting states' interests and individuals' rights.

substantive from a pure analysis of the effects of the rules, rather than their nature. Substance defines the parties' rights rather than implements them.[105] However, he stays in that paradigmatic divide between substance and procedure. He uses two main arguments to support his position. First, choice of law in effect assigns rights to the parties.[106] Second, choice of law is part of the process of defining the elements of a claim or defence and determining whether the individual has a right to recover.[107] Professor Linda Silberman pleads openly against a "single law" proposal because choice of law rules seek to protect states' interests.[108] She thus follows Professor Kramer in this substantive qualification, but places the debate on a different level: that of the nature and purpose of choice of law rules.[109]

Professors Kramer and Silberman seem right in saying that behind the debate on choice of law issues in the class actions context lie different conceptions of the nature of choice of law rules. This article parts with them, however, because Professor Kramer appears to use the wrong level of analysis; one that is internal to choice of law itself. The root answer to the question of choice of law treatment in multi-jurisdictional class actions depends on the perception of the nature and objectives of choice of law rules. This is the level of analysis chosen by Professor De Boer when he examines whether the facultative choice of law doctrine should or should not be preserved.[110] As for Professor Silberman, her substantive qualification is disagreed with on both a normative and descriptive basis. It is, however, recognised that it must be understood from an American perspective that is largely influenced by governmental interest analysis, an approach that has been rejected in Canada. It is thus proposed to start by determining whether choice of law rules in Canada are at all individual substantive rights or fundamental principles of procedure, or whether the nature and objectives of these rules place them outside this framework entirely.

(a) The Theoretical Debate on the Nature of Choice of Law Rules

Jean-Gabriel Castel and Janet Walker state that "[i]n no other field of the law is there so much uncertainty with respect to basic theories, methods or interests at stake"[111] than in private international law. Nowadays, choice of law rules and private international law generally are traditionally seen as part of the domestic law of

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105 See George Pangopoulous, "Substance and Procedure in Private International Law" (2005) 1:1 JP Int'l L 69. The classical distinction between substance and procedure says that "[m]atters of procedure are those rules, which are directed to governing or regulating the mode of conduct of court proceedings. Matters of substance are those that affect the existence, extent or enforceability of the rights or duties of the parties to an action" (*ibid* at 92). See also *Tolofson*, *supra* note 28 (discussing how this distinction has given rise to a lot of difficulties).

106 Larry Kramer, "Choice of Law in Complex Litigation" (1996) 71 NYUL Rev 547 at 569-70.

107 *Ibid* at 570-71.

108 Silberman, *supra* note 10.

109 *Ibid* at 2022-23.

110 De Boer, *supra* note 29at 358-59.

111 Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 5th ed (Markham: Butterworths, 2004) at ¶ 1.13 [*Castel & Walker*].

jurisdictions, embodying states' interests. Rhetorically, it is also often repeated that they serve to protect the rights and expectations of the parties,[112] comity being the mild acknowledgment of the public international side of private international law. This conception establishes a direct bridge between choice of law rules and individual rights.

In a recently published book, Alex Mills challenges this traditional vision of private international law as being focused on individual private disputes and based on domestic notions of justice.[113] Differentiating himself from the internationalist school of thought, Mills acknowledges that although private international law is formally part of domestic law, it constitutes a type of distributed network of international ordering, functioning through national courts, which reflects and replicates norms of public international law. Private international law rules are secondary rules concerned with justice pluralism, rather than primary rules designed to do material justice. His argument draws on the intersection between private international law and constitutional law in federal systems such as Canada, in order to show the publicallocation of authority role that private international law plays at the international level.

For Mills, the domestic private law vision of private international law is the product of a particular historical context: the glorious epoch of unrestrained sovereign nation-states and of legal nationalism leading to codification movements in the eighteenth and nineteenth centuries. In a certain sense, the conception that he defends is a return to the vision of private international as a type of international natural law, a vision that dominated in the medieval world in which the discipline was born.[114]

This "public" vision of private international law could have important implications for the purposes of this article since it is squarely in contradiction with a conception of choice of law rules as individual substantive rights. Indeed, Mills concludes:

> Viewing private international law from a systemic perspective is not about denying that it has real effects in individual cases. But it does imply rejecting the idea that private international law should be evaluated based on those effects. If the outcome is objectionable, it will not be because of private international law but because of the procedural rules of the selected forum, or the applicable rules of substantive law. The outcome of a private international law decision is an allocation of regulatory authority, not a final judgment.

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112 Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge: Cambridge University Press, 2009) at 3-4; Castel & Walker, supra note 111 at ¶ 1.13.c.i-ii.

113 See Mills, *supra* note 112 at ch 1 (for a summary of the arguments).

114 See generally *ibid* at ch 2.

> A private international law rule should not be subject to criticism because of its *effects*.[115]

However, this vision has to be nuanced. To a certain level, Mills expresses more his aspirations for the future state of the discipline than an assessment of its current status after two centuries of influence by the domestic, private vision of private international law.

In his general report on the state of private international law at the end of the twentieth century, Professor Symeon C. Symeonides brings a more nuanced appreciation.[116] The report examines five basic antagonisms between: (1) multilateral and unilateral approaches; (2) certainty and flexibility; (3) jurisdiction-selecting rules and content-oriented rules or approaches; (4) conflicts justice and material justice; and (5) the goal of international uniformity and the desire to protect states' interests. All of these frictions reflect generally the same opposition between a public vision of private international law and a domestic, private one.

The public side is characterised by multilateral rules that focus on legal relationships and the identification of the state in which the relationship has its seat (1). It promotes certainty through the application of rules with fixed connecting factors (2). It seeks to achieve conflicts justice (3) with rules that select a jurisdiction without regard to the content of the law chosen or the circumstances of the individual case (4).[117] Finally, it exhibits a desire for international uniformity (5). The general conclusion of the report is that, although the public vision still dominates–except in the US, where interest analysis is predominant–there is now a pluralism of goals and objectives. There are no more pure systems.[118]

The last two centuries have taken their toll and one now finds in all systems rules that embody the domestic private vision, essentially in the form of correctives to the traditional jurisdiction-selecting rules.[119] Examples of these rules are: rules with alternate connecting factors that aim to validate an act or favour certain results (e.g. a rule that offers multiple connecting factors in order to find that an act is formally valid); rules favouring one party (e.g. a rule that leaves the choice of law to the weaker party or preserves it from an adverse choice of law clause); escape clauses (e.g. a rule providing that the law designated by a multilateral choice of law rule is not applicable if, in light of the circumstances, the situation is only remotely

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115 *Ibid* at 18 [emphasis in original]. See also *ibid* at 72 (for a similar affirmation).

116 Symeon C Symeonides, "General Report: XVth International Congress of Comparative Law" in Symeon C Symeonides, ed, *Private International Law at the End of the 20th Century: Progress or Regress?* (London: Kluwer Law International, 1999) 3.

117 With the exception of the public policy exception. The applicability of such an exception does not detract from the multilateral approach because, at most, public policy is a substantive right not to be applied to a law that is contrary to public values. It is not an individual right to the application of a specific law.

118 Symeonides, *supra* note 116 at 78.

119 See De Boer, *supra* note 29at 293-96.

connected with that law or is much more closely connected with the law of another country); rules with flexible connecting factors (e.g. a rule providing that the law of the center of gravity of a contract applies); and rules that are mandatory or unilateral (e.g. a rule that provides for the application of the *lexfori* automatically, notwithstanding the presence of a foreign element).

This nuanced appreciation suggests that several choice of law rules aim to provide material justice to individual litigants. The relationship between access to justice and the treatment of the choice of law issues in multi-jurisdictional class actions does not seem reducible to a simple answer applicable to all areas of the law and all nations. It lies in the particular combination of these two visions within a jurisdiction. This article will now examine the specific Canadian equilibrium.

(b) Canadian Choice of Law

The Canadian approach is in transition. Historically, private international law has been conceived in Canada as a branch of private domestic law. Accordingly, there are two main traditions of private international law: the civil law tradition in Québec and the common law tradition in the remaining provinces. In addition, the federal legislature also adopts private international law rules in its areas of jurisdiction. Choice of law rules, both in Québec and the common law provinces, are of the multilateral type. They embody a conflicts justice conception and are mainly blind to the content of the laws to which they refer.[120]

Material justice has been introduced in recent years, especially in Québec with the adoption of the new *Civil Code* in 1994 (CCQ).[121] For example, article 3085(2) of the CCQ is a material rule that permits the application of Québec law to any protected person possessing property in Québec, even if that person is not domiciled in Québec and Québec law should not apply to her.[122] Article 3082 of the CCQ is a rule with alternate connecting factors that aims to find a foreign marriage formally valid.[123] Articles 3117 and 3118 of the CCQ are rules favouring consumers and workers that preserve the application of the mandatory laws of their countries of residence, notwithstanding the presence of a choice of law clause in their contract.[124] Article 3112 of the CCQ prescribes that if no law is designated in an act, the courts have some flexibility and must apply the law of the country with which the act is most closely connected, in view of its nature and the attendant circumstances.[125] Finally, article 3082 of the CCQ is an escape clause that allows a

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120 Alain Prujiner, "Canadian Private International Law at the End of the 20th Century: Progress or Regress?" in Symeon C Symeonides, ed, *Private International Law at the End of the 20th Century: Progress or Regress?* (London: Kluwer Law International, 1999) 127 at 130-39. See also Castel & Walker, *supra* note 111 at ¶ 1.14.e.ii.

121 Prujiner, *supra* note 120 at 139.

122 art 3085(1) CCQ.

123 *Ibid*, art 3082.

124 *Ibid*, arts 3117, 3118.

125 *Ibid*, art 3112.

judge to apply a different law than the one designated under the rules of the CCQ if, "in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country."[126]

Interestingly, the same year the new CCQ was adopted, the decision of the Supreme Court of Canada in *Tolofson* was rendered. This decision extended into the realm of choice of law the new stance taken by the Court in favour of a public understanding of private international law. The new era started with the *Morguard* decision in which the Court decided that full faith and credit must be given to the decisions of the courts of a sister province if that court had jurisdiction. It was later followed in *Hunt*, where it was decided that this rule was of a constitutional nature.[127]

In *Tolofson*, the Court decided that the law of the place where the tort occurred is the general choice of law rule in torts. This decision is remarkable for its emphasis on the role of private international law in the design of a rational system of law. The Court rejected the American interest analysis approach to choice of law because, "One of the main goals of any conflicts rule is to create certainty in the law."[128] It even suggested that the Canadian constitutional arrangements play in favour of a rule that ensures that the same law applies to whichever court is seized, i.e. a uniform choice of law rule across the country that leads to the application of a single law. The Court treated the choice of law issue as distinct from both substance and procedure; it really adopted a public conception of private international law, where order comes first and fairness second.[129] The Court's hard stance on order and constitutionalism[130] suggests that the constitutionality of these content-oriented rules could be challenged, at least in their application between the provinces, but to date this has not happened.

If not already apparent, the line between constitutional and private international law analyses was definitely blurred in the case of *Imperial Tobacco*[131] where the extra-provincial aspect of the pith and substance test, applied to determine if a law is within the legislative competence of a province under the *Constitution Act, 1867*,[132] was blended with the test developed in *Unifund* for the constitutionality of choice of law rules.

However, this new trend towards order has still not resulted in complete uniformity of choice of law rules between the different provinces. Therefore, it is possible in Canada, as it is in the US by reason of the much-criticised *Klaxon*

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126 *Ibid*, art 3082.
127 *Hunt*, *supra* note 58.
128 *Tolofson*, *supra* note 28 at 1061.
129 Symeonides, *supra* note 116 at 48; Mills, *supra* note 112 at 175. See also *Morguard*, *supra* note 58; *Hunt*, *supra* note 58 (where this is also visible).
130 Prujiner, *supra* note 120 at 136.
131 *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473.
132 (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, App II, No 5.

decision,[133] for plaintiffs in class actions to shop for the best choice of law rules. Indeed, a provincial court seized of any action applies its own choice of law rules.[134] This article will nowlook at the implications of this Canadian stance on the relationship between choice of law and access to justice.

(c) Implications for the Relationship Between Choice of Law and Access to Justice in the Multi-Jurisdictional Class Actions Context in Canada

A public conception of private international law precludes an understanding of choice of law rules as individual substantive rights. To be sure, such a vision does not mean that choice of law rules should not be applied because, as public law rules, their application is of general interest to the entire society and judges are required to apply them. Indeed, Professor De Boer, in his analysis on the facultative choice of law doctrine, finds an irreconcilable conflict between the doctrine and a vision of choice of law as a branch of public law.[135] For the purposes of the analysis here, however, it means that most choice of law rules in Canada have no relationship to the substantive component of access to justice. In other words, the non-application of the choice of law rules that embody this public vision does not thwart access to justice for non-resident class members. These rules have nothing to do with material justice or individual rights. They simply seek to coordinate the legal diversity between sovereign entities.

It is less clear that this public conception of choice of law rules detaches them completely from fundamental procedural rights. After all, the SCOTUS posited in *Allstate* that the constitutional limits on choice of law rules are drawn from due process rights.[136] This does not mean that the individual class member has a right to the application of a specific choice of law rule, but rather that she has a negative right not to have a law applied that is insufficiently connected to her.[137] The rule established by the Court in *Allstate* leaves open a range of possibilities in terms of choice of law rules. It can thus be concluded that choice of law rules are not of a fundamental procedural character because a denial to apply a choice of law rule does not necessarily mean a violation of fundamental procedure.

However, it has been shown that a purely multilateral conception of choice of law rules is not tenable and that many rules in Canadian private international law, especially in Québec, are content-oriented. It can be argued that these constitute either the substantive rights of individual class members or fundamental rules of

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133 *Klaxon*, *supra* note 12 at 496 (which says that federal courts sitting in diversity jurisdiction must apply the choice of law rules of the state in which they sit).

134 There is no *renvoi* in Canada. See Prujiner, *supra* note 120. One exception to the application of the forum's choice of law rules could be when a provincial court applies a federal law.

135 De Boer, *supra* note 29 at 357-58.

136 *Allstate*, *supra* note 56. See also Mills, *supra* note 112 at 273. The application of a law insufficiently connected with the dispute would be a clear example of a breach of international procedural rights.

137 See Samuel Issacharoff, "Getting Beyond Kansas" (2006) 74:3 University of Missouri-Kansas City Law Review 613 at 621 (for such an interpretation of *Shutts*, *supra* note 8).

procedure at their disposal. In this sense, their non-application would thwart access to justice for non-resident class members. Similarly, in his analysis of the facultative choice of law doctrine, Professor De Boer notes that one objection to the doctrine is the protection of special interests: When choice of law rules embody substantive policies, these policies will be frustrated if the parties can choose procedurally not to apply them.[138] This suggests that judges should apply on their own initiative the choice of law rules that embody material justice ideals in order to protect the interests of non-resident class members. Are there ways to counter this conclusion?

It can be tempting to derive from the existence of the facultative choice of law doctrine in Canada the conclusion that choice of law rules are neither individual substantive rights nor fundamental procedural rights. On reflection, the existence of the doctrine does not help in ascertaining the nature of the choice of law rules. The doctrine is first and foremost about the evidentiary status of choice of law rules and foreign law. Furthermore, the doctrine must not be taken as a given. As Professor De Boer illustrates, the doctrine challenges the internal consistency of numerous legal systems.[139] It is in contradiction with a public vision of choice of law as defended by the Court in *Tolofson*. Interestingly, this decision suggests that the doctrine might be a relic of the past, stemming from the difficulties of proving foreign law. Its application is also at variance with the idea of freedom of choice or party autonomy in substantive law and in choice of law. This means that there is no strict correlation between the public order character of substantive law, the possibility for parties to choose the law applicable to their legal relationship and the mandatory or facultative character of choice of law rules.[140]

All of this shows that one must not infer the nature of choice of law rules from the existence of the facultative choice of law doctrine. Rather, the appropriate question is: should the procedural status of choice of law rules be modified, more specifically in the multi-jurisdictional class actions context, in order to preserve the access to justice of non-resident class members? Should the judge be obliged to apply choice of law rules that embody a material justice ideal?

There appear to be no ways to counter the conclusion that the non-application of a choice of law rule that embodies a material justice ideal compromises the access to justice of non-resident class members, whether that rule is conceived as an individual substantive right of the member or as a fundamental procedural right.[141] The only way this could be justified is through the adoption of a different vision of access to justice, one that is extrajudiciary.

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138 De Boer, *supra* note 29 at 367.

139 *Ibid*.

140 *Ibid* at 351-54.

141 I do not believe it is necessary to resolve this question here.

B. Extrajudiciary Conception of Access to Justice

Law as a unified and uniform system administered by the state is not the only normative order. It is simply its paradigmatic example, which cohabits with other normative orders: customary, religious, economic, functional and cultural.[142] Legal pluralism, as a fact and as a discipline, helps us understand why the first conception of access to justice used in this article can be rightly criticised. Indeed, it equates access to justice with access to formal law enacted by the state. Yet other *fora* can bring justice and there are multiple conceptions of the just and of the rules through which justice can be rendered.[143] Access to justice is not simply about accessibility of the judicial system and the application of formal state law; it is about new modes of resolution of disputes and finding the solution most appropriate to resolve a dispute.[144]

This critique would have less relevance if this article concluded that choice of law rules have no connection whatsoever with justice. However, since certain choice of law rules embody a material justice ideal that is frustrated whenever courts neglect to ensure their application, it is necessary to examine whether an extrajudiciary vision of justice could justify this inaction. Furthermore, the recognition that it is extremely hard for a judge to assess what role the norms and authoritative standards have played in the negotiation of a settlement and how they should translate in its content pushes us towards an extrajudiciary vision of justice.

In this section, this article will examine two different arguments as to why the non-application of choice of law rules in the multi-jurisdictional class actions context does not necessarily thwart access to justice for non-resident class members. The term "extrajudiciary" is used because both arguments rely on visions of justice that are not strictly equated with formal state law.[145]

The first vision of justice draws on the notions of party autonomy and procedural freedom (choice) that must, in the case of class actions, be completed with the adoption of an entity model of the class. The second vision of justice relies on an *ex ante* perspective.

1. Justice as the Choice of an Entity

In the context of individual litigation, Professor De Boer raises two arguments to defend the facultative choice of law doctrine against the objection that it frustrates special interests. These arguments are of relevance to assessing whether the non-application of choice of law rules jeopardises the access to justice of non-resident

142 Brian Z Tamahana, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Sydney L Rev 375 at 376, 397-400.

143 MacDonald, *supra* note 100 at 291-94, 308-10.

144 See Thierry Bourgoignie, "Droit et Politique communautaires de la consommation : une évaluation des acquis" in Pierre-Claude Lafond, ed, *Mélanges Claude Masse*. En quête de justice et d'équité (Cowansville: Yvon Blais, 2003) 273 at 291-94; Galanter, *supra* note 96 at 187-90.

145 See Pierre-Claude Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (Montreal: Thémis, 1996) at 60 [Lafond, *Le recours*].

class members. First, he says that in practice, the rules of jurisdiction allowing weaker parties to sue in their state of domicile render null the impact of the doctrine. Second, he argues that since protective policies serve the interests of those who are protected, it should be left to them to invoke their protection.[146]

These answers can be linked to the two theoretical justifications for the doctrine identified by Professor De Boer: party autonomy and procedural freedom of disposition in civil litigation.[147] Party autonomy refers to parties defining their own just solution in the form of an agreement. Procedural freedom of disposition more generally relates to a conception of justice that rejects the ideal of formal state law as justice, or the judicial system as the proper forum to achieve it. Both are united through the concept of choice. They are extrajudiciary, in the sense that they do not rely on the application of state formal law, but not totally so since both justifications are legitimised by the judicial system, notably through the favour given to settlement.

The problem with this vision of justice as choice is that it does not straight forwardly apply in cases of multi-jurisdictional class actions where non-resident class members are dragged into a forum chosen by the representative plaintiff and counsel. In these cases, non-resident class members never really choose to forego the protection afforded by choice of law rules. An absent class member does not, apart from the possibility of opting-out, which is often very theoretical, make a choice. To this, it can be added that in class actions, procedural freedom of disposition is limited. For example, section 29(1) of the *CPA* requires the approval of the court for discontinuance or abandonment of a class action.[148]

It should be obvious by now that the answer to whether the non-application of choice of law rules that embody a material justice ideal can be justified by choice (party autonomy and procedural freedom of disposition) depends on the adoption of a collectivist conception of the class—the adoption of the entity model.

Indeed, the classical vision of access to justice adopted above not only relied on a very legalistic vision of justice, but also on an individualistic one. From an individual perspective, class actions, and for the purposes of this paper multi-jurisdictional class actions, are decried as inevitable trade-offs between justice and access: "less justice" for "more access."[149] It should come as no surprise that the fundamental tension between the individual and the collective reappears yet again in the debate over choice of law treatment in multi-jurisdictional class actions.[150]

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146 De Boer, *supra* note 29 at 368-71.

147 *Ibid* at 330-38.

148 *CPA*, *supra* note 3.

149 MacDonald, *supra* note 100 at 293.

150 There will always remain a tension between individual justice and mass justice. See Mauro Cappelletti and Bryant Garth, "Introduction" in Mauro Cappelletti, ed, *Accès à la justice et Etat-Providence* (Paris: Economica, 1984) 1 at 16. This is a fundamental debate in class actions. See Martin Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Stanford: Stanford University Press, 2009) at 3. It is always in the foreground of any more specific discussion on class actions. See David L Shapiro, "Class Actions: The Class as Party and Client" (1998) 73:4 Notre Dame L Rev 913 at 916.

The entity model conceives of the class as the sole litigant and client, with no or a very limited possibility for individual members to opt-out.[151] It is based on an analogy between the class and collectivities, such as trade unions, municipalities and governments, all of which can be litigants in their own right on behalf of their members, residents and citizens.[152] The ways in which members, residents and citizens exercise control over these entities vary, but usually entail a delegation of authority to certain representatives and the right to vote directly on important decisions.

There are two ways in which the entity model can support a conception of justice based on choice. First, it can be done through the procedural route. Ideally, conceiving a class as an entity implies modifying the relationship between class counsel and his or her client.[153] Structures within the class should be created so that individual members can play a role as representatives of the entity. These representatives would in turn be the interlocutors of class counsel.[154] The democratic legitimating of the decisions taken on behalf of the class would then justify the absence of an opt-out right or a very limited one.

Obviously, existing standards and rules currently applicable in class proceedings in Canada do not embrace such an entity model with regards to the relationship between class counsel and her client. The decision by class counsel whether or not to invoke choice of law rules is not legitimated through a collective decision-making process in which individual class members can participate.

The second avenue is the one taken by Professor David Shapiro in trying to theoretically justify the entity model. First, he argues that the class should be conceived as an entity because of the economies of scale resulting from the pooling of resources and information.[155] A purely pragmatic argument like this one seems insufficient to justify the adoption of the entity theory, as Professor Shapiro himself appears to recognise.[156]

Second, Professor Shapiro argues, in response to Professor Kramer, that there is a substantive difference between mass and individual torts.[157] Mass torts pose specific causation and evidence challenges that can be best answered through a collective treatment of the class. Here, it is the nature of a mass wrong itself that justifies the entity model; for example, the fact that decisions are centralised, or that one can only ascertain the global harm, not its individual manifestations. It is doubtful that this second argument applies in all class action cases since it appears highly fact-dependent. Interestingly, the Supreme Court of Canada has

151 *Ibid* at 919.
152 *Ibid* at 921.
153 *Ibid* at 938.
154 *Ibid* at 940.
155 *Ibid* at 928.
156 *Ibid* at 934.
157 *Ibid* at 929.

often repeated that a class action is a simple procedural vehicle,[158] Canadian courts have moved on from an individualistic conception of the class to a more collectivist and pragmatic one that brought about the relaxation of the rules of evidence and proof,[159] notably with regard to the assessment of damages[160] or proof of injury requirements.[161] The Canadian legal environment thus seems receptive to this type of argument. For example, in cases where the nature of the wrong committed by the defendant is inherently collective, there could be an argument that the class must be conceived of as an entity that made the choice to be subjected to one single law.

Finally, Professor Shapiro maintains that a collective approach is also the best way to ensure a proper and equitable level of deterrence and compensation from both the defendant's and the members' perspectives.[162] To the extent that the entity model is justified by deterrence purposes, the argument goes back to saying that deterrence is simply a more important goal than access to justice. It thus appears useless for the purpose here: that of finding a different conception of justice to justify the non-application of choice of law rules in multi-jurisdictional class actions. Conceivably, one could argue that deterrence furthers access to justice in that it benefits the whole society for the future, but this seems to stray too far from the notion of access to justice as one of the foundational goals of class actions.

The last argument is that the entity model is justified in terms of compensation because it is more equitable to similarly injured victims. The validity of this argument depends on the way damages are ascertained within the class. Professor Shapiro appears to presume that damages should be calculated in a similar way for all members and that only differences in the harm suffered should count.[163] In essence, this is an argument as to how damages should be ascertained and not an argument supporting an entity model.

2. Ex Ante Justice

Another way to justify the non-application of choice of law rules in multi-jurisdictional class actions is through the adoption of an *ex ante* perspective of justice. Professors

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158 *Québec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at para 36, 138 DLR (4th) 577 [*St-Ferdinand*] (which had no modification of rules of evidence); *Bisaillon v Concordia University*, 2006 SCC 19 at para 19, [2006] 1 SCR 666 (which had no modification of subject-matter jurisdiction); *BouMalhab v Diffusion Métromédia CMR inc*, 2011 SCC 9 at para 52, [2011] 1 SCR 214 [*BouMalhab*] (which had no modification of the elements of a cause of action).

159 Lafond, 2006, *supra* note 39 at 219-29.

160 *St-Ferdinand*, *supra* note 158 at paras 72-82 (regarding proof of injury by inference); *St Lawrence Cement Inc v Barrette*, 2008 SCC 64, [2008] 3 SCR 392 at paras 107-18 (regarding use of average amounts for different subgroups of members).

161 *BouMalhab*, *supra* note 158 at para 64. Personal injury must still be proved in a class action, but the court can infer that each member of the group suffered a personal injury from the proof of an injury shared by all members.

162 Shapiro, *supra* note 150 at 931-32.

163 *Ibid*.

Craig Jones and David Rosenberg both write that arguments based on individual justice are exaggerated because they fail to recognise the existence of collectivizing forces operating *ex ante* in the mass accident context.[164] *Ex ante* effects of accident risks are indivisible and experienced class-wide.

The argument is based on economic reality. Defendants make centralised costs-benefits calculations and decisions that aggregate the risks and average prices, often across jurisdictional borders. Similarly, defendants' preventive measures are often taken at a collective level and are uniform across borders. On the other side of the equation, there is a class-wide response to the risk of accident by potential plaintiffs in the *ex ante* context, based on a risk averse assumption about people buying insurance. Whether a risk arises in a contractual or a non-contractual setting, defendants purchase insurance against liabilities. The premiums for insurance are usually calculated on a collective basis, one that does not necessarily take into account legal borders. Defendants then externalise the costs of this insurance on the consumers, often in an undiscriminating fashion, through price averaging.[165]

Professor Rosenberg uses this argument to justify the risk of redistribution of higher to lower value claims inherent in the class actions context.[166] Another author uses a similar argument to justify the statistical technique of sampling.[167] It appears to also be applicable to choice of law issues. Indeed, if premiums on insurance are calculated for a population that is spread across diverse jurisdictions with different substantive laws for product liability, for example, and if the defendant externalises its costs and averages the prices across jurisdictions without regard for the different substantive laws, an argument can be made that it is unjust for certain members of the class to have a different law applied to them. If different laws are applied, certain members will cross-subsidize others.

IV. CONCLUSION

In conclusion, this article has found that, owing to the few guidelines given by the Supreme Court of Canada on the intersection between private international law and class actions as well as the flexibility afforded by the law surrounding class actions and choice of law, the Ontario courts are divided in their treatment of choice of law in multi-jurisdictional class actions.

There is serious reason to believe that the Ontario courts often duck the issue of choice of law, either by ignoring it altogether, by acknowledging the dimension but adopting a wait and see approach, by invoking the facultative choice

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164 David Rosenberg, "Class Actions for Mass Torts: Doing Individual Justice by Collective Means" (1986-1987) 62 Ind LJ 561; Jones, *supra* note 7.

165 Rosenberg, *supra* note 164 at 575, 588-92. See also Jones, *supra* note 7 at 66-72, 87-90.

166 Rosenberg, *supra* note 164 at 593-94.

167 Robert G Bone, "Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity" (1993) 46:3 Vand L Rev 561 at 614.

of law doctrine or by neglecting to assess this component at the settlement approval stage. Because the cases overwhelmingly settle, the Ontario courts might see choice of law as an unnecessary hurdle to the practical resolution of mass litigation.

The main purpose of the theoretical part of this article was to assess whether such a practice jeopardises the furtherance of one of the foundational goals of class actions: access to justice. Even when the Ontario courts showed a willingness to ensure that choice of law had an impact on the resolution of the dispute by demanding or implementing structural assurances of fairness, such as subclasses or *ad hoc* measures, or by scrutinizing the content of a settlement, there is reason to question whether these techniques are sufficient to ensure fidelity to the goal of access to justice. However, none of the jurisprudential trends identified in the Ontario case law can obviously be qualified as furthering or frustrating the underlying goal of access to justice. This is because justice is multifaceted and also because the nature of the choice of law rules varies.

If access to justice is defined as the possibility to vindicate substantive rights in accordance with fundamental principles of justice, access to justice will be denied if the choice of law dimension bars certification of a class action. As the results obtained illustrate, the "possibility to vindicate" component of access to justice is not jeopardised by the Ontario case law since a plurality of applicable laws does not hinder certification.

Under that same definition, access to justice will equally be denied if a choice of law rule that by its nature embodies a material justice ideal is not applied. This conclusion relies on a sub-argument, which is that the proper approach to determine the relationship between choice of law and access to justice is not to rely on the effects of choice of law rules generally, but rather on their purpose and nature.

However, choice of law rules in Canadian private international law have only a tenuous link to substantive justice. The majority of choice of law rules are multilateral; their objective is conflicts justice. They simply seek to coordinate the diversity of legal systems. Therefore, their non-application in the multi-jurisdictional class actions setting does not deprive non-resident members of their substantive individual rights or fundamental procedural rights.

Nonetheless, some choice of law rules have recently been adopted with a material justice purpose, especially in Québec. They often purport to give rights to individuals and protect them as weaker parties to employment or consumer contracts, for example. Therefore, if a class action is in an area of the law where the choice of law rule is of that nature, non-recognition of the choice of law dimension would appear to thwart access to justice for the non-resident class members who would benefit from that rule. This is likely to occur especially in consumer class actions.

This nuanced appreciation of the connection between choice of law rules and access to justice does not call for a black and white solution. Therefore, one cannot say that the facultative choice of law doctrine should be abandoned

completely in the class actions context. Instead, the judge should be alert to the area of the law concerned in the case and the nature of the choice of law rules that apply. If the choice of law rules involved embody a material justice ideal, to ensure that the non-resident class members have access to justice, the judge should arguably apply the rules on her own initiative. If she neglects to do so, non-resident class members will be deprived of their rights, which constitute part of their bargaining endowment.[168] This is in conformity with the more proactive role played by judges in class actions in order to protect absent class members' rights generally, sometimes conceived as a fiduciary duty.[169]

The hard questions then become: (1) what types of differences in applicable laws matter; and(2) what can be doneto ensure that these differences will be reflected in the settlement content or will play a role in the negotiation process?[170]

The American courts struggled on the first question. The decision of the SCOTUS in *Amchem* opened the doors of argument to differences in applicable laws. In that case, the SCOTUS refused to approve a substantial asbestos settlement notably because of the absence of structural assurances of fairness for different subgroups of plaintiffs (currently injured versus exposure-only plaintiffs and plaintiffs with diverse medical conditions). However, it did not give any criteria to assess what types of differences matter, nor did it decide which medical conditions required separate representation. A few years later, the SCOTUS decided in *Ortiz* that only variations in interest that can be grouped into easily identifiable categories of claimants and may have a predictable impact on the settlement outcome of the negotiations need to be taken into account.[171] Fine-grained variations in substantive laws are, therefore, unlikely to have any impact and need to be sacrificed in class actions[172] due to the reality of settlement as an outcome.

Regarding the methods to ensure that the differences play out in the settlement content or the negotiation process, there are two main avenues. The first is procedural and requires that structural assurances of fairness be put into place at the certification stage. The discussion here can consist of whether subclasses and separate representation are always required.[173] The second route is substantive and consists of developing techniques to assess the fidelity of the settlement to the underlying law. Considering that every settlement is a give-and-take in which negotiation encompasses a variety of extrajuridical elements that impact on leverage, this is a very hard task. Even with recourse to such techniques as

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168 Galanter, *supra* note 96 and accompanying text.

169 *Reynolds v Beneficial National Bank*, 288 F3d 277 (7th Cir 2002) [*Reynolds*].

170 One could add the question of how to assess the application of the foreign law by the forum court, even though judgments on the merits are very rare. See e.g. *Sun Oil*, *supra* note 103 (where this question was raised).

171 *Ortiz*, *supra* note 37 at 831-32.

172 Richard A Nagareda, *Mass Torts in a World of Settlement* (Chicago: University of Chicago Press, 2007) at xv.

173 For a discussion on this, see Woolley, *supra* note 16 at 826-32.

quantifying the net expected value of the case[174] or comparing with aggregated data of tort recovery,[175] a high degree of precision is impossible to attain and the standard of review must recognise that there is a range of acceptable class settlements.[176] Finally, the fact that at the recognition and enforcement stage (in a collateral attack) the current grounds of review usually do not encompass the merits suggests that the emphasis will be strictly put on the structural assurances.

As the difficulty in resolving these two questions shows, even if such a material justice choice of law rule is applied, the practical limits of settlement review and of the scope of the collateral attacks that can be mounted against a class action judgment, as well as the types of differences in the laws that can be taken into account in the structure of the class, suggest that there must be some compromise in this conception of access to justice. If not, the only remaining solution is to deny certification.

Moreover, it is not evident that denial of the choice of law dimension, even when the rule embodies a material justice ideal, is always problematic. Indeed, two extrajudiciary conceptions of justice nuance this appreciation. First, justice conceived as a choice made by the class conceived as an entity appears to be a promising avenue to theoretically justify the non-application of choice of law rules by courts in multi-jurisdictional class actions. This model justifies such non-application because it is always the result of the initial choice by class counsel not to invoke these rules (to rely on the facultative choice of law doctrine). However, the class proceedings statutes in Canada do not yet reflect such an entity model in their organization of the relationship between class counsel and the members. With regard to the substantive differences between individual and collective wrongs used by Professor Shapiro to justify the vision of the class as an entity, they must be scrutinised on the facts of each case to see if they really do provide such justification. If such a vision was justified, again, there would be some work left for the court to ensure that those taking the decisions for the entity class do so with the best interests of the members at heart.

Further, the adoption of an *ex ante* perspective denotes some potential to justify, in terms of access to justice, the application of the same law to all the members of a multi-jurisdictional class action. Again, the facts of a case must be examined in detail to see if the reversal from an *ex post* to an *ex ante* perspective is justified. Finally, one would still have to determine which single law would best translate the *ex ante* perspective.

Obviously, the Ontario courts that are suspected of having ducked the choice of law issue did not articulate such elaborate rationales for doing so.

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174 See e.g. *Reynolds*, *supra* note 169.

175 See Nagareda, *supra* note 172 at 92.

176 See *supra* note 38 at 44-45 (where according to Piché, one of the golden rules of the fairness inquiry is to recognise that there is a range of acceptable class settlements due to the risk and costs of litigation and to the uncertainties of the law). See also *supra* notes 35-39 and accompanying text.

Chances are that they did so in order to clear the courts' dockets or because they wanted to facilitate a pragmatic resolution of the case through settlement. But one of the purposes of this research was to determine if such theoretical justifications existed. These avenues permit, at least in some instances, to justify the application of a single law, either through the application of the facultative choice of law doctrine or through the modification of the choice of law rules in cases of aggregate litigation.

As a concluding note, an interesting general finding that derives from the dominant conception of choice of law rules in Canadian private international law, regardless of what vision of access to justice is adopted, is that there is no impediment from an access to justice perspective to the adoption of new rules providing for a single law in the multi-jurisdictional class actions setting. On the contrary, the flexibility of the constitutional standard of "sufficient connection" established in *Unifund* would allow such an approach and the emphasis put on order in *Tolofson* seems to favour it.