THE [NOT SO] GOOD FIGHT? FEE SPLITTING IN THE VISA/MASTERCARD CLASS ACTION: THE MERCHANT LAW GROUP, JUSTICE PERELL, AND THE ONTARIO COURT OF APPEAL

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The Ontario Court of Appeal recently upheld a decision of the Ontario Superior Court to reduce the fee payable to class counsel because of an arrangement class counsel had made to pay off another class action firm that had filed copycat actions. The Court of Appeal held that the costs of fighting and settling carriage motions are business expenses that class counsel should bear, not the plaintiff class members.

The decision leaves open the larger issue of multi-jurisdictional class actions filed in multiple provinces. Canada needs a working multi-jurisdictional class action system. Progress toward this goal has been slow, although parts of a solution are now in place. Provincial legislatures need to heed the Supreme Court's 2015 call to establish more effective methods for managing jurisdictional disputes.

La Cour d'appel de l'Ontario a récemment confirmé la décision de la Cour supérieure de cette province au sujet de la réduction d'honoraires dus à des conseillers juridiques agissant dans le cadre d'un recours collectif, en raison des dispositions qu'ils ont prises pour rembourser, à un autre cabinet d'avocats en recours collectifs, les frais encourus par ce dernier en intentant un recours semblable. La Cour d'appel de l'Ontario a jugé que les frais encourus pour la défense et le règlement de requêtes visant à déterminer lequel des recours collectifs intentés sera autorisé, constituaient des dépenses professionnelles que doivent assumer les avocats concernés et non les membres du groupe demandeur.

La décision laisse en suspens la question plus générale des recours collectifs qui relèvent de plus d'une autorité et qui sont intentés dans plusieurs provinces. Le Canada a besoin d'un système opérationnel de traitement de recours collectifs multijuridictionnels. Jusqu'ici, les progrès accomplis en vue de la réalisation de cet objectif ont été lents, même si certaines composantes d'une solution sont désormais en place. Les législatures provinciales doivent répondre à l'appel – lancé par la Cour suprême en 2015 – à la mise en place de méthodes plus efficaces de gestion de conflits de compétence.

Not infrequently, two or more law firms file competing class actions arising out of the same alleged wrongdoing. They then need to determine who will lead the charge on behalf of the class. Sometimes a contested carriage motion is the result, with the court determining which firm will represent the class – and have the potential to earn an attractive fee in the process. Sometimes one firm will pay off another by agreeing to split its fee with the firm that withdraws from the field. Sometimes, the firms will agree to work together as co-counsel. Regardless, the percentage contingency fee sought from class members by the firm incorporates a risk factor to account for potential carriage fights.

This, the Ontario Superior Court and Court of Appeal recently held in the Visa/MasterCard class action,[2] is wrong. The cost of either fighting the carriage battle or of paying a firm to withdraw is not an expense that benefits the class; rather, it is a business expense of the firms involved and should be borne by them.

The "ransom fee"

The issue arose in connection with the approval of a settlement in the interchange fee competition law class actions.

More than one year after a consortium of two BC firms and one Quebec firm had filed class actions in Ontario, BC, and Quebec alleging conspiracies in relation to credit card interchange fees, a Saskatchewan-based firm, Merchant Law Group ("Merchant") started copycat actions in Alberta and Saskatchewan. The consortium proposed a national class in its Ontario action and provincial classes in its BC and Quebec actions. Merchant proposed national classes in Alberta and Saskatchewan.

The BC firms then filed their own class actions in Alberta and Saskatchewan and brought carriage motions. After the BC firms and Merchant spent two days arguing a contested carriage and stay motion in Alberta, they reached a settlement, with judicial assistance. The BC firms agreed to pay up to $800,000 from their fee to Merchant in return for Merchant agreeing to stay its Alberta and Saskatchewan actions.

The BC firms then brought settlements with three defendants (Bank of America, Citigroup, and Capital One) to the Ontario Superior Court for approval. Justice Perell approved the settlements, but condemned the fee sharing agreement between the BC firms and Merchant, and reduced

class counsel's fees by 10% in order to account for his refusal to approve the fee sharing. He also ordered that class counsel could not pay any portion of their fee to Merchant, and that they could not otherwise pay Merchant the amount agreed.[3]

Class counsel did not include the fee sharing agreement in the settlement approval materials before the court. During the hearing, Perell J. insisted that it be produced, and made plain his disapproval of class counsel's failure to include it in the first place: there "was no excuse for Class Counsel not fully disclosing" it.[4]

A key threshold issue was whether the fee sharing agreement was subject to review by the court. Subsection 32(2) of the *Class Proceedings Act* provides that "an agreement respecting fees and disbursements between a solicitor and a representative party" is not enforceable unless it is approved by the court.[5] The issue was not canvassed at any length by Perell J.; he simply held that the fee sharing agreement fell within this provision because "it is an agreement about how the fees paid to Class Counsel by the Class Members are to be paid and then shared".[6]

Having found that the fee sharing agreement required court approval to be enforceable, Perell J. refused to approve it. He described it as "ransom fee" that was unenforceable and possibly illegal, and that it certainly was not fair and reasonable to the class for it to pay for services that were "useless" and did not contribute to the settlement:

> [68] I do not approve of it. The Fee Sharing Agreement requires court approval and approval requires that the fee be fair and reasonable to the Class Members. The Fee Sharing Agreement is not fair and reasonable. It is not fair, reasonable, or just to have the Class Members pay the putative Class Counsel of a stayed rival class action. It is not fair and reasonable for a client to pay for legal services that were useless to the client. In the case at bar, there is nothing fair and reasonable in asking the Class Members in Ontario to pay a ransom fee in order to stay late-arriving rival class actions in Alberta and Saskatchewan.
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> [69] In the case at bar, the Merchant Law Group did not make a contribution to the achievement of the settlement agreement and the firm should not share in the recovery. The alleged $1 million of work-in-progress of the Merchant Law Group was redundant and useless for Class Members.[7]

Perell J. suggested that instead of agreeing to split their fee, class counsel could have fought the "good fight" of the carriage motion, or

potentially brought stay motions in Alberta and Saskatchewan in favour of their BC action.[8]

Perell J. went on to suggest that the fee sharing agreement might be illegal under the "maintenance" doctrine at common law. Maintenance, he noted, deals with the officious intermeddler and the profiteer in another's litigation. The Merchant actions were filed late — 15 months after the BC actions, and just after successful litigation in the US — which led Perell J. to suspect that they were motivated by opportunism to share in the contingency fee:

> [76] I am not in the position of this fee approval motion to determine whether the Fee Sharing Agreement is illegal as maintenance. All I can say is that it may be. The circumstances are suspect. The Merchant Law Group's rival class actions in Saskatchewan and Alberta were late arriving, and these actions presented themselves hard upon the announcement of successful litigation in the United States against the alleged Visa and MasterCard conspirators. The merchants from across Canada who comprised the Class Members did not need another champion for their cause given an active proceeding in British Columbia. What purpose was being served by another class action other than opportunism to share in the contingency fee?[9]

Disapproval in Quebec

The settlement also had to be approved by the court in Quebec. Justice Corriveau took note of Perell J.'s decision to reduce class counsel's fees by 10%. She expressed her disapproval of the fee sharing agreement in somewhat milder language:

> [32] The Court does not approve of agreements reached between competing groups of plaintiffs' counsel that are intended to disinterest some of them.[10]

Although not noted in the decision, the fee sharing agreement did not seem to affect the fees claimed by class counsel in Quebec (making her comments *obiter*), and Corriveau J. approved the settlement and the fees.[11]

Hello Baby, Welcome to Saskatchewan

When the plaintiffs took their settlement to Saskatchewan, they got a quite different reception.[12] Justice Ball agreed with Perell J. that the fee sharing agreement ought to have been disclosed to the court, because the

fact that class counsel had agreed to accept less money than their claimed contingency fee was relevant to the court's assessment of whether the fee requested by class counsel was fair and reasonable.

The fee sharing agreement did not, however, make an otherwise fair and reasonable fee agreement unfair or unreasonable, Ball J. held, as it did not impose additional costs on the class. Moreover, he considered that the fee sharing agreement was not an agreement between class counsel and the representative plaintiff, and was thus not subject to court approval under Saskatchewan's *Class Actions Act*.[13] He thus declined to address class counsel's decision to share its fee in order to resolve carriage disputes:

> [23] I will not look behind Class Counsel's decision to enter into the Fee Sharing Agreement with MLG in order to resolve the carriage disputes. Class Counsel are knowledgeable and experienced, they made their decision knowing the circumstances, and they resolved their dispute with judicial oversight. I accept that they did so because they believed it to be in the best interests of the class. If there is to be a determination that MLG acted unlawfully, it should be made in a proceeding in which MLG is before the court and has an opportunity to address the issue.[14]

The Ontario Appeal

Class counsel appealed Perell J.'s decision to reduce their fees by 10%. In a decision released in November 2016, the Ontario Court of Appeal upheld Perell J.'s decision to reduce class counsel's fee by 10%, and to prohibit class counsel from paying Merchant out of their remaining fee. However, the court reversed the portion of Perell J.'s decision prohibiting class counsel from paying Merchant out of their own money.

The first question before the court was whether it had jurisdiction to review class counsel's fee. The court held that it did, under both subsection 32(2) of the *Class Proceedings Act*, which requires court approval of fee agreements between class counsel and the representative plaintiff, as well as the general power in section 12 to "may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination".[15]

The key fact that led the court to this determination was that class counsel were using the proceeds of the settlement to buy off Merchant in a carriage settlement. This was apparent from class counsel's acknowledgement that the fee sought from the class includes a "risk factor" to

account for carriage battles: "the ask bakes in a carriage risk".[16] In other words, the fee sought from the client includes expenses relating to carriage battles. Thus, while a carriage settlement buys certainty, it is the class members who pay for that certainty. Justice Blair, writing for the court, noted:

> For the purpose of interpreting s. 32, the important point is that the contingency fee agreement between class counsel and the representative party has as one of its risk components the potential for carriage disputes, including the potential for payment to competing class counsel in order to buy the "certainty" referred to above.[17]

The implication of class counsel's acknowledgement is that class members are being asked to pay higher fees in order to account for the cost of carriage battles or settlements to avoid such battles. Blair J.A. viewed this as class members being required to pay for lawyers to fight to represent them:

> ... class members are being exposed increasingly to accepting the "baked-in ask" that is designed to protect class counsel from incurring any costs in fighting for the right to represent them, as opposed to costs for providing legal services that are a benefit to the class.[18]

The fact that part of the fees sought by class counsel were not for legal services provided to class members, but for class counsel to fight off, or buy off, other contending class proceedings led the court to hold that the fee sharing agreement is a component of the fee package for which class counsel is seeking approval, and thus requires approval under section 32. Blair J.A. recognized that, strictly speaking, the fee sharing agreement was an agreement between lawyers, not an agreement between class counsel and the representative plaintiff. However, he concluded that it falls within the court's duty to ensure that fees are fair and reasonable and "reflect payments made for legal services that benefit the class members".[19]

Blair J.A. went on to disagree with Ball J.'s view that the fee sharing agreement did not transform an otherwise reasonable fee into an unreasonable one. This argument, he said,

> ... simply begs the question: how is it fair and reasonable, and in the best interests of the class, to require class members to pay a potential $800,000 out of their settlement funds to lawyers whose services, in the motion judge's view, made no contribution to the settlement and provided no benefit to their class proceeding?[20]

Having determined that the fee sharing agreement required approval of the court, Blair J.A. held that it was open to Perell J. to reduce class counsel's fees as part of a "highly contextual discretionary exercise".[21] His decision was not unreasonable and was entitled to deference.

Blair J.A. addressed class counsel's complaint that Perell J. had focussed on the possibly illegal nature of the fee sharing agreement by suggesting that it would have been preferable had Perell J. focussed less on this point. However, he noted that Perell J. did not make a finding that the agreement was illegal. Rather, Perell J. wanted to send a message about a concern that judges have about competing class proceedings and, Blair J.A. noted, he was not the first to do so.[22]

Perell J.'s "primary and underlying concern", Blair J.A. held, was "to ensure that the fees to be paid by the class to Class Counsel out of the settlement funds were fair and reasonable and in the best interests of the class".[23] Neither class counsel nor Merchant were able to demonstrate that the carriage settlement and fee sharing agreement, or the Alberta and BC proceedings that gave rise to the settlement, benefitted the class members in any significant way, Blair J.A. noted. He added that Perell J. was not only entitled to consider the substantial benefits that class counsel stood to reap from the arrangement, he was required to do so.[24]

Blair J.A. then addressed the practice of counsel filing competing class actions. He noted that courts have attempted in many cases to discourage the practice of filing class actions in multiple proceedings in order toll limitation periods, as well as the practice of filing subsequent, or late-arriving, copycat class actions, for the purpose of securing carriage of national class actions. He added, "Coincidentally, many have involved the Merchant Law Group".[25] Blair J.A. concluded:

> [84] While these decisions did not involve the approval of fees or fee sharing arrangements – the actions had not reached those stages – they signal that courts have been grappling with the same concerns revolving around carriage disputes arising out of competing multi-jurisdictional class proceedings that underpinned the motion judge's concerns here: the need to maintain the integrity of the adjudicative system in general and the class action process in particular where it appears that the competing class proceeding in question does not serve any useful purpose for the plaintiffs: Duzan, at para. 30. Each court in a multijurisdictional class proceeding retains this responsibility when called upon to assess the fairness and reasonableness of counsel fees.[26]

Returning to the issue of carriage battles and settlements, Blair J.A. noted that they will continue to occur. He held that carriage settlements are a private business matter that counsel should pay for themselves as a cost of doing business:

> [91] The issue on a fee approval motion is not so much whether the carriage dispute or the carriage settlement was justified. The issue is who should bear the cost of that fight – the lawyer participants for whose primary benefit the struggle is waged, or the class members? It seems to me that it is the lawyer participants who should bear the costs.
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> [92] If class counsel see it in their best interests to resolve carriage disputes by agreeing privately, amongst themselves, to remunerate one set of class counsel for leaving the scene, that is a matter for their private business determination. But they should bear the cost of that business decision as well, in my view. The class members ought not to be exposed – either directly or through some form of "potential carriage dispute mark-up" built into the contingency fee negotiated with the class members – to having to pay for what is essentially a general business expense of the firm associated with the litigation and not an expense providing any added value to the class action itself.[27]

Blair J.A. then turned to Perell J.'s decision to declare the fee sharing agreement unenforceable in its entirety, that is, to deny Merchant the ability to be paid by class counsel from sources other than the fee. He confirmed that Perell J. was entitled to declare that the paragraph in the fee agreement that obliged class counsel to pay Merchant from out of its fee was not enforceable.[28] However, it was unfair of Perell J. to go further and deprive Merchant of any personal rights to be paid by class counsel from other sources without the opportunity to make submissions, he held.[29] Indeed, Blair J.A.'s view that payment for carriage settlements is a private business matter between law firms suggests that the court ought not to interfere with those arrangements, absent exceptional circumstances.

No Parking

The focus of the Ontario Court of Appeal on restricting class counsel's fees to services that benefit the class, as opposed to steps that are taken to benefit class counsel's own position, is correct. It leaves it open to plaintiff firms to make whatever deal they wish to settle carriage disputes, provided that the class members are not asked to pay for it, directly or indirectly.

The decision, however, leaves open the larger issue of multi-jurisdictional class actions filed in multiple provinces. In price fixing class actions,

plaintiffs typically file in at least three provinces. They frequently seek a national class in Ontario, carving out provincial classes in BC and Quebec. Typically these actions will be filed by a consortium of cooperating plaintiff firms. The plaintiff firms will then designate one of these jurisdictions as the lead, with the other actions being parked. While the practice of filing in multiple jurisdictions is not unheard of in other types of class actions, it is not endemic to them as it is to price fixing class actions.

Even without the addition of copycat actions filed by other firms, this practice is inherently wasteful and inevitably increases the legal fees paid by class members from the settlement funds. Perell J. questioned the usefulness of starting overlapping national class actions in five provinces after the BC action was commenced and then "parking" them. He suggested that the representative plaintiffs in these other provinces could simply be added as representative plaintiffs in BC. He added what the Court of Appeal described as a "cri de coeur":[30]

> ...it is time to stop blaming the Canadian *Constitution*, which creates a federation of jurisdictions, for the so-called jurisdictional problems of national class actions. There are already in place the legal tools necessary to stop the multi-jurisdictional tactics of law firms that get in the way of access to justice, behaviour modification, and judicial economy for Canadian citizens.[31]

Courts in Quebec have also reacted negatively to class action parking. In two cases decided in late 2015, the Quebec Superior Court departed from the "first to file" rule that normally applies in Quebec, and awarded carriage to a rival firm, after finding that the actions started by the first firm were simply copy-and-paste pleadings from actions in other jurisdictions (including, in one case, the US) that had then been one of many actions started across the country to occupy the field, and then not pursued with diligence.[32] The Quebec Court of Appeal very recently upheld the second of those two rulings.[33]

It is intuitively obvious that there should be one national class action for any case that has national scope. Perell J.'s assertion that the necessary tools are already in place may be too optimistic, however. Nor is his suggestion that plaintiff law firms should "fight the good fight" in contested carriage motions instead of resolving carriage practicable. Carriage battles waste legal and judicial resources, delay the progress of the action, and involve courts in the unwelcome task of choosing lawyers for class plaintiffs.

Canada needs a working multi-jurisdictional class action system. Progress toward this goal has been slow, although parts of a solution are now in place. Three things are needed for such a system:

First, courts must be able to certify a multi-jurisdictional opt-out class action. Six Canadian provinces now permit such class actions either expressly or inferentially.[34] Three provinces require non-residents to opt in, including BC, making a national class action impracticable in those jurisdictions, since large-scale class actions are only economic where class members are included unless they opt out.[35]

Second, courts must be willing to stay an action in their jurisdiction in favour of a multi-jurisdictional class action in another province. Two provinces, Alberta and Saskatchewan, have provisions in their class actions statutes expressly providing for this.[36] Quebec has gone the other way, adopting protectionist multi-jurisdictional provisions that are designed to make it difficult to yield to a class action in another province.[37]

Third, courts must be willing to recognize and enforce settlements that have been reached and approved by courts in other provinces. Provincial reciprocal enforcement of judgments legislation,[38] as well as the Supreme Court's decision that Canadian courts must give "full faith and credit" to decisions from courts in other provinces,[39] suggest that this ought to be relatively straightforward.

The reality is more complex. Recognition is the flip side of jurisdiction. A court will only recognize a judgment of another court if that other court validly assumed jurisdiction. In the case of class actions, this raises difficult constitutional and jurisdictional issues that cannot be fully canvassed in this article. The problem arises because non-residents are forced to become plaintiffs in circumstance where there may not be a sufficient foundation for jurisdiction *simpliciter*. The Ontario Court of Appeal has indicated a willingness to recognize a foreign class action settlement that includes Ontario plaintiffs where the interests of Ontario plaintiffs are properly protected.[40] The Quebec Court of Appeal has taken a more restrictive approach, effectively requiring that the conditions for jurisdiction *simpliciter* (which are codified in Quebec) be met for *each* class member in an opt-out class action.[41] The court also suggested that it is constitutionally impossible to include non-residents in a class action.[42] Even where another court might have jurisdiction, Quebec courts are reluctant to enforce a settlement.[43] More recently, Justice Leitch of the

Ontario Superior Court held that an Ontario opt-out class could not include plaintiffs outside of Canada because the Ontario court did not have jurisdiction *simpliciter* over those would-be plaintiffs, and the foreign courts in question would not recognize or enforce a judgment issued by the Ontario court that purported to bind the foreign class members.[44]

In an appeal from another Quebec case, the Supreme Court of Canada recognized that national classes are desirable, yet raise issues. The court left it to provincial legislatures to develop solutions:

> ...provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions.[45]

It goes almost without saying that these solutions are needed urgently, and that provincial legislatures need to get on with the job. Alberta and Saskatchewan have begun the work; the other provinces need to complete it.

Endnotes

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[2] *Bancroft-Snell v Visa Canada Corporation*, 2016 ONCA 896 [*Bancroft-Snell* ON CA], aff'g 2015 ONSC 7275 [*Bancroft-Snell* ON Sup Ct].
[3] *Bancroft-Snell* ON Sup Ct, supra note 2 at para 4.
[4] *Ibid* at paras 27-29.
[5] *Class Proceedings Act*, SO 1992, c 6, s 32(2) [Class Proceedings Act].
[6] *Bancroft-Snell* ON Sup Ct, *supra* note 2 at para 56.
[7] *Ibid* at paras 68-69.
[8] *Ibid* at paras 70-71.
[9] *Ibid* at para 76.
[10] *9085-4886 Quebec Inc v Visa Canada Corporation*, 2015 QCCS 5291 [*Quebec Inc*] at para 32.
[11] *Ibid* at paras 34-35.
[12] *Hello Baby Equipment Inc v B of A Canada Bank*, 2015 SKQB 410 [*Hello Baby Equipment Inc*].
[13] *The Class Actions Act*, SS 2001, c C-12.01, s 41(2).
[14] *Hello Baby Equipment Inc, supra* note 12 at para 23.
[15] *Class Proceedings Act, supra* note 5, s 12.

[16] *Bancroft-Snell* ON CA, *supra* note 2 at para 50.
[17] *Ibid* at para 51.
[18] *Ibid* at para 53.
[19] *Ibid* at para 59.
[20] *Ibid* at para 63.
[21] *Ibid* at para 69.
[22] *Ibid* at para 73.
[23] *Ibid* at para 77.
[24] *Ibid* at para 79.
[25] *Ibid* at para 83.
[26] *Ibid* at para 84.
[27] *Ibid* at paras 91-92.
[28] *Ibid* at para 100.
[29] *Ibid* at paras 110-111.
[30] *Ibid* at para 73.
[31] *Ibid* at para 66.
[32] *Cohen v LG Chem Ltd*, 2015 QCCS 6463; *Yana Badamshin v Panasonic Corporation*; *Option Consomateurs v Panasonic Corporation; Hérard v Panasonic Corporation*; 2015 QCCS 6554.
[33] *Badamshin v Option Consommateurs*, 2017 QCCA 95, leave to appeal to the SCC denied.
[34] Alberta and Saskatchewan do so expressly, see *Class Proceedings Act*, SA 2003, c C-16.5, s 9.1; *Class Actions Act*, SS 2001, c 12.01, s 6.1 (see also *Merck Frosst Canada Ltd v Wuttunee*, 2009 SKCA 43 at para 8). Manitoba, Ontario, and Nova Scotia do so by not requiring non-residents to opt in Manitoba, Ontario, in: see Meeking Bre-X *Meeking v The Cash Store Inc et al*, 2012 MBQB 58 at para 65; *Carom v Bre-X Minerals Ltd*, [1999] OJ No 281, 43 OR (3d) 441 at para 21; *BCE Inc v Gillis*, 2015 NSCA 32 at para 83. While Quebec's class proceedings legislation is also silent on non-residents, its rules on jurisdiction *simpliciter* and caselaw place severe limits on participation of non-residents in a class: see Hocking certified *Hocking c Haziza*, 2008 QCCA 800. Quebec courts have, nevertheless, certified national classes: see for example *Belley c TD Auto Finance Services Inc*, 2015 QCCS 168.
[35] British Columbia: *Class Proceedings Act*, RSBC 1996, c 50, s 16(2); New Brunswick: *Class Proceedings Act*, RSNB 2011, c 125, s 18(3) (as am 2006, c C-5.15, s 18); and Newfoundland and Labrador: *Class Actions Act*, SNL 2001, c C-18.1, s 17(2) (as am 2001 c C-18.1, s 18).
[36] Alberta: *Class Proceedings Act*, SA 2003, c C-16.5, s 9.1 (as am 2010, c 15, s 8); Saskatchewan: *Class Actions Act*, SS 2001 c 12.01, s 6.1 (as am 2007, c 21, s 7).
[37] *Code of Civil Procedure*, CQLR, c C-25.01, s 577.
[38] All provinces have some form of general reciprocal enforcement legislation.
[39] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077.
[40] *Currie v McDonald's Restaurants of Canada Ltd* (2005), 74 OR (3d) 321.
[41] *Hocking v Haziza*, 2008 QCCA 800 [Hocking].

[42] *Ibid* at paras 157, 160.
[43] See for example *Lépine v Canada Post Corp*, where a settlement in Ontario included Quebec residents. The settlement was not enforced because the Quebec class action was still pending, as well as defects in the notice to class members: [2005] QJ No 9806 (Q CS), aff'd 2007 QCCA 1092, aff'd 2009 SCC 16.
[44] *Airia Brands Inc v Air Canada*, 2015 ONSC 5332.
[45] *Canada Post Corp v Lépine*, 2009 SCC 16, 1 SCR 549 at para 57.