THE CASE FOR A CANADIAN PANEL ON MULTI-JURISDICTIONAL CLASS PROCEEDINGS

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In Hryniak v Mauldin, the Supreme Court called for a cultural shift to promote timely and affordable access to the civil justice system in Canada. The failings of the civil justice system with respect to class proceedings are particularly troubling. The authors focus on multi-jurisdictional proceedings, which are procedurally complex and notoriously slow-moving, and on past efforts by the bar and bench to render these proceedings more efficient. For the most part, existing reform measures are discretionary, ad hoc, and premised on the consent of all the parties. Whereas cooperation is currently an option under the various reform measures, cooperation should be the rule. The authors recommend that legislatures simplify and expedite class proceedings across the country by creating a Panel based in part on the United States District Courts' Judicial Panel on Multidistrict Litigation. The Panel would have representation from all provincial jurisdictions and its mandate would be restricted to three areas. First, it would determine the appropriate forum for a national class action to be heard and stay competing class proceedings. Second, it would determine which plaintiff law firms would have carriage of the selected proceeding. Third, where the parties obtain court approval of a settlement in the province having jurisdiction over the case, the Panel would be responsible for approving class action settlements for the other participating provinces. The authors canvas potential constitutional challenges to the proposed model, concluding that the model does not offend section 96 of the Constitution Act, 1867.

Dans l'arrêt Hryniak c. Mauldin, la Cour suprême a réclamé un virage culturel pour promouvoir un accès rapide et abordable au système de justice civile du Canada. Les manquements de ce système en matière de recours collectif sont particulièrement troublants. Les coauteurs de l'article se penchent sur les procédures multijuridictionnelles, procédures complexes et notoirement longues, et sur les efforts déjà déployés par le barreau et la magistrature pour en améliorer l'efficacité. La plupart des mesures de réforme existantes sont des mesures discrétionnaires adoptées ponctuellement sur la base du consentement de toutes les parties. Actuellement facultative aux termes des diverses mesures de réforme, la coopération devrait être la règle. Les coauteurs recommandent aux gouvernements de simplifier et d'accélérer les recours collectifs dans l'ensemble du pays en créant un groupe de spécialistes

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s'inspirant en partie du Judicial Panel on Multidistrict Litigation des cours de district des États-Unis. Ce groupe réunirait des représentants et, représentantes de toutes les provinces et son mandat se limiterait à trois questions. Premièrement : déterminer quelle serait la bonne instance à laquelle s'adresser pour faire valoir un recours collectif national et faire suspendre les recours concurrents. Deuxièmement, déterminer quelles cabinets juridiques représentant les parties plaignantes seraient chargés de conduire l'instance. Troisièmement, dans les cas où les parties obtiendraient gain de cause pour un règlement dans la province ayant compétence, le groupe de spécialistes serait chargé d'approuver les règlements du recours collectif pour les autres provinces concernées. Les coauteurs brossent un portrait des défis constitutionnels que pourrait présenter le modèle proposé, et concluent que celui-ci n'est pas contraire à l'article 96 de la Loi constitutionnelle de 1867.

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1. Part I—Introduction

In *Hryniak v Mauldin*, the Supreme Court called for a cultural shift to promote timely and affordable access to the civil justice system in Canada.[2] That unprecedented injunction reflects the dire state of the civil justice system in this country, which is plagued by delays and is prohibitively expensive. This problem is particularly acute for the vast majority of individual litigants for whom the civil justice system is simply unaffordable. Consequently, civil courts serve only a small percentage of potential users—those with the financial wherewithal to withstand the war of attrition that is modern-day civil litigation.[3]

How have the bar, judiciary and legislatures responded to the plea from our highest court to adopt a new approach to civil litigation? Unfortunately, reforms have been largely inconsequential and have moved at a glacial pace.[4] Indeed, since *Hryniak*, the problems with the civil justice system have been exacerbated by Supreme Court jurisprudence that has required the diversion of scarce judicial resources to facilitate an accused's *Charter* right to be tried within a reasonable time.[5] In this context, civil cases have inexorably fallen to the bottom of the priority list, below criminal cases and urgent family law matters.

The failings of the civil justice system with respect to class proceedings are particularly troubling. Legislation permitting class proceedings was enacted because governments across the country recognized that the civil justice system was beyond the financial means of most plaintiffs, especially in cases where the monetary amount in issue was relatively modest.[6] The policy objectives of this legislation are judicial economy,

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2 *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*].

3 For a broader discussion on the access to justice crisis, see the Right Honourable Richard Wagner, Chief Justice of Canada, "Access to Justice: A Societal Imperative" (Remarks delivered at the 7th National Pro Bono Conference, Vancouver, 4 October 2018), online: <http://tinyurl.com/p6c5uzd4> [perma.cc/7L4P-6GL8]. See also Trevor C.W. Farrow et al, "Everyday Legal Problems and the Cost of Access to Justice in Canada: Overview Report" (2016), online (pdf): <http://tinyurl.com/vv7j6dat>[perma.cc/B6Q5-EAQD].

4 See R. McKay White, "Seven Years of Accessible Justice: A Critical Assessment of *Hryniak V. Mauldin*'s Culture Shift" (2022) 59:3 Alta L Rev 611 at 629–630.

5 See especially *R v Jordan,* 2016 SCC 27. See also Keara Lundrigan, "*R v Jordan*: A Ticking Time Bomb" (2018) 41:4 Man LJ 113 at 121–124.

6 For a broader discussion of the considerations behind the introduction of class proceedings, see Janet Walker, "Class Proceedings in Canada—Report for the 18th Congress of the International Academy of Comparative Law" (2010) at 2–4, online (pdf): <http://tinyurl.com/3n69vaav> [perma.cc/E98H-JATG] [Walker, "Class Proceedings in Canada"].

access to justice[7] and behaviour modification.[8] Unfortunately, many class proceedings continue to be "mired in uncertainty and procedural wrangling across the country."[9] The excessive focus on procedural issues delays a determination on the merits. Further, the class members usually bear the costs of such proceedings from the proceeds of settlements. Thus, the goals of judicial economy and access to justice are not being met, and behaviour modification is being delayed.

As we will discuss, this inefficient focus on procedural matters frequently arises in multi-jurisdictional class proceedings, which are notoriously procedurally complex and slow-moving.[10] These cases regularly feature concurrent pretrial motions in numerous jurisdictions. This multiplicity of pretrial motions can lead to inconsistent rulings on issues like the appropriate forum and carriage and increases the costs ultimately borne by the class members. Further, in cases where the parties reach a settlement agreement, the process of obtaining approval of that settlement is cumbersome and can require hearings in each affected province.[11] In a civil justice system that barely has sufficient resources

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7 Of the three goals associated with class actions, no concept has attracted as much commentary as access to justice. In her landmark study of class actions in Canada, Jasminka Kalajdzic argues that courts have narrowly interpreted access to justice as synonymous with "access to a procedure": Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (Vancouver: UBC Press, 2018) at 169. She advocates for a thicker conception of access to justice that includes within its ambit "(1) access to the courts; (2) a fair and transparent process; (3) meaningful participation rights for class members; and (4) a substantively just result": *Ibid* at 51. Similarly, Mathew Good warned against a purely economic conception of access to justice and argued that the concept should also comprise subjective and objective considerations such as "cost, delay, complexity, intelligibility, accessibility, socio-cultural and demographic characteristics of litigants, and psychological barriers to resolution": Mathew Good, "Access to Justice, Judicial Economy, and Behavioral Modification: Exploring the Goals of Canadian Class Actions" (2009) 47:1 Alta L Rev 185 at 204. While this paper does not fully analyze the access to justice gains that a Canadian multi-jurisdictional panel would represent, we believe that such a panel would advance both thin and thick conceptions of access to justice.

8 *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46 at paras 27–29 [*Western Canadian Shopping Centres*].

9 *Ravvin v Canada Bread Company, Limited*, 2020 ABCA 424 at para 30 [*Ravvin*].

10 In this paper, when we reference multi-jurisdictional class proceedings, we are referring to overlapping class proceedings that unfold in multiple provincial jurisdictions. For a statutory definition of a "multi-jurisdictional class proceeding," see *Class Proceedings Act, 1992*, SO 1992, c 6, s 1(1).

11 See e.g. *Carruthers v Purdue Pharma*, 2022 SKKB 214; Lenczer Slaght, "Class Actions in Canada 2022" (2022) at 4, online (pdf): <http://tinyurl.com/bdhtujzu> [perma.cc/48UB-MDL9]. Similarly, even when a court in one province has approved a national settlement, the settlement approval may be conditional on a court in another province

to keep its head above water, the existence of duplicative proceedings is unacceptable. Moreover, duplication and delay are inconsistent with the public policy goals animating class proceedings legislation. Notwithstanding the foregoing, there have been some encouraging trends that illuminate opportunities for meaningful civil justice reform. Two such trends are particularly relevant in the context of multi-jurisdictional class proceedings.

First is the trend of interprovincial cooperation in managing multi-jurisdictional class proceedings.[12] Recent jurisprudence shows examples of courts working cooperatively across provincial boundaries to manage such actions.[13] Statutory reforms as well as the adoption by some Canadian courts of the Canadian Bar Association's Judicial Protocol for the Management of Multi-Jurisdictional class actions have provided means by which judges can more easily stay a class proceeding based on the existence of a companion action in another province.[14] However, these measures are largely discretionary, "*ad hoc*", and premised on the consent of all the parties.[15] While in some instances, parties will cooperate and vigilant superior court judges[16] will create a more expeditious procedure,

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granting a permanent stay. For example, in one multi-jurisdictional class action, Justice Perell of the Ontario Superior Court of Justice approved the settlement, conditional on the grant of a permanent stay of a parallel action by the Court of Queen's Bench for Saskatchewan: *Larocque v Yahoo! Inc.*, 2022 SKQB 136 at paras 2–3. In such a situation, the settlement will be held up until the court has granted the permanent stay and appellate courts have disposed of any appeals: see e.g. *Larocque v Yahoo! Inc.*, 2023 SKCA 63 at paras 3–4 (dismissing the plaintiff's appeal of the trial court's order of a permanent stay and noting that the Ontario settlement had been approved in 2021).

12 Keely Cameron & Alicia Yowart, "Navigating Multijurisdictional Class Actions" (22 April 2022), online (blog): *Bennett Jones* <http://tinyurl.com/3yafwy98> [perma.cc/E9ST-3UN8].

13 See e.g. *École communautaire Belz c Bernard*, 2021 QCCA 905 (holding that the discontinuance of a proposed class action in Québec according to the *Code of Civil Procedure* may be granted where the discontinuance (1) does not harm the putative members of the proposed class and (2) does not undermine the integrity of the justice system) at para 8; *Bourgeois c Electronic Arts Inc.,* 2023 QCCS 910 (concluding that a discontinuance in that case would "not undermine the integrity of the justice system but rather would promote the principles of both judicial economy and interprovincial comity") at para 14.

14 Law Commission of Ontario, "Class Actions: Objectives, Experiences and Reforms: Final Report" (July 2019) at 32–34, online (pdf): <http://tinyurl.com/2s44tt9t> [perma.cc/4BB8-5YZH] [LCO Report]; Canadian Bar Association, "Class Action Judicial Protocols (2018)" (2018), online (pdf): <http://tinyurl.com/49jztmw5> [perma.cc/L8QM-BH4M] [CBA Protocol].

15 LCO Report, *supra* note 14 at 31.

16 We pause here to note that in some situations, judges without relevant expertise may be assigned to handle complex jurisdictional and procedural issues unique to the class actions context. To the extent that the bar and bench view this as a problem, one of the

there is clearly a need for systematization and expediency in determining issues arising from the presence of class action proceedings in multiple jurisdictions. In other words, whereas cooperation is currently an option under the various reform measures, we submit that cooperation should be the rule.

The second trend is the encouragement from the Supreme Court that legislatures should engage in cooperative federalism.[17] We submit that legislatures should harness the principle of cooperative federalism to make the justice system more effective and efficient. In the context of class proceedings, there is no constitutional impediment and no other compelling reason why legislatures should not work cooperatively to facilitate class proceedings when the putative class members are located in more than one province and actions have been commenced in multiple jurisdictions. Only through cooperative federalism can meaningful and effective reform be implemented.

We argue in this paper that legislatures must move to simplify and expedite class proceedings across the country, consistent with the policy objectives underlying class proceedings legislation. Academics and class actions practitioners have already focused their attention on various aspects of multi-jurisdictional class actions, ranging from the constitutionality of national class actions[18] to the implications of multi-jurisdictional class actions for access to justice.[19] While these lines of inquiry remain fruitful even today, we believe that commentators must pay more attention to the "creation of realistic mechanisms of interprovincial judicial coordination".[20]

In 2010, Janet Walker alluded to the potential "establishment of a multilateral body patterned on the Multidistrict Litigation Panel in the United States", without explaining what such a body might look like in

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benefits of the proposed Panel is that it would concentrate the country's most experienced class action judges in one body.

17 See especially *Reference re Securities Act*, 2011 SCC 66 [*Securities Act*]. See also *Reference re Impact Assessment Act*, 2023 SCC 23 at para 216.

18 See e.g. Peter W. Hogg & S. Gordon McKee, "Are National Class Actions Constitutional?" (2010) 26:2 NJCL 279; Janet Walker, "Are National Class Actions Constitutional? A Reply to Hogg and McKee" (2010) 48:1 Osgoode Hall LJ 95 [Walker, "Are National Class Actions Constitutional?"]; Joshua Krusell, "Are National Class Actions Constitutional? A Reply to Walker, Hogg and McKee" (2012) 70:1 UT Fac L Rev 9.

19 Valérie Scott, "Access to Justice and Choice of Law Issues in Multi-Jurisdictional Class Actions in Canada" (2012) 43:2 Ottawa L Rev 233.

20 Joseph Marcus, "National Class Actions in Canada: Yet Another Call for Clarity and Coordination" (2012) 8:1 Can Class Action Rev 43 at 71.

the Canadian context.[21] We pick up where Professor Walker left off and recommend the creation of a panel ("Panel") that is based, in part, on the United States District Courts' Judicial Panel on Multidistrict Litigation ("JPML"). The Panel would have representation from all cooperating provincial jurisdictions and its mandate would be restricted to three areas. First, it would determine the appropriate forum for a national class action to be heard and stay competing class proceedings. Second, and closely related to the first responsibility, it would determine which plaintiff law firms would have carriage of the proceeding selected. Third, where the parties obtain court approval of a settlement in the province having jurisdiction over the case, the Panel would be responsible for approving class action settlements for the other participating provinces.

This paper begins with a discussion of the current status of multi-jurisdictional class proceedings in Canada. Next, we consider what elements of the JPML could be adopted into the Canadian judicial system to meet the policy objectives of class proceedings legislation. Then, we discuss potential constitutional challenges to our proposed model. Finally, we provide a high-level outline of how the Panel would operate.

2. Part II—Nature of the Problem

A) Multi-jurisdictional Class Proceedings

As noted by the Law Commission of Ontario, the judicial response to multi-jurisdictional class proceedings has been inconsistent, with courts applying *ad hoc* management arrangements.[22] The primary difficulty with this approach is that it does not provide any certainty for litigants regarding whether and under what conditions their cases will be determined on the merits. In some cases, courts will work together cooperatively to manage such claims.[23] However, in other instances, courts have been unwilling to take steps to avoid a multiplicity of proceedings.[24]

An example of the latter phenomenon is the litigation surrounding the drug Vioxx, which has been termed the "low-water mark" for multi-

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21 Walker, "Are National Class Actions Constitutional?", *supra* note 18 at 142.

22 LCO Report, *supra* note 14 at 31.

23 See e.g. *Reddock v Canada (Attorney General)*, 2019 ONSC 5053 (explaining the judge's decision to hear the summary judgment motion in the *Reddock* case in July 2019 so that the appeals of several interconnected cases could be heard together) at para 9.

24 See e.g. *Option Consommateurs c Nippon Yusen Kabushiki Kaisha (NYK),* 2022 QCCS 1338 (refusing a stay of proceedings of a Quebec class action in the context of parallel class actions).

jurisdictional class actions in Canada.[25] An Ontario court made a carriage order and losing counsel then brought a similar claim in Saskatchewan; the Saskatchewan court certified the action as a class proceeding under provincial legislation before an Ontario court could certify the proceedings.[26] The Ontario court then certified the original case and refused to order a stay on the basis that the Saskatchewan court had failed to give comity to the Ontario carriage decision.[27] As commentators have noted, the outcome was that some residents of Canada were, for a time, members of two competing class proceedings that could have reached conflicting results.[28] Fortunately, the Court of Appeal for Saskatchewan overturned the certification of the Saskatchewan proceedings.[29]

In order to avoid a multiplicity of class proceedings, defence counsel are forced to rely on several different tools. These include *forum non conveniens* motions, which are infrequently used because defendants are generally loath to concede that there is any proper forum for a class proceeding.[30] Motions alleging abuse of process seem to be more common, although sound empirical data on the use of such procedural tactics is lacking.[31] With regards to motions alleging abuse of process, the courts have developed a legitimate purpose test, pursuant to which they may stay actions that serve no legitimate purpose for overlapping class members.[32] In addition, defendants can rely on the existence of a proceeding in another province to argue on a certification motion that the certification of the case is not the preferable procedure.[33]

In cases where the parties are able to settle in the multi-jurisdictional class action context, the process for settlement approval is time-consuming, cumbersome and expensive. The parties must obtain province-by-province approval from the superior courts that are involved in the multi-jurisdictional proceedings. Even the approval of another superior court or several will not guarantee that the settlement will be approved in all jurisdictions. For example, in the litigation against Purdue Pharma regarding opiates, the parties reached a final settlement that was contingent on the approval of all the affected courts. Courts in Quebec, Ontario and

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25 Justin Manoryk & Gordon McKee, "Canada's Evolving Response to Overlapping Multi-Jurisdictional Class Actions" (2021) 88:3 Def Couns J 1 at 2.

26 *Wuttunee v Merck Frosst Canada Ltd.*, 2008 SKQB 229 at para 1.

27 *Toboni v Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (ONSC).

28 Manoryk & McKee, *supra* note 25 at 2.

29 *Merck Frosst Canada Ltd. v Wuttunnee*, 2009 SKCA 43.

30 Manoryk & McKee, *supra* note 25 at 3.

31 *Ibid* at 4.

32 See especially *Hafichuk-Walkin v BCE Inc.*, 2016 MBCA 32 at para 40 [*Hafichuk-Walkin*]. See also *DALI 675 Pension Fund v SNC Lavalin*, 2019 ONSC 6512 at para 19.

33 Manoryk & McKee, *supra* note 25 at 6–7.

Nova Scotia approved the settlement. However, the Saskatchewan Court of Queen's Bench refused to do so in two separate decisions released in 2017 and 2018.[34] The Saskatchewan court did not approve a settlement of the litigation until 2022.[35]

B) Past Reform Initiatives

There are encouraging signs that experienced class action counsel can sometimes work cooperatively to manage class proceedings. In those instances, defendants and plaintiffs agree on the province in which the case will proceed and agree that class proceedings in other provinces with different class counsel will stay dormant. Counsel in other provinces are often only responsible for obtaining settlement approval in their home province.[36]

In addition to cooperation at the counsel level, courts are increasingly cognizant of the importance of multi-jurisdictional cooperation. In a recent case dealing with an application to consolidate various actions into a single common issue, the Court of Appeal for British Columbia affirmed that "there is a clear public interest in courts in different provinces coordinating class proceedings with substantially the same issues and parties brought in multiple jurisdictions"; the court noted that such coordination would promote "judicial efficiency" and followed naturally from the concept of comity.[37] Indeed, the Supreme Court has explicitly approved and encouraged collaboration among superior courts dealing with parallel class proceedings. For example, in *Endean v British Columbia*, concurrent class proceedings for individuals infected with hepatitis C by the Canadian blood supply were certified in Quebec, Ontario and British Columbia.[38] As part of a settlement of all the cases, the parties agreed that the superior courts of those provinces would have a supervisory role and that their decisions would only take effect if they were materially identical. Motions were filed in all three jurisdictions related to the settlement, with the proposal that all three judges sit together in one location. The issue was whether the judges had the jurisdiction to conduct hearings outside their home province.

The majority of the Supreme Court found that in multi-jurisdictional class proceedings, a judge has the discretion to hold a hearing outside

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34 *Perdikaris v Purdue Pharma Inc.*, 2017 SKQB 287 [*Purdue 2017*]; *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86 [*Purdue 2018*].

35 *Carruthers v Purdue Pharma*, 2022 SKKB 214.

36 Elizabeth Raymer, "Multi-jurisdictional mess" (20 February 2018), online: <http://tinyurl.com/5ef7d985> [perma.cc/VME6-TYPJ].

37 *Nippon Yusen Kabushiki Kaisha v Ewert*, 2023 BCCA 142 at para 66.

38 *Endean v British Columbia*, 2016 SCC 42 [*Endean*].

their jurisdiction along with other judges managing parallel proceedings, provided that the judge did not rely on the court's coercive powers to convene or conduct the hearing and the hearing is not contrary to the law of the jurisdiction in which it will be held.[39] The Supreme Court instructed that in exercising the discretion to sit outside of their home province, a judge should consider: whether sitting in another province will impinge or could be seen as impinging on the sovereignty of that province; whether there are benefits or costs to the proposed out-of-province proceeding; and whether any terms should be imposed, such as conditions as to the payment of extraordinary costs or use of a video link to the court's home jurisdiction.[40]

While *Endean* has been viewed as an explicit endorsement by the Supreme Court of cooperation among courts managing multi-jurisdictional class proceedings, the reality is that the case has not significantly advanced the cause of interprovincial collaboration. The decision arose in unique factual circumstances where class counsel coordinated and consented to a joint hearing.[41] That agreement between class counsel was insufficient on its own to ground jurisdiction, as it is a well-established principle that jurisdiction cannot be conveyed on a court by virtue of an agreement among the litigants.[42] The Supreme Court found that there was jurisdiction to hold the joint hearing but then held that the superior courts could not rely on their coercive powers to convene or conduct the hearing.[43] Thus, the agreement of class counsel was not sufficient to ground the jurisdiction of the Court, but was a prerequisite to the Court's exercise of jurisdiction. Moreover, the Court cautioned that judges should make the decision to hold a hearing outside of their territory "in the interests of the administration of justice".[44] In other words, judges should give careful consideration before exercising this discretion. Not surprisingly, according to multiple class action practitioners, *Endean* has not contributed meaningfully to the management of multi-jurisdictional class proceedings.[45]

It is evident that courts can only do so much to reform the management of multi-jurisdictional class proceedings. As early as 2009, the Supreme Court recognized that legislatures needed to take steps to manage national class proceedings more effectively. In *Canada Post Corp. v Lépine*, Justice

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39 *Ibid* at paras 41–42.

40 *Ibid* at paras 73–75.

41 *Ibid* at para 5.

42 *Attorney General of Nova Scotia v Attorney General of Canada*, 1950 CanLII 26 (SCC).

43 *Endean*, *supra* note 38 at para 42.

44 *Ibid* at para 58.

45 Raymer, *supra* note 36.

Lebel, writing for the Court, urged provincial legislatures to "pay more attention to the framework for national class actions and the problems they present," in part because it "is not this Court's role to define the necessary solutions."[46] Justice Lebel suggested that more "effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity."[47]

Various legislatures have made progress by adopting statutory reforms aimed at the effective management of multi-jurisdictional proceedings. The provinces of Saskatchewan, Ontario, Alberta and British Columbia have adopted provisions first recommended by the Uniform Law Conference of Canada ("ULCC") in 2005 and 2006.[48] These reforms provide, among other things, that courts considering the preferable procedure in a certification motion should or must have regard to overlapping proceedings in other jurisdictions.[49] The ULCC's model legislation also lists a series of objectives and factors for the court to consider in determining the issue of forum as part of the preferable procedure analysis.[50] Further, plaintiffs in other provinces are granted standing on the issue.[51] Since adopting these amendments, a body of case law has developed wherein courts have considered the ULCC's objectives and factors in determining a preferable procedure.[52]

While these statutory developments are encouraging, they are hardly a panacea. The consideration of parallel proceedings is only one of several factors in a motion for certification. The weight to be given to that factor will depend somewhat on the presiding judge's discretion as well as on how that factor interacts with the existing class actions regimes in the various provinces. Ultimately, it will be open to motion judges across the country to permit the existence of multiple certified class proceedings. This leaves the potential not only for inconsistent results but also increased costs. As a practical matter, it is essential to recognize that most class proceedings settle and that defendants are only prepared to contribute so much to a settlement agreement. Therefore, where there are multiple proceedings, a larger percentage of the settlement funds will be paid out to cover legal

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

47 *Ibid*.

48 LCO Report, *supra* note 14 at 32.

49 *Ibid* at 33.

50 Uniform Law Conference of Canada, "Uniform Class Proceedings Act (Amendment) 2007" (2007) at 2–3, online (pdf): <http://tinyurl.com/2p9k5yud> [perma.cc/KDM3-3FRL].

51 *Ibid* at 2.

52 *Ammazzini v Anglo American PLC*, 2016 SKQB 53 at paras 51–57; *Ravvin*, *supra* note 9 at paras 36–39. See also Manoryk & McKee, *supra* note 25 at 7–9.

fees. In other words, the class members will bear the financial costs of the existence of multiple proceedings.

In addition to these statutory reforms, the Canadian Bar Association ("CBA") issued a protocol on multi-jurisdictional class proceedings in 2018.[53] The protocol provides, among other things, for filing class action pleadings in a central registry so that lawyers and courts have information regarding the status of proceedings across the country. It also permits parties to agree to permit judges involved in parallel proceedings to discuss the case and conduct case conferences jointly.[54]

The protocol aims to facilitate information sharing and the management of multiple class proceedings. These are laudable goals. However, it does not provide much certainty about how multi-jurisdictional proceedings will be managed. For example, the parties may agree to their judge communicating with judges of superior courts in different provinces. If the parties do not so agree, a judge who wishes to communicate with other judges in any other action must convene a hearing on the issue and hear submissions from the parties.[55] Thus, the CBA Protocol, like the Supreme Court's decision in *Endean*, envisions cooperation as an option rather than as the rule. Even under the CBA Protocol, litigants retain some ability to fetter judges' discretion to manage class proceedings effectively.

These reforms are insufficient to ensure that multi-jurisdictional proceedings are managed in a manner that is consistent with the public policy goals underlying class proceedings legislation. For example, the ability of courts to take such basic steps as communicating with courts in other provinces should not depend on the litigants' consent. Similarly, the codification of the power of the judge on a certification motion to consider the existence of companion actions in other jurisdictions will not on its own lead to the establishment of systematic and predictable rules for the management of multi-jurisdictional class proceedings. Instead, legislatures must act proactively to bring order to a system rife with delay, duplication and uncertainty. For such reforms to work, all stakeholders in the civil justice system must be willing to compromise, break with tradition and commit to a model that better achieves judicial economy, access to justice and behaviour modification. Any proposed model should conceive of access to justice not in purely economic terms but should also advance a "fair and transparent process", "meaningful participation rights for class members," and a "substantively just result".[56] We believe that our

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53 CBA Protocol, *supra* note 14.

54 *Ibid* at 3.

55 *Ibid* at 3–4.

56 Kalajdzic, *supra* note 7 at 51.

proposed panel will lead not only to increased procedural efficiencies, but also, due to its composition of experienced class actions judges, lead in many cases to more substantively just results. In the next section of the paper, we consider which parts of the United States' JPML can be adopted in Canada to meet these goals.

3. Part III—A Potential Solution

A) Relevant Lessons from the Judicial Panel on Multidistrict Litigation

Class action commentators have long contrasted Canadian provinces' decentralized approach towards multi-jurisdictional class actions with the robust and centralized management style of the JPML.[57] Congress created the JPML in 1968 in response to the "first modern mass litigation in the early 1960s".[58] The JPML, comprised of seven sitting federal judges, performs two main tasks. First, it determines whether civil actions pending in different federal districts involve common questions of fact such that the actions should be transferred to one federal district for consolidated pretrial proceedings. Second, the Panel selects the judge or judges and the court assigned to conduct the consolidated proceedings.[59]

Given the constitutional differences between the two countries, it would be impossible for Canada to import all aspects of the JPML model domestically.[60] In addition, it is critical to note that multidistrict litigation is not synonymous with multi-jurisdictional class actions. Most multidistrict cases are not class actions, and there remain "major differences" between the two forms.[61] Indeed, some commentators have argued that multidistrict litigation has increased in popularity in

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[57] See especially Janet Walker, "Recognizing Multijurisdiction Class Action Judgments within Canada: Key Questions—Suggested Answers" (2008) Osgoode Hall Law School, Working Paper, online (pdf): <http://tinyurl.com/mr3wf7xw> [perma.cc/839B-EDEQ] [Walker, "Recognizing Multijurisdiction Class Action Judgments within Canada"]. See LCO Report, *supra* note 14 at 31; Molly Reynolds, James Gotowiec & Davida Shiff, "Class Actions in Canada Part 1: Class Proceedings 101", online (blog): <http://tinyurl.com/2vettekn> [perma.cc/2ER7-7BWW].

[58] Martin H. Redish & Julie M. Karaba, "One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism" (2015) 95:1 BUL Rev 109 at 116. See also *Multidistrict Litigation*, 28 USC § 1407 (1968).

[59] United States Judicial Panel on Multidistrict Litigation, "About the Panel", online: <http://tinyurl.com/bdz5j2zw> [perma.cc/4FBT-2QUA].

[60] See Walker, "Recognizing Multijurisdiction Class Action Judgments within Canada", *supra* note 57 at 11–12.

[61] Redish & Karaba, *supra* note 58 at 110–11.

response to the decline of federal class actions.[62] Nonetheless, we suggest that Canadian legislators—particularly at the provincial level—can draw several valuable lessons from the JPML experience. In this section, we first discuss the operation of multidistrict litigation, focusing on the broad discretion that the JPML and transferee judges enjoy. We then consider the key criticisms that commentators have levied against modern multidistrict litigation. Finally, we close with takeaways for a Canadian audience.

Both the JPML and the transferee judge who manages the consolidated pretrial proceedings enjoy immense discretion. Although the United States Code establishes the basic contours of multidistrict litigation, the modern practice of multidistrict litigation has evolved significantly since the 1960s. Thus, meaningful discussion of multidistrict litigation cannot begin and end with the federal multidistrict litigation statute (28 USC § 1407).

In practice, the JPML enjoys broad and almost unreviewable discretion and is not bound by a complex statutory framework. The JPML decides a whole gamut of matters. For example, the JPML can, on its own motion or at the behest of a party, decide whether consolidation of multiple actions in a transferee district is appropriate. Moreover, the JPML selects which district court and district judge should manage the consolidated proceedings. Professor Robert Klonoff has argued that in making these decisions, the JPML enjoys "virtually unlimited discretion."[63] Klonoff notes that a decision by the Panel to deny transfer is unreviewable, even by extraordinary writ. The JPML's decisions in favour of transfer as well as its selection of the transferee court and judge are reviewable, but only by extraordinary writ. Historically, federal appellate courts have rarely overturned a JPML decision.[64] The combination of a loose statutory framework and a pattern of appellate deference means that the JPML has plenty of room for manoeuvre.

The transferee judge similarly has wide room to manoeuvre in managing the consolidated proceedings. Just as the JPML has broad discretion in selecting the transferee judge, so does the transferee judge have significant discretion in appointing lead counsel. Professor Abbe Gluck underlines the "unorthodox" nature of this aspect of multidistrict litigation: multidistrict judges get to select the consolidated case's lead

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62 Jay Tidmarsh & Daniela Peinado Welsh, "The Future of Multidistrict Litigation" (2019) 51:3 Conn L Rev 769 at 778–79. See also Robert H. Klonoff, "The Decline of Class Actions" (2013) 90:3 Washington U L Rev 729 at 730.

63 Robert H. Klonoff, "The Judicial Panel on Multidistrict Litigation: The Virtues of Unfettered Discretion" (2021) 89:4 U of Missouri-Kansas City L Rev 1003 at 1005 [Klonoff, "The Judicial Panel on Multidistrict Litigation"].

64 *Ibid* at 1006.

counsel and will often select counsel who have distinguished themselves in past multidistrict proceedings.[65] In addition, multidistrict litigation judges work closely with lawyers to devise case-specific procedures; as interviewed judges have indicated, each case is different and multidistrict litigation is a field marked by constant evolution.[66]

The fact that transferee judges enjoy so much latitude and can robustly manage pretrial proceedings means that few consolidated cases are transferred back to the originating district for trial. To put it plainly, many judges see the transfer of actions back to the originating district as a "failure" and thus take an especially active role in pretrial management and settlement negotiations.[67] In sum, discretion is the cornerstone of modern multidistrict litigation. The JPML has wide discretion to consolidate actions and select a transferee judge. Transferee judges can deploy a broad array of powers in pursuit of efficiency and a global settlement.

Unsurprisingly, the unorthodoxies of multidistrict litigation have generated a great deal of criticism. Many commentators see the flexibility of multidistrict litigation as a negative and have recommended that Congress apply restrictions and specific rules from the class action context to multidistrict litigation.[68] In their often-cited rebuke, Julie Karaba and Professor Martin Redish have gone further and argued that multidistrict litigation violates the Due Process Clause and is thus unconstitutional. Focusing both on the powers of the JPML and transferee judges, they conclude that "procedural due process demands considerably more protection of the individual litigants' interests than [multidistrict litigation] provides."[69] The fact that commentators have criticized modern multidistrict litigation on due process grounds is yet another reason to avoid the wholesale importation of American structures such as the JPML into Canada.

While not comprehensive, the above discussion of modern multidistrict litigation in the United States reveals two valuable lessons for Canadian policymakers. First, Canada might borrow certain organizational principles from the American multidistrict litigation experience but should attempt to avoid the problems with the JPML.

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65 Abbe R. Gluck, "Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure" (2017) 165:7 U Pa L Rev 1669 at 1700.

66 *Ibid* at 1689, 1700.

67 Redish & Karaba, *supra* note 58 at 128–29.

68 See e.g. Linda S. Mullenix, "Aggregate Litigation and the Death of Democratic Dispute Resolution" (2013) 107:2 Nw UL Rev 511 at 541. See also Tidmarsh & Welsh, *supra* note 62 at 794.

69 Redish & Karaba, *supra* note 58 at 151.

For example, a Canadian analog to the American multidistrict litigation system must allow for sufficient discretion. However, at the same time, Canadian policymakers should articulate more restrictions and details than the US Congress did in 28 USC § 1407. A Canadian framework statute should provide guidance on issues such as the selection of class counsel and the test for determining the appropriate forum for a proceeding. A clear, statutorily-mandated process will allow Canadian policymakers to pursue efficiency gains without undercutting procedural fairness. Second, Canadian policymakers should not follow the American example of granting virtually unreviewable powers to the Panel. Instead, the legislative scheme must permit meaningful supervision by superior courts. This imperative is consistent with the Canadian constitutional restraints discussed in the next section of this paper.

B) Potential Constitutional Constraints

1) Introduction

Although the JPML operates within the US federal court system, the Panel often has to determine whether actions that originate in state court should be swept up into a consolidated, multidistrict litigation forum.[70] Commentators have criticized what they see as the JPML's evisceration of state courts' authority and jurisdiction.[71] Unlike the JPML, our proposed Canadian analog does not engage any significant consideration of the division of powers between federal and provincial governments. Only in rare cases has there been conflict between the Federal Court of Canada and one or more provincial superior courts regarding the appropriate jurisdiction for a class action.[72] Thus, the federal government's participation in our proposed plan is limited to agreeing to make superior court judges available to sit as Panel members.

Our model is based on a consensual sharing of powers between provinces and a limited delegation of authority from provincial governments to a multi-provincial body. In this regard, we first consider the leading Supreme Court case on cooperative federalism in the regulatory context, *Reference re Pan-Canadian Securities Regulation*.[73] There, the court provided guidance regarding the delegation of matters within the exclusive purview of legislatures to a multi-province, statutorily-established entity. After that discussion, we analyze whether, according to

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70 Emily M. Dowling, "To Stay or Not to Stay: Competing Motions in the Shadow of Multidistrict Litigation" (2022) 97:2 Notre Dame L Rev 897 at 899.

71 See e.g. *ibid* at 898–900.

72 But see *Micron Technology Inc. c Hazan*, 2020 QCCA 1104.

73 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [*Pan-Canadian Securities*].

the case law under section 96 of the *Constitution Act, 1867*, the Panel is a shadow superior court and thus unconstitutional.

2) Reference re Pan-Canadian Securities Regulation

In *Pan-Canadian Securities Regulation*, the Supreme Court declared that a pan-Canadian national securities regulation scheme, which featured cross-jurisdictional cooperation, was constitutional. We contend that the Supreme Court's active encouragement of cross-jurisdictional cooperation in the securities regulatory context furnishes applicable lessons for the class actions context.

In 2009, the federal government drafted legislation that would establish a "national scheme for the regulation of capital markets under the oversight of a national securities regulator."[74] The federal government sought an advisory opinion from the Supreme Court regarding the constitutionality of the *Proposed Canadian Securities Act*. The Court determined that the Act did not fall under Parliament's legislative authority over the general branch of the federal power to regulate trade and commerce under section 91(2) of the *Constitution Act, 1867*, because the Act purported to "regulate, on an exclusive basis, all aspects of securities trading in Canada."[75] The Court observed, however, that it was constitutionally permissible for the federal and provincial governments to agree to a cooperative approach that respected the provincial nature of securities regulation while also permitting Parliament to deal with genuinely national concerns.[76]

Acting on the suggestion of the Supreme Court, the federal government and the governments of several provinces and one territory reached an agreement to create a national system—built upon the principle of cooperative federalism—for regulating capital markets in Canada. This agreement provided for, among other things, a model provincial act concerned with the day-to-day aspects of the securities trade and a proposed federal statute aimed at preventing and managing systemic risk.[77] The federal act also established criminal offences relating to financial markets and a national securities regulator responsible for administering the regime. The national securities regulator and its board of directors were to operate under the supervision of a Council of Ministers, comprised of ministers responsible for capital markets regulation in each participating province and territory as well as the federal Minister of Finance. Both the proposed provincial and federal legislation provided

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74 *Ibid* at para 10.

75 *Securities Act*, *supra* note 17 at para 106.

76 *Ibid* at para 131.

77 *Pan-Canadian Securities*, *supra* note 73 at para 131.

that the Council of Ministers had to approve any regulations proposed by the national regulator before the regulations could come into force.

The Government of Quebec referred the scheme to the Court of Appeal of Quebec and posed two reference questions. First, was the implementation of pan-Canadian securities regulation under the authority of a single regulator constitutional? Second, did the proposed federal statute—that is, the *Capital Markets Stability Act*—exceed the federal government's legislative authority over the general branch of the trade and commerce power under section 91(2) of the *Constitution Act, 1867*?[78] The Court of Appeal answered both questions in the negative. The Supreme Court, however, unanimously answered the first question in the affirmative and the second in the negative.

Regarding the first question, the Supreme Court reasoned that the proposed system did not improperly fetter the legislatures' sovereignty.[79] It noted that the model provincial legislation is expressly subject to legislative approval and thus lacks the force of law within a province or territory unless and until that province or territory's legislature enacts it. Nor did the agreement imply that the legislatures of the participating provinces and territory would be required to implement the amendments made to the model provincial act that the Council of Ministers might approve. Further, the proposed regulatory regime did not entail an impermissible delegation of law-making authority. The Court held that Parliamentary sovereignty encompasses the notion that the legislature has the authority to enact laws as well as the authority to delegate administrative or regulatory powers to some other person or body, which in turn has the ability to make binding but subordinate rules and regulations.[80]

Concerning the second question, the Court found that the pith and substance of the proposed federal legislation was "to control systemic risk having the potential to create material adverse effects on the Canadian economy."[81] The draft legislation addressed a matter of genuine national importance and thus fell within Parliament's general trade and commerce power. Further, there was nothing impermissible about how the proposed federal legislation delegated the power to make regulations to the regulator under the supervision of the Council of Ministers.[82] The Court also cautioned that it is important to distinguish between the constitutionality of legislation and the legislature's authority to delegate administrative

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78 *Ibid* at para 3.
79 *Ibid* at paras 48–52.
80 *Ibid* at paras 53–67.
81 *Ibid* at para 87.
82 *Ibid* at para 123.

powers, holding that in "respect of matters over which a legislature has competence…the statutory delegation of administrative powers cannot undermine the underlying validity of that statute itself."[83]

Several aspects of the Court's judgment readily apply to our topic of inter-provincial regulation of multi-jurisdictional class proceedings. The first point is that Canadian courts will not lightly intervene when governments cooperate to provide more efficient judicial/administrative services to the public. Indeed, in the *Reference re Securities Act*, the Supreme Court went so far as to proactively suggest to the federal government what type of regulatory regime would be constitutional. Although the principle of cooperative federalism does not allow courts to disregard constitutional text, the Supreme Court has held that courts should affirm, where possible, regulatory efforts by both orders of government.[84]

The second point is that provincial governments can delegate powers under their class proceedings legislation over issues like forum selection and the approval of settlements to a subordinate party. This is so even though other provincial governments may appoint some members of the oversight body. All that is required is that the provincial legislatures retain the power to revoke the delegation of authority.[85]

The third point is that it would be open to the federal government of Canada, if necessary, to enter into a memorandum of understanding with the provinces or enact legislation to allow federally-appointed superior court judges to sit on the Panel. In our view, the federal government has a legitimate, albeit limited, interest in the use of federally-appointed superior court judges to maximize the efficiency of the civil justice system across provincial boundaries in multi-jurisdictional class proceedings.

3) Section 96, *Constitution Act, 1867*

Sections 96 to 100 of the *Constitution Act, 1867* provide for the appointment, selection, tenure and payment of superior court judges. The terms of those provisions are purely procedural and do not, on their face, apply to the substantive responsibilities or jurisdiction of the superior courts. For example, section 96 provides: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New

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83 *Ibid* at para 125.

84 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37.

85 *Pan-Canadian Securities*, *supra* note 73 at para 74.

Brunswick."[86] Despite the precise wording of section 96, it has been interpreted by Canadian courts as *the* line of defence against provincial encroachment on superior courts' inherent jurisdiction.[87] In a series of cases, the Court has relied upon the narrow wording of section 96 to preclude provincial and federal governments from transferring superior courts' historic or core jurisdiction to inferior courts or administrative tribunals.[88]

In the recent *Reference re Code of Civil Procedure (Que.), art. 35*, the Supreme Court placed its section 96 jurisprudence into broader context and held that two fundamental principles underpin that jurisprudence: national unity and the rule of law. All of the Court's section 96 jurisprudence seeks to "safeguard the compromise reached at Confederation by preserving the unitary nature of our judicial system."[89] To achieve this objective, the Court has developed various tests so as to block the "creation of courts that mirror the superior courts."[90] Moreover, the Court stated that superior courts have a vital role to play in preserving national unity. Indeed, the very role of the superior courts is to "unify and ensure the uniformity of justice in Canada."[91]

As a practical matter, of course, the goal of uniformity in the superior courts is more aspirational than real. In the civil sphere, superior courts are frequently called upon to interpret and apply provincial laws that relate to both procedural and substantive matters. It is also essential to recognize that the provinces are charged with operating the civil justice system to provide accessible and effective service to users. To meet that goal, they must innovate and experiment in responding to local conditions. These provincial innovations weaken the notion that superior courts are uniform

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86 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, Appendix II, No 5.

87 Paul Daly, "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism" in Richard Albert, Paul Daly & Vanessa MacDonnell eds., *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) at 86. See also *Poorkid Investments Inc. v Ontario (Solicitor General)*, 2023 ONCA 172 at paras 23–24 [*Poorkid Investments*].

88 See *Re Residential Tenancies Act*, 1981 CanLII 24 (SCC) [*Residential Tenancies*]; *MacMillan Bloedel Ltd. v Simpson*, 1995 CanLII 57 (SCC) [*Macmillan Bloedel*]; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 [*Trial Lawyers*]; *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 [*Quebec Code Reference*].

89 *Quebec Code Reference*, *supra* note 88 at para 31.

90 *Ibid*.

91 *Ibid* at para 43.

in their development of the law.[92] In our view, courts should not employ section 96 as a weapon with which to stifle innovation; the amorphous goal of uniformity in the law should not prevent provinces from fulfilling their constitutional responsibility regarding the delivery of justice.

With respect to the second fundamental principle that underlies the section 96 jurisprudence—the rule of law—the Supreme Court has held that the superior courts are its primary guardians. In the *Quebec Code Reference*, the Court identified three fundamental facets of the rule of law: "equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers."[93] The Court also observed that within Canada's constitutional system, the superior courts are best positioned to rule on division of powers disputes and protect fundamental individual rights against government action because of their independence and national character.[94]

The Supreme Court has developed two overlapping tests under section 96—both of which are relevant to our proposed Panel. The first is the three-step *Residential Tenancies* test, which aims to prohibit the granting of powers to another body that were within the exclusive remit of the superior courts as at the time of Confederation.[95] The second test is the core jurisdiction test, as articulated in *MacMillan Bloedel*, which prevents a grant of jurisdiction that infringes on the superior courts' core jurisdiction.[96] We now turn to an application of the *Residential Tenancies* and core jurisdiction tests to our proposal. As part of that analysis, we also consider the policy rationales underlying the section 96 tests.

Under the *Residential Tenancies* test, the court asks three questions: (i) does the transferred jurisdiction conform to a jurisdiction that was dominated by superior, district or county courts at the time of Confederation? (ii) If so, was the jurisdiction in question exercised in the context of a judicial function? (iii) If the first two questions are answered in the affirmative, is the jurisdiction either subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal of the legislature?[97] There is nothing to suggest that the determination of the appropriate forum for multi-jurisdictional actions among the colonies that formed British North America in 1867 was something that the superior or district courts were undertaking at

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92 For a discussion of how section 96 does not bar provincial experimentation with administrative law institutions, see Daly, *supra* note 87 at 92–98.

93 *Quebec Code Reference*, *supra* note 88 at para 47.

94 *Ibid* at para 49.

95 *Residential Tenancies*, *supra* note 88 at 734–736.

96 *Macmillan Bloedel*, *supra* note 88 at para 18.

97 *Residential Tenancies*, *supra* note 88 at 734–736.

the time of Confederation. With an even greater degree of certainty, the same can be said regarding the selection of lead counsel or the approval of settlements for multi-plaintiff litigation. Therefore, under the *Residential Tenancies* test, there is no basis for concluding that section 96 would operate to prevent the proposed plan on the grounds that it represents an unconstitutional usurpation of powers that the superior courts exercised in 1867.

The more substantive issue is whether our model impermissibly intrudes on the superior courts' core functions and thus violates section 96. The Supreme Court created the core jurisdiction test in *MacMillan Bloedel,* a case that involved the application of the *Residential Tenancies* test to a provincial legislature's exclusive grant of authority to provincial youth courts to punish young persons for *ex-facie* contempt of court. Under the *Residential Tenancies* test, the provision in issue was determined to be constitutional.[98] Unsatisfied with this result, the Court held that it was necessary to expand the ambit of section 96 from simply protecting historical jurisdiction to offering protection of the superior courts' core jurisdiction in circumstances where a legislature has created a parallel court or has interfered impermissibly with a superior court's exercise of core jurisdiction.[99] The core jurisdiction of superior courts, according to the Court, "extends to whatever is needed in order to preserve the vigour and strength of those courts." Those protected powers and jurisdictions are "solidly anchored in the role the superior courts are called upon to play in the maintenance of the rule of law in our unitary justice system."[100] Since *Macmillan Bloedel*, the core jurisdiction concept has been understood as narrow and as including "only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its fundamental role within our legal system."[101]

The Supreme Court's decision in the *Quebec Code Reference,* is a good example of the application of the core jurisdiction test. At issue was an article in the Quebec *Code of Civil Procedure* that granted the provincial court jurisdiction over civil cases involving claims valued at less than $85,000. The Court clarified that the factors to be considered under the core jurisdiction test would vary depending on the circumstances of each case. The majority adapted the *Macmillan Bloedel* test to the facts of the case and articulated six factors that should be considered in determining whether the legislature has vested a court composed of provincially

98 *Macmillan Bloedel*, *supra* note 88 at para 26.

99 *Ibid* at paras 15, 18, 27.

100 *Quebec Code Reference*, *supra* note 88 at para 67.

101 *Reference re Amendments to the Residential Tenancies Act (N.S.)*, 1996 CanLII 259 (SCC) at 224, Lamer CJC, concurring. See also *Quebec Code Reference*, *supra* note 88 at para 68; *Poorkid Investments*, *supra* note 87 at 34.

appointed judges with overly broad jurisdiction.[102] In applying the core jurisdiction test in the circumstances of that case, the Court considered the following factors: "the scope of the jurisdiction being granted, whether the grant is exclusive or concurrent, the monetary limits to which it is subject, whether there are mechanisms for appealing decisions rendered in the exercise of the jurisdiction, the impact on the caseload of the superior court of general jurisdiction, and whether there is an important societal objective."[103] The application of these factors led the majority to conclude that the impugned article overstepped the bounds of constitutionality.

Even though the majority in the *Quebec Code Reference* did not develop the modified core test in the context of multi-jurisdictional class actions, it is instructive to focus on two points that the majority considered. First, the Court noted that if there is a right of appeal without leave from the suspected parallel court with no requirement of deference on questions of law, then the superior court will retain its ability to state the law. Consequently, "it will be more difficult to conclude that the grant of jurisdiction undermines the superior court's role."[104] In the case of art. 35 of the *Code of Civil Procedure*, that automatic appeal right did not exist. Therefore, the Court's analysis of this factor buttressed its conclusion that the article created a shadow court. In our proposal, the right of appeal is unqualified and automatic, and thus the power of the superior courts to state the law and supervise the Panel's processes is maintained.

The second relevant consideration is the societal benefit of the impugned legislation. The Supreme Court has signalled that courts should be more flexible when the legislation at issue meets a pressing societal objective, including access to justice.[105] Indeed, the Court has declared that the provinces "must have considerable flexibility in what they do to address the needs of a changing society."[106] In the *Quebec Code Reference*, there was no evidence that the provincial courts' assumption of a greater monetary jurisdiction conferred significant benefits on society. On the contrary, the superior and provincial courts' procedural and evidentiary rules were nearly identical. Thus, no benefits were established, such as increasing access to justice or speeding up the resolution of cases.[107] Under our model, the whole purpose of the scheme is to increase access to justice and combat the culture of delay in civil courts. At the same time, we have granted the superior courts overall supervision of the Panel and maintained their role in the development of class proceedings

102 *Quebec Code Reference*, *supra* note 88 at para 88.

103 *Ibid.*

104 *Ibid* at para 121.

105 *Ibid* at para 126.

106 *Ibid.*

107 *Ibid* at paras 128–129.

jurisprudence. Accordingly, there is an appropriate balance between responding to a pressing societal objective and respecting the constitutional role of superior courts.

Finally, it is necessary to circle back and consider section 96's underlying rationales: the protection of national unity and the rule of law. Our proposal facilitates national unity by encouraging cooperation among provincial superior courts. It also decreases the chances of inconsistent rulings and parallel proceedings. These measures would go a long way toward achieving the uniformity of justice in Canada. In addition, measures aimed at making the justice system more accessible can only strengthen the rule of law. When access to courts for the resolution of civil disputes is beyond the financial means of most Canadians, the rule of law is eroded. As the Supreme Court warned in *Hryniak*, "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined."[108] Therefore, our proposal is entirely consistent with the underlying rationales of section 96 and should not be found to be constitutionally impermissible.

C) Proposed Model

1) Overview

Under our proposed model, the Panel will consist of superior court judges from each participating province. It is anticipated that these judges will be chosen based on their experience in the class action field, so that the Panel will bring to bear significant expertise on the issues that form its mandate: forum, carriage and settlement approval. Thus, class action practitioners can be assured that when they appear before the Panel, the judges will have specialized knowledge regarding the issues within their jurisdiction. The expert composition of the Panel will help to develop consistency in the rulings and increase predictability in the jurisprudence.

We recognize that creating a new structure for managing multi-jurisdictional class proceedings across provinces is unprecedented and will require significant goodwill among provincial governments to achieve consensus. For this reason, we have been relatively modest in our goals. At this stage, we are not suggesting that legislatures across the country create a uniform class proceedings act. Instead, our proposal impacts only the issues of jurisdiction, carriage and settlement approval. No doubt there are more intricate issues—for example, the articulation of specific choice of law rules[109]—that legislatures might consider should they decide to

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108 *Hryniak*, *supra* note 2 at para 26.

109 See Scott, *supra* note 19.

create a multi-jurisdictional panel. We have chosen to focus only on the basics: the potential for greater integration of class action regimes should be left for future reform initiatives.

Moreover, despite our occasional allusions to Quebec case law, we have chosen not to focus on the complications of Quebec's potential entry into a multi-jurisdictional regime. Quebec enacted class actions legislation in 1978—earlier than did Canada's common law provinces—and has a unique class actions regime.[110] A representative plaintiff seeks "authorization"—Quebec's analog to certification—of a class proceeding in accordance with Article 575 of the *Code of Civil Procedure*.[111] There is no requirement under Article 575 that a class action be the "most appropriate" vehicle or that "common questions predominate over the individual ones".[112] Indeed, the Supreme Court held in *Desjardins Financial Services Firm Inc. v Asselin* that the judge's role at the authorization stage of the class action is to "filter out frivolous claims, and nothing more".[113] The standard for authorization is a lower one than that for certification in the common law provinces. Quebec's unique approach to class actions and continued pride in its distinct legal system may translate into hesitance on the part of the provincial legislature to join a multi-jurisdictional effort. Even without Quebec's participation, however, a multi-jurisdictional panel comprised of Canada's common law provinces would represent a huge leap forward in terms of efficiency gains.

As noted, our model calls for the Panel to stay parallel proceedings in other jurisdictions and to order that the selected jurisdiction determine the case on its merits as part of a national class action. This proposal represents a departure from the jurisprudence and class proceedings legislation, which hold that there is nothing impermissible in having multiple claims in certain circumstances as long as each claim serves a legitimate purpose.[114] The argument in favour of multiple proceedings is often based on differences in the substantive or procedural law between the provinces. For example, the nature of the cause of action may differ by province based on the facts of the case.[115] Thus, under the law as it currently stands, multiple claims can exist to accommodate these regional differences.

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110 Garry D. Watson, "Class Actions: The Canadian Experience" (2001) 11:2 Duke J Comp & Intl L 269 at 272.

111 Art 575 CCP (2014).

112 *Desjardins Financial Services Firm Inc. v Asselin*, 2020 SCC 30 at para 27.

113 *Ibid.*

114 See e.g. *Hafichuk-Walkin*, *supra* note 32, leave to appeal to SCC refused, 37011 (22 December 2016).

115 See e.g. *Asquith v George Weston Limited*, 2018 BCSC 1557, aff'd *Fantov v Canada Bread Company, Limited*, 2019 BCCA 447.

In our submission, the provinces must make a fundamental policy choice on this point. They can continue to permit parallel proceedings to exist, or they can decide that regional differences are not significant enough to justify the added expense and risk of inconsistent verdicts that are inherent in parallel proceedings in different provinces. Our plan is based on the notion that as a matter of comity and practicality, provinces must be willing to accept that courts located elsewhere in Canada can be trusted to provide effective justice for all class members by, for example, applying substantive law from another province. A court to which the Panel has assigned jurisdiction also has the option to create subclasses when the various provinces' legal regimes differ in material ways.[116]

In this regard, it should be noted that the Supreme Court has consistently communicated to superior courts that they should adopt a generous and liberal approach to recognizing and enforcing foreign judgments.[117] Within Canada, courts must accept that superior courts in other provinces can competently manage multi-jurisdictional class proceedings, even where they are called to apply the law of another province or where they apply their province's law to class members outside the province. We note that currently, in cases in Ontario where there is a national class, the courts apply the Ontario test for certification to all members of the class regardless of where they are situated in the country and regardless of the certification test in their home province.[118]

There will always be arguments available to justify the existence of multiple class proceedings across jurisdictions. In many cases, those arguments will not be motivated by altruistic considerations but will instead be based on the impact of reform on the bottom line for class action counsel. Class action legislation was intended to increase access to justice for the vast majority of Canadians who cannot afford to participate in the civil justice system. The idea was to promote judicial economy, not reward class action counsel for participating in duplicative preliminary motions. What is essential is that the provinces look at the big picture and make sensible compromises in order to fulfill the policy imperatives of class proceedings legislation. This change in approach is part of the

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116 See *Lépine*, *supra* note 46 at para 56.

117 *Morguard Investments Ltd. v De Savoye*, 1990 CanLII 29 (SCC); *Beals v Saldanha*, 2003 SCC 72; *Chevron Corp. v Yaiguaje*, 2015 SCC 42 at para 27.

118 See e.g. *Rebuck v Ford Motor Company*, 2018 ONSC 7405 (certifying an action as a class proceeding, wherein the class members were defined as "all persons who purchased or leased a new 2013 or 2014 model year Ford vehicle in Canada" at para 72). See also the Honourable Warren K. Winkler, "The Globalization of Class Actions" (Remarks delivered at An International Conference co-sponsored by Stanford Law School and the Centre for Socio-Legal Studies, Oxford University, England, 12-14 December 2007), online: <http://tinyurl.com/axrd7pta> [perma.cc/9JUD-BT5F].

cultural shift that the Supreme Court called for in *Hryniak*. It puts the interests of litigants first and serves as an essential safeguard against the erosion of the rule of law.

In contrast to the JPML experience, it is essential that the Panel operates under well-established criteria in carrying out its mandate. Decisions such as the selection of an appropriate forum and the staying of competing class proceedings must be made based on an agreed set of criteria that are clearly articulated in provincial legislation. For this paper's purposes, we suggest that the criteria proposed by the ULCC be used as a starting point.[119] Once the Panel decides on the issue of forum, that effectively ends the participation of the courts from the provinces that were not selected. The role of superior courts in those provinces is limited to hearing appeals from orders of the Panel regarding forum and carriage and hearing applications to set aside the registration of orders approving settlements.

In addition to making a forum determination, the Panel will also determine the issue of carriage. No element of the current class proceedings regime is as frustrating as watching counsel battle for control of the prosecution of a class proceeding.[120] These motions have become complex, expensive and time-consuming. The Panel will develop expertise in evaluating carriage motions and applying the criteria as developed in the jurisprudence and contained in the legislation creating the Panel. We note that there should be no presumption that the law firm that commenced the action in the chosen forum should have carriage. Unlike with the JPML model, under our plan, the Panel's denial of carriage to a law firm would effectively end that firm's participation in the proceeding. Recognizing that law firms make considerable investments in commencing class proceedings, the Panel would have the option to award costs to an unsuccessful law firm, which would ultimately be payable from any settlement or judgment. As with a forum ruling, an unsuccessful law firm could appeal to the superior court in the province where they commenced their action.

The final area of the Panel's mandate is the approval of settlements. Under the proposed model, where a settlement agreement is reached, the parties would seek the approval of the superior court having jurisdiction over the proceeding. Once that approval is obtained, the parties could bring an application in writing to the Panel for approval of the settlement in all remaining participating jurisdictions. Upon receipt of that application,

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119 Uniform Law Conference of Canada, *supra* note 50 at 2–3.

120 See Glenn Kauth, "Carriage battles" (13 July 2009), online: <http://tinyurl.com/3365pxha> [perma.cc/XLJ5-QUAK].

the Panel would convene a hearing where counsel for the parties would make submissions regarding the fairness and suitability of the settlement. If the Panel were concerned about the settlement, it would be able to appoint *amicus curiae* to appear at the hearing along with counsel for the parties. Regardless of its decision whether to appoint *amicus*, the Panel must be "proactive and creative in [its] inquisitorial assessment" of the settlement.[121]

Once the Panel has approved the settlement, the settlement may be filed in the participating provinces' courts and enforceable as an order of those courts. Yet the superior court's oversight function would be preserved by granting any class member or defendant the right to move to set aside an order approving a settlement. The procedure for setting aside such an order would mirror the provisions of the *Reciprocal Enforcement of Judgments Act*[122] and other reciprocal legislation extant in all jurisdictions except Quebec.[123]

The details of the proposed Panel's composition, procedure and operations would be subject to discussion and agreement among the provinces. Once an agreement is reached, each province would be responsible for enacting enabling legislation and regulations thereunder in furtherance of the inter-provincial agreement. In the next sections of the paper, we set forth a high-level outline of how the Panel might operate.

2) Composition of the Panel

The Panel will be designed to ensure equal representation of the participating provinces and the development of class proceedings expertise. It would feature the following elements:

- The Panel judges would be selected by the province appointing them.
- Each province would appoint the same number of judges.
- The judges should be persons with experience in class proceedings.
- The Panel will determine issues related to jurisdiction, carriage and the approval of settlements.

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121 Catherine Piché, "Judging Fairness in Class Action Settlements" (2010) 28:1 Windsor YB Access Just 111 at 150.

122 *Reciprocal Enforcement of Judgments Act*, RSO 1990, c R.5.

123 See e.g. *Court Order Enforcement Act*, RSBC 1996, c 78.

3) Jurisdiction and Carriage

Early in the litigation process, the Panel will determine the appropriate forum for a national class action and carriage issues. In carrying out those functions, the agreement of the provinces and the resultant legislation should include the following conditions:

- All class proceedings commenced in the participating provinces shall be filed in a central registry maintained by the Panel.

- Where class proceedings are commenced in more than one of the participating provinces, any party to such proceedings can apply to the Panel to determine the proper jurisdiction for a national class action and which counsel should have carriage of the proceeding. On its own motion, the Panel may also determine jurisdiction for a national class action and resolve carriage issues.

- The parties to each proceeding are entitled to notice of the hearing and are permitted to file written material. The parties will also be entitled to make oral submissions at a virtual hearing.

- The Panel, or a majority thereof, will release reasons for its decision and prepare a written order reflecting the decision, which will select a single jurisdiction and stay parallel proceedings.

- In considering the appropriate forum, the Panel shall be guided by the following objectives: ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration, ensuring that the ends of justice are served, and promoting judicial economy.[124]

- In considering the appropriate forum, the Panel may consider any of the following non-exhaustive factors: (i) the alleged basis of liability, including the applicable laws, (ii) the stage that each of the proceedings has reached, (iii) the plan for the proposed class proceedings, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class, (iv) the location of the class members and class representatives in the various proceedings, including the ability of class representatives to participate in the proceedings and to represent the interests of class members and (v) the location of evidence and witnesses.[125]

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124 Uniform Law Conference of Canada, *supra* note 50 at 2–3.

125 *Ibid* at 3.

- In considering the issue of carriage, the Panel may consider any of the following non-exhaustive factors: (i) the nature and scope of the causes of action advanced, (ii) the theories advanced by counsel in support of the claims advanced, (iii) the state of each class action, including preparation, (iv) the number of proposed representative plaintiffs and the extent of their involvement, (v) the resources and experience of counsel, (vi) the existence of any conflicts of interest, (vii) the best interests of all putative class members and (viii) fairness to the defendants.[126]

- The Panel's order shall be filed in the superior courts of all participating provinces and shall act as a stay of all other current or future class proceedings that are sufficiently related to the consolidated action.

- The Panel may award costs to any party on a scale and in an amount at its discretion.

- In the event that a class proceeding is brought after the issuance of the Panel's forum order involving the same subject matter and parties, any party in such action may apply in writing to the Panel to have the putative proceeding stayed. On such an application, a successful moving party shall be entitled to its costs on a full indemnity basis.

- Any order of the Panel regarding forum and carriage issues may be appealed as of right by any party to the superior court of any participating province.

4) Settlement Agreements

The civil justice system as a whole—and the class proceedings regime in particular—encourages the settlement of claims. The key objective of the Panel regarding settlement approval is to ensure that an approved settlement is not unfair, having regard to the interests of the class members from all the affected jurisdictions. Settlement approvals would operate as follows:

- In cases where settlements are reached, the parties would seek court approval in the superior court with jurisdiction over the case, in keeping with that province's law and the court's rules.

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126 *Vitapharm Canada Ltd. v F. Hoffman-Laroche Ltd.*, 2000 CanLII 29027 (ON SC) at para 49; *Smith v Sino-Forest Corporation*, 2012 ONSC 24 at para 17.

- Once the parties have obtained approval, they are free to seek an order from the Panel for approval in all remaining provinces that are signatories to the agreement.

- The application for settlement approval by the Panel shall be in writing, but the Panel may order an oral hearing if it deems it necessary. The Panel may also order an *amicus* appointment to ensure the settlement's fairness to the class members.

- In determining whether to approve a settlement, the Panel may have regard to the following non-exhaustive factors: (i) Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim? (ii) Is there reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached? (iii) On a cost/benefit analysis, are the plaintiffs and the class members they represent well served by accepting the settlement rather than proceeding with the litigation? and (iv) Has sufficient information been provided to the class members represented by representative plaintiffs, and if so, are they generally favourably disposed to the settlement?[127]

- The Panel, or a majority thereof, will release reasons for its decision and prepare a written order reflecting the decision.

- The Panel's order may be filed in the superior courts of all participating provinces and the Panel may award costs to any party on a scale and in an amount at its discretion.

- A class member or defendant may move in any superior court where the settlement order is registered to set aside the order on the grounds, among others, that: it was obtained by fraud or in a procedurally unfair manner, is inequitable to the class or any part thereof or to one or more defendant, or should be void for reasons of public policy.[128]

4. Part IV—Conclusion

The model proposed in this paper must be viewed as part of a greater movement to reform Canada's civil justice system. That call to reform will

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127 *Jeffery v Nortel Networks*, 2007 BCSC 69 at para 28.

128 *Reciprocal Enforcement of Judgments Act*, *supra* note 122 at s 3.

only be answered when the leadership of the civil justice system embraces the cultural shift called for in *Hryniak* for the benefit of all stakeholders.

Reform of class proceedings is a logical place to start because class action legislation was itself a reform initiative. It was supposed to improve access to justice for those litigants with modest means and modest claims. Instead, it has created a system that increases delay and procedural wrangling. In multi-jurisdictional proceedings, the impact of several provincial superior courts' involvement in a case is the addition of a further layer of complexity and delay. This added complexity runs contrary to the original purposes of class proceedings legislation. Ultimately, it is the class members who bear the cost of this unnecessary proceduralism.

The efforts made by some superior courts to cooperatively manage multi-jurisdictional proceedings represent a positive development, as do the legislative reforms described above. But in the context of a civil justice system that is severely under-resourced and unable to provide timely and affordable justice, these *ad hoc* measures have proven insufficient. Governments must be proactive and engage in cooperative federalism in order to fulfil their constitutional responsibility to provide an effective civil justice system. The courts and the bar must also be open to reform measures and be willing to act in a manner that furthers the interests of all stakeholders. A failure to act and to reform existing approaches to multi-jurisdictional class actions will imperil the rule of law in Canada.