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RETHINKING THE SOLICITOR-CLIENT RELATIONSHIP DURING THE OPT-OUT PERIOD

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Introduction

In *Ward-Price v. Mariners Haven Inc.* [*Ward-Price*], the Ontario Superior Court of Justice decided in 2004 that class counsel are deemed to stand in a solicitor-client relationship with putative class members during the opt-out period following certification of a class proceeding.[1] The decision has been relied upon for this principle, without further analytical scrutiny, over the past ten years.

This article examines the policy rationale of this judge-made rule and suggests that a different rule is appropriate.

It is problematic as an ethical matter for class counsel to be in a joint client relationship with a diverse pool of putative class members, who often have mutually conflicting interests, during the opt-out period. Moreover, for a number of reasons, the imposition of a solicitor-client relationship prior to crystallization of the class is not the best way to ensure meaningful access to justice. During the opt-out period, access to

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justice means access to complete, accurate, and unbiased information about the pros and cons of remaining part of the class or following another path, in a manner that enables a putative class member to make a fully informed and voluntary decision on whether to opt out.

Following a review of the current law in this area and a discussion of the problems with the current law, this article suggests an alternative approach. A solicitor-client relationship between class counsel and putative class members should not be deemed to exist during the opt-out period. Both class counsel and defence counsel should be permitted to inform putative class members about the available options and their relative merits. There is no reason to give class counsel a monopoly on communications and no reason to assume that defendant's counsel will be any less scrupulous about observing ethical and legal obligations when communicating with putative class members. The fairness and integrity of the process will remain subject to oversight by the court.

Class Counsel's Solicitor-Client Relationship with the Class: The Current Law

The relationship between class counsel and putative class members is unique and necessarily evolves as the action progresses from proposed certification to certification, opt-out, and proceedings on the merits.

To date, the following principles have been articulated in the case law relating to the solicitor-client relationship before, after, and during the opt-out period.

Pre-certification: Pre-certification, the representative plaintiff, and proposed class counsel have an ordinary solicitor-client relationship. This relationship is subject to the normal fiduciary obligations and other duties imposed by the law and any ethical rules of professional conduct.[2]

However, there is no solicitor-client relationship during this period between class counsel and putative class members who have not directly consulted class counsel. Rather, there is a potential solicitor-client relationship, described as a *sui generis* relationship (the parameters of which are still under development), in which proposed class counsel owes at least some duties to these members.[3]

The courts have diverged in their descriptions of the nature of this relationship. For example, in *Pearson v. Inco Ltd*., the court took a narrow view, stating that members of the proposed class ought not to be treated any differently from non-parties during the pre-certification period, except that the court should intervene if either party communicates or deals with proposed class members in a fashion and to a degree that would cause injustice or undermine the integrity of the class proceeding itself.[4] In *Lewis v. Shell Canada Ltd*., by contrast, the court held that counsel for the proposed class has an obligation to ensure that potential class members receive legal advice and representation.[5] In *Lundy v. VIA Rail Canada Inc.,* the court acknowledged a potential advisory role for proposed class counsel in reviewing proposed settlements but did not identify a positive obligation to advise putative class members.[6]

The divergence in the case law has not been resolved, and no court has comprehensively described the duties of proposed class counsel during the pre-certification period.

After the opt-out period: Once the class action has been certified, and the class has crystallized following the opt-out period, class counsel is deemed to stand in a solicitor-client relationship with the entire class (including the representative plaintiff) on a joint client basis.[7] The joint client relationship is deemed rather than actual—that is, class members may not know they are in a solicitor-client relationship and may not even know about the class action if they did not receive or review notices. As well, for policy reasons articulated in the case law, the joint client relationship in a class action is different in some respects from a typical joint client relationship. For example, no individual class member can terminate the joint client relationship or cease to be represented by class counsel unless class counsel is shown not to be acting in the best interests of the class.[8] Whether a solicitor-client relationship between class counsel and the class should be deemed after the opt-out period raises its own ethical and practical issues that are not addressed here.

During the opt-out period: As noted, class counsel is deemed to stand in a solicitor-client relationship with putative class members not only once the class crystallizes after the opt-out period but also during the opt-out period itself (*i.e.,* even before the putative class members have had an opportunity to decide whether they wish to be class members or wish to be in a relationship with class counsel).

The leading case holding that class counsel are in a solicitor-client relationship with putative class members during the opt-out period is *Ward-Price*.[9] The court in *Ward-Price* declined to follow an earlier Ontario decision (*Mangan v. Inco Ltd*.[10]) that held that during the opt-out period, putative class members are no more than potential clients of class counsel.

The court in *Ward-Price* gave three reasons for deeming a solicitor-client relationship to exist during the opt-out period. The reasons are important because subsequent decisions follow *Ward-Price* without further analysis on this issue. As a result, the strength of the law on point is directly proportional to the validity of the reasons given for this motions decision in 2004.

First, the court stated that members of the class may wish, during the opt-out period, to receive advice regarding their participation in the class proceeding, including whether they should or should not opt out of the class. The court stated that class counsel is the logical source for that advice and

expressed the assumption that the alternative would be to require class members to seek advice from another lawyer, which the court concluded would be contrary to the objective of access to justice.[11]

Second, the court concluded that class counsel may wish to contact putative class members proactively to provide information about the class action and that it would be counterproductive to the objective of providing a readily available source of advice if such communications were not subject to solicitor-client privilege.[12]

Third, the court stated that if there is no solicitor-client relationship between class counsel and putative class members during the opt-out period, it follows that there is no solicitor-client privilege to protect advice actually received from class counsel, even if a putative class member actively sought out class counsel to obtain that advice.[13]

The decision in *Ward-Price* was cited in *Glover v. Toronto (City)* [*Glover*] as the sole authority for the proposition that "there is little doubt" that a solicitor-client relationship will exist between class counsel and putative class members upon certification.[14] In *Lundy v. VIA Rail Canada Inc.* [*Lundy*], the court stated that there was "no doubt" about the principle, citing *Ward-Price* and *Glover*, without further analysis.[15] In *Durling v. Sunrise Propane Energy Group Inc*., the court stated that "the law is clear" on this point, citing *Ward-Price, Glover* and *Lundy*, again without analysis.[16] In *Fantl v. Transamerica Life Canada*, the Ontario Court of Appeal stated that a solicitor-client relationship arises upon certification, again citing *Ward-Price* without analysis.[17] Other cases also cite *Ward-Price* for the same proposition, both in Ontario and elsewhere.[18]

In short, the law regarding the existence of a solicitor-client relationship between class counsel and putative class members during the opt-out period is essentially premised on the three policy reasons articulated by the motions judge in *Ward-Price*.

Problems with the Current Law

The analysis in *Ward-Price* merits reconsideration. The policy analysis is not practically compelling, and there are several countervailing considerations that the court did not consider.

1. A solicitor-client relationship is not a precondition for class counsel to advise on whether to opt out of a class action: A reason cited in *Ward-Price* for deeming a solicitor-client relationship between class counsel and putative class members during the opt-out period is that that the putative class members may wish to receive advice on whether or not to opt out of the class, and class counsel may wish to provide such advice proactively on a class-wide basis. However, the deeming of a solicitor-client relationship is not a logical prerequisite for such advice to be given, proactively or otherwise. Indeed, in a proactive situation in which putative class members have not requested the advice, the overture lacks the hallmark of a solicitor-client relationship—namely, a client who seeks legal advice. Typically, class counsel who proactively give such advice are soliciting participation in a class action. Class counsel are free (within the limits of proper communication with putative class members) to convey information and advice about the merits of opting out regardless of whether a solicitor-client relationship exists.
2. The transparency and fairness of the opt-out process is critical: The main reason one might deem a solicitor-client relationship is to keep class counsel's advice confidential by affording the benefits of solicitor-client privilege, as *Ward-Price* indicates. But keeping opt-out advice secret through the imposition of privilege runs contrary to the policy objective of ensuring the transparency and fairness of the opt-out process. As stated by the court in *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, "pending the expiration of the opt-out

period, it is imperative that communications with class members deal fairly with considerations relevant to the exercise of the choice before them". The court notes in that case that the supervisory jurisdiction of the court over such communications is dependent on motion by a party.[19] Yet if the communications by class counsel are privileged, the defendant will never be in a position to know of the communications or, therefore, to bring the very motion that would allow the court to exercise its supervisory jurisdiction.

3. Class counsel are conflicted. There are two main occasions in a class proceeding when class counsel's personal financial interest collides most overtly with the interests of class members. One is at the time of fee approval in connection with a class action settlement, when an increase in class counsel's fee results in a decrease in funds available to the class. The other is during the opt-out period, when every putative class member who opts out decreases the class size and thus the settlement value of the class action. Class counsel have a very strong incentive to encourage putative class members to remain in the class. The existence of this direct conflict of interest in connection with the giving of opt-out advice is a further reason not to deem class counsel to be in a solicitor-client relationship with putative class members. It creates an ethical conundrum for class counsel, and it lends further support to the view that communications between class counsel and putative class members at this stage of the proceedings should be open and transparent rather than secret. Ordinarily, when a lawyer is conflicted in this way, a remedy is to have the client seek independent legal advice ("ILA")—an option that *Ward-Price* rejects as being contrary to the goal of access to justice. Even if one accepts that ILA is undesirable under class proceedings legislation (which is debatable as a policy matter), the best alternative is not a secret advisory relationship with only the conflicted counsel but rather expanding the scope of available information and advice.

4. A joint client relationship is not ethically workable at the opt-out stage: A joint client relationship between a lawyer and multiple clients is ethically workable only in a limited range of circumstances. Most rules of professional conduct for lawyers place strict limits on the circumstances in which a joint client retainer may be undertaken. A key limitation is that the lawyer should not accept the joint retainer if the interests of the clients are divergent.

   In a class action at the opt-out stage, the potential for divergent interests among putative class members is huge. Putative class members may fall into one of at least five categories, each of which has different interests: (1) the representative plaintiff and others who have consulted class counsel directly or wish to do so because they agree with the merits of the case; (2) those who know nothing about the case and need information in order to make their decision whether to opt-out; (3) those who know about the case and consider it unmeritorious; (4) those who know about the case and are opposed to it for commercial or other reasons unrelated to its merits; and (5) those who are interested in other options for addressing their claims, such as early settlement or an individual action.

   The deemed imposition of a solicitor-client relationship is ethically unworkable in the case of, at least, the last three categories. For example, putative class members who consider the case unmeritorious and those who are opposed to the class action itself and wish to see it derailed are diametrically opposed in interest to class counsel. This is what occurred in the *Pet Valu* class action, where a faction of class members campaigned to encourage opt-outs.[20] The deeming of a solicitor-client relationship means that class

counsel has a fiduciary duty to act selflessly in these members' best interests—an impossible task for a lawyer who is invested both financially and ethically in advancing the class proceeding. A similar situation arises in the case of class members who are interested in other resolution options—class counsel is ethically challenged in attempting to act in their best interests, especially in cases where the existence of a sufficient number of alternative resolutions could impair the viability of the class proceeding itself.

5. Individual class members can still enter into a solicitor-client relationship with class counsel: The third policy rationale identified in *Ward-Price* as a basis for deeming a solicitor-client relationship at the opt-out stage is that there would be no solicitor-client privilege "even if [a] class member actively sought out counsel for the representative plaintiff and obtained advice from him or her".[21] This statement seems to be simply incorrect. Under ordinary rules of privilege, a person who actively seeks legal advice from a lawyer on a consensual basis will receive the benefit of solicitor-client privilege, regardless of whether there is a formal retainer. The same rule presumably applies to a putative class member actively seeking legal advice from class counsel if (1) the advice is sought on a confidential basis with the intention of creating a solicitor-client relationship, (2) there is no conflict of interest preventing the relationship, and (3) the request is for actual advice rather than simply information. At the same time, there are good reasons not to consider class counsel's proactive opt-out advice to be privileged, in the interests of transparency and fairness as noted. The boundary between proactive advice offered to putative class members by class counsel and advice actively sought by a putative class member would need to be explored carefully.

6. The defendant's counsel is a valid alternative source of information: The deemed imposition of a solicitor-client relationship between putative class members and class counsel has been found to have the effect, under applicable rules of professional conduct, of prohibiting the defendant's counsel from communicating with the same putative class members despite the fact that those putative class members may be aligned in interest with the defendant or, in any event, may not be aligned in interest with class counsel.[22] The defendant's counsel should be assumed to be as ethical in his or her conduct as class counsel and can be a useful source of information about the pros and cons of opting out. On some issues, defendant's counsel is likely to be a better source of information. For example, defendant's counsel is more apt to explain fully the merits of any alternative dispute resolution process or early settlement process being proposed by the defendant, compared to class counsel who has an interest in discouraging opt-outs. As noted in *Lundy v. VIA Rail Canada Inc*.:

> [C]ommunications [by the defence] to putative class members may be lawful, in the normal course of business, appropriate, and the communications may even advance the purposes of the [*Class Proceedings*] *Act*, which have the ultimate purpose of obtaining access to justice for the putative class members.
>
> The case at bar is illustrative that communications by defendants to putative class members are not necessarily a bad thing.[23]

Access to justice means different things for different putative class members, which is what makes the opt-out period so significant. It is important, when considering what access to justice means, not to approach the concept with the *a priori* assumption that justice is best achieved through a class action or that justice for an individual putative class member is best achieved through participation in a class action. Some class actions are wholly meritless, as evidenced by the increasing number of class actions that have proceeded to trial only to fail and be dismissed. One should not discount the right of putative class members to make an informed and voluntary decision about whether they wish to associate themselves with a class action they do not

agree with—a right that can be exercised effectively only if putative class members are given complete and unbiased information about all considerations relevant to their choice.

An Alternative Approach

It is apparent, then, that the deemed imposition of a solicitor-client relationship between class counsel and putative class members during the opt-out period is problematic, both ethically and from the perspective of permitting informed choices that achieve real access to justice.

There is an alternative approach that would better achieve the desired goals of class proceedings.

Both class counsel and defence counsel should be permitted to inform and advise putative class members about the available options and their relative merits during the opt-out stage, within reasonable limits that could be established by the court or prescribed by amendments to class proceedings legislation. This would help to ensure balanced presentation of information. Permitting such communications by both counsel is not significantly different from the status quo, insofar as the courts currently permit defendants themselves to communicate with putative class members during the opt-out period, provided the communications do not create unfairness or intimidation, and subject always to judicial oversight.

At the same time, as a corollary, the current rule that class counsel may assert solicitor-client privilege over opt-out communications with putative class members should be eliminated in order to ensure that the court is able to carry out its supervisory role in an effective manner.

It must be remembered that the deemed imposition of a solicitor-client relationship during the opt-out period is a relatively recent jurisprudential development, resulting from a single motions decision that was inconsistent with the prior law and has not been critically examined since. It is open to the courts to re-examine the reasoning in *Ward-Price* and to move the law forward in a more balanced fashion.

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1 *Ward-Price*, [2004] O.J. No. 2308, 71 O.R. (3d) 664, paras. 7–18 (Ont. S.C.J.).

2 *Lundy v. VIA Rail Canada Inc.,* [2012] O.J. No. 3264, 2012 ONSC 4152, para. 18; *Berry v. Pulley,* [2011] O.J. No. 927, 2011 ONSC 1378, para. 83.

3 *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536, 60 C.P.C. (6th) 326, para. 78 (Ont. S.C.J.), aff'd [2009] O.J. No. 1826, 2009 ONCA 377, paras. 49–55.

4 *Pearson v. Inco Ltd*., [2001] O.J. No. 4877, 57 O.R. (3d) 278, para. 18 (Ont. S.C.J.).

5 *Lewis v. Shell Canada Ltd*., [2000] O.J. No. 1825, 48 O.R. (3d) 612, para. 16 (Ont. S.C.J.).

6 *Lundy v. VIA Rail Canada Inc.*, [2012] O.J. No. 3264, 2012 ONSC 4152, para. 18.

7 *Berry v. Pulley,* [2011] O.J. No. 927, 2011 ONSC 1378, para. 79.

8 *Ibid.*, paras. 79–83.

9 *Ward-Price*, *supra* note 1, paras. 7–18 (Ont. S.C.J.).

10 *Mangan v. Inco Ltd.,* [1998] O.J. No. 551, 38 O.R. (3d) 703, para. 38 (Ont. Ct. J. (Gen.Div.)).

11 *Ward-Price*, *supra* note 1, para. 10 (Ont. S.C.J.).

12 *Ibid.,* para. 11 (Ont. S.C.J.).

13 *Ibid.*, para. 12 (Ont. S.C.J.).

14 *Glover v. Toronto (City)*, [2009] O.J. No. 1523, 70 C.P.C. (6th) 303, para. 92 (Ont. S.C.J.).

15 *Lundy v. VIA Rail Canada Inc.,* [2012] O.J. No. 3264, 2012 ONSC 4152, para. 28 (Ont. S.C.J.).

16 *Durling v. Sunrise Propane Energy Group Inc*., [2012] O.J. No. 5260, 2012 ONSC 6328, para. 54.

17 *Supra* note 3, Ont. C.A. at para. 61. The Court of Appeal also cited *Cassano v. Toronto- Dominion Bank,* [2007] O.J. No. 4406, 2007 ONCA 781, but that case does not address the issue of whether a solicitor-client relationship arises between class counsel and putative class members during the opt-out period.

18 See, *e.g., Richard v. British Columbia*, [2007] B.C.J. No. 1645, 2007 BCSC 1107, para. 23; *Hagos v. ING Insurance Co. of Canada*, [2007] O.J. No. 5732, 82 C.P.C. (6th) 61, para. 11 (Ont. Sup.Ct.); *Ramdath v. George Brown College of Applied Arts and Technology*, [2012] O.J. No. 2475, 2012 ONSC 2747, para. 33.

19 *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2004] O.J. No. 5134, para. 4.

20 *1250264 Ontario Inc. v. Pet Valu Canada Inc*., [2013] O.J. No. 2012, 2013 ONCA 279.

21 *Supra* note 1, para. 12.

22 *Supra* note 16, paras. 54–59.

23 *Lundy v. VIA Rail Canada Inc.,* [2012] O.J. No. 3264, 2012 ONSC 4152, paras. 8–9.

THE (LIMITED) POWER OF INHERENT JURISDICTION AND ITS USE IN THE PAN-CANADIAN HEPATITIS C CLASS ACTIONS

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Introduction

The *Endean v. Canada Red Cross Society* [*Endean*],[1] *Parsons v. The Canadian Red Cross Society* [*Parsons*],[2] and *Honhon c. Canada (Procureur général)* [*Honhon*][3] parallel class actions in British Columbia, Ontario, and Quebec have brought to the forefront the issue of whether a superior court's inherent jurisdiction can be used as a basis to extend the territorial jurisdiction of a judge to sit outside the boundaries of a province. The superior courts in British Columbia, Ontario, and Quebec each determined that the inherent jurisdiction of superior courts, which permits them to control their own process, also empowers them to hold a hearing outside their home province if it promotes the interests of justice in a particular case, and the superior court has personal and subject matter jurisdiction over the parties. In these class actions, the superior court judges in each province held that they could simultaneously hear an application in Alberta where all three judges would be present attending a judicial conference. While these decisions may be a means of facilitating national class action hearings, at issue was their consistency with the existing common law jurisprudence on territorial limitations on the jurisdiction of superior court judges.

The Attorneys General of British Columbia and Ontario each appealed the decisions (although there was no appeal of *Honhon* in Quebec). The British Columbia Court of Appeal (the "B.C.C.A.") overturned the British Columbia Superior Court decision on the basis that it was inconsistent with, and contrary to, the common law. Leave to appeal the B.C.C.A.'s decision to the Supreme Court of Canada (the "S.C.C.") was filed on April 22, 2014. At the time of writing, the Ontario Court of Appeal's consideration of *Parsons* was under reserve (arguments were heard on September 16, 2014).

Background

Between 1986 and 1990, as many as 10,000 individuals contracted hepatitis C from the blood supply controlled by the Canadian Red Cross Society. This epidemic spawned three parallel class actions against the Canadian Red Cross Society in British Columbia, Ontario, and Quebec brought by persons claiming to have been infected by the Canadian Red Cross Society–controlled blood supply.

Ultimately, the litigants settled the class actions by way of a national settlement agreement (the "Settlement Agreement") dated June 5, 1999, whereby the governments of Canada—all ten provinces and all three territories—agreed to be bound by its terms upon the Settlement Agreement receiving court approval by the superior courts in each of the three provinces in which the class actions were commenced. Upon approval, in each of the three jurisdictions, the $1.118 billion fund established by the Settlement Agreement would be available to eligible claimants.

The settlement was approved by the courts in British Columbia, Ontario and Quebec. Under the terms of the Settlement Agreement, each of the three courts is to exercise an independent supervisory power over the litigation settlement within the confines of its jurisdiction. A key term of the Settlement Agreement provides that any order made

by a court will take effect only once there are materially identical orders of the other two courts.

Since 1999, many applications have been brought in each of the courts. For the most part, the applications proceeded on consent. Each court heard the applications separately and independently of each other, and the orders issued by each court were without material differences.

In 2012, an application was brought in each jurisdiction by class counsel to approve a protocol to deal with certain categories of claims sought to be made after the first claims deadline. Pursuant to the Settlement Agreement, materially identical orders were required from each jurisdiction before the protocol could take effect. The Attorney General of Canada and certain other provincial governments indicated that they intended to oppose the relief sought in the protocol motions.

To deal with these contested motions, class counsel in each province proposed that the most efficient and effective procedure would be to have the three supervisory judges sit together in one location so that the same submissions could be heard and each could be well placed to make concurrent orders without material differences as required by the Settlement Agreement. The three supervisory judges from British Columbia, Ontario, and Quebec were scheduled to attend meetings in Edmonton, Alberta, in September 2012, and the motions were made returnable during that period to be heard in Edmonton.

Each of the Attorneys General of British Columbia, Ontario, and Quebec objected to their provinces' judges sitting outside the territorial boundaries of their respective province. The jurisdictional question was important to resolve because class counsel intended to bring future joint applications. As a result, class counsel brought a motion in each province, essentially seeking directions regarding whether a superior court judge of a province may sit with judicial counterparts in another province to hear applications under the Settlement Agreement.

The Decision in *Parsons*

In *Parsons*, the motion for directions was heard by Ontario's Chief Justice Winkler sitting as the supervisory Superior Court Judge and not as a single judge of the Court of Appeal. He resolved the jurisdictional issue with respect to whether an Ontario judge, along with the other supervisory judges from British Columbia and Quebec, could hear a contested motion in a province not connected to the proceeding by concluding that it was within the Ontario superior court's inherent jurisdiction to fully control its own process.[4] In arriving at this conclusion, Winkler C.J.O. noted that no constitutional, statutory, or binding common law authority was provided to suggest the opposite conclusion.[5]

The rationale underpinning Winkler C.J.O.'s decision in *Parsons* was that

- holding a single (joint) hearing instead of three would save expense and valuable resources,
- a single (joint) hearing would help to avoid potential additional costs by facilitating the process of rendering consistent judgments as mandated by the Settlement Agreement, and
- a joint hearing ensures that the supervisory judges would receive the same oral and written submissions and would be able to confer directly with one another before issuing an order on the merits.[6]

Chief Justice Winkler also identified the shortcomings of using videoconference technology, which would permit a concurrent hearing in three separate locations. He noted that it would be difficult for individual judges to ask questions of the numerous counsel, who would be appearing at three sites, without repeated interruptions and breakdowns in the flow of exchange between the bench and counsel. He concluded that "experience has shown that video-conferencing technology does not offer the equivalent procedural advantages of holding a hearing before all the supervisory judges in one

location".[7] (It should be noted that a process similar to this is currently occurring in the long-running *Nortel Networks Corp.* bankruptcy case where the Ontario Superior Court and its U.S. counterpart are holding a joint hearing pursuant to a cross-border protocol that is simultaneously occurring via telephone or video link in Toronto and Delaware courthouses. Under the cross-border protocol, the Canadian and U.S. judges are entitled to communicate with one another in advance of, and during, any joint hearing with or without counsel present).

Chief Justice Winkler noted that the inherent jurisdiction of the superior courts includes the power of the courts to fully control their own process, and identified its key functions, including ensuring convenience in legal proceedings and preventing steps being taken that would render judicial proceedings inefficacious.[8]

The Superior Court decisions in British Columbia and Quebec relied extensively on Winkler C.J.O.'s reasons in *Parsons* which held:

> I conclude that a judge of the Superior Court of Justice in Ontario may preside over a hearing that is conducted outside Ontario where the Ontario court has personal and subject-matter jurisdiction over the parties and the issues in the proceeding. This jurisdiction is not lost simply because the court presides over a motion in a location that is outside the court's regular territorial limits. Rather, the court's inherent jurisdiction to control its own process empowers the court to consider if it should exercise its discretion to hold a hearing outside its home province having regard to whether sitting outside the court's home province promotes the interests of justice in the particular case. I would exercise this discretion in the present case.[9]

Endean at the B.C.C.A.

The B.C.C.A. paid particular attention to Winkler C.J.O.'s reasons in *Parsons*, which were adopted by Chief Justice Bauman of the British Columbia Supreme Court (the "B.C.S.C.") at first instance in *Endean*, with respect to whether there was any rule in the common law that would prohibit a Canadian superior court from sitting outside the confines of the province.

There Is No Rule in the Common Law That Permits a Superior Court to Sit Outside Its Jurisdiction

In *Parsons*, the Attorney General for Ontario argued that because common law English courts could not hold hearings outside England, and because there is no explicit statutory provision permitting an Ontario superior court to hold hearings outside Ontario, the superior court could not hold hearings outside the province. The Attorney General traced the roots of the restrictions on English courts to the *Magna Carta*. Chief Justice Winkler was of the view that the restrictions that exist in England were not determinative of the jurisdiction issue in *Parsons*.[10]

In dismissing the Attorney General's argument, Winkler C.J.O. was persuaded by Justice La Forest's decision in *Morguard Investments v. De Savoye* [*Morguard*].[11] While *Morguard* concerned the recognition and enforcement of foreign judgments, Winkler C.J.O. found the case instructive by way of analogy to the jurisdictional issues that arose in *Parsons*. Particularly, Winkler C.J.O.'s reasoning relied upon the notion articulated in *Morguard* that there is no comparison between the interprovincial relationships of today and the relationships of foreign countries in the 19th century and that common law rules need to conform in such a manner so as to accommodate modern commercial and social realities.[12]

In addition, Winkler C.J.O. applied the rationale in *Morguard* that the structure of the Canadian judicial system is arranged such that any concerns about a differential quality of justice between the provinces are without foundation. Specifically, the factors underpinning the prohibition in the English common law, which prevent an English court from sitting outside English territory, should not be applied to prohibit superior courts in Canada from sitting outside their home provinces when it would

be in the interests of justice to do so. According to the reasons in *Parsons*, a superior court from Ontario sitting in another province would not engage any issue of sovereignty among foreign states as an English court sitting outside England would.[13]

In *Parsons*, the Attorney General cited Justice Rowles of the B.C.C.A. in *Ewachniuk v. Law Society of British Columbia* [*Ewachniuk*] for the proposition that "the jurisdiction of the superior courts of the provinces is determined internally by the Constitution and externally by the boundaries of the provinces" and that superior courts of the provinces "do not sit outside their boundaries".[14] While *Ewachniuk* contains an analysis of the territorial boundary of the jurisdiction of a superior court, Winkler C.J.O. noted that *Ewachniuk* was not binding upon him and that the statement made by Rowles J.A. was not necessary for the B.C.C.A.'s decision because that case was about the power of a statutory tribunal to sit outside its jurisdiction—a situation different from that of a court with inherent jurisdiction.[15]

In *Endean*, the B.C.C.A. noted that while the decision in *Ewachniuk* was not binding on Winkler C.J.O. and the proposition relied upon by the Attorney General was *obiter* in that case, it did not mean that Rowles J.A. did not accurately set out the law that superior courts do not sit outside their boundaries.

To support the conclusion that a superior court could sit outside its territorial jurisdiction in certain circumstances, the first instance judges also relied on the decision of Justice Bennett (as she then was) in *R. v. Pilarinos*.[16] In that case, the B.C.S.C. held that a B.C.S.C. judge of criminal jurisdiction had the authority to issue an authorization to intercept private communications within British Columbia when the authorizing judge was physically outside British Columbia and Canada.[17] The B.C.C.A. noted that the proposition set out by Rowles J.A. in *Ewachniuk* was not disputed by Bennett J. in *Pilarinos*.

In *Pilarinos*, the Associate Chief Justice of British Columbia, while on holiday in Palm Springs, California, issued an authorization permitting the RCMP to wiretap the private communications of the two accused. The authorization was issued in California to peace officers in British Columbia and elsewhere in Canada and was to take effect within the province of British Columbia and elsewhere in Canada. The law enforcement officials who sought authorization from the Associate Chief Justice brought the B.C.S.C. Registry date stamp and seal stamp with them to California.[18] Further, all of the primary and secondary targets were in British Columbia, as were all of the landlines.[19]

While, at first blush, it appears that a superior court with criminal jurisdiction sat outside its territorial confines to adjudicate a matter, a closer look at the circumstances in *Pilarinos* is warranted. The B.C.C.A. held that the location where the authorization was granted was irrelevant because the hearing was *ex parte* and did not involve or require the involvement or cooperation of any U.S. citizen or court. In *Pilarinos*, Bennett J. analogized a superior court judge to police officers who, when they cross an international border, do not, under international law, lose their status as police officers (rather only some or all of their powers).[20] In the same manner, according to Bennett J., there is no reason under international law why superior court judges should lose their status as judges if they cross an international border. They have no authority or jurisdiction in the foreign state, but they still may exercise their jurisdiction for their territory (*i.e.*, not enforcing any order in the foreign jurisdiction).[21]

Further, an application for an authorization to intercept private communication is an *ex parte*, secret application wherein the applicant and affiant meet privately with a judge in order to obtain permission

to intercept private communications.[22] The B.C.S.C. held that it could not be said that in issuing the *ex parte* order, the issuing judge was holding a "hearing" or "sitting".[23] In other words, territorial sovereignty was not engaged in *Pilarinos*.

Relying on the judgment in *Pilarinos* and other cases for the purported proposition that there is no rule of law preventing a superior court judge from sitting outside his or her jurisdiction was, according to the B.C.C.A., the basis for the first instance judges turning erroneously to inherent jurisdiction to support the declaration that a superior court judge, having personal and subject matter jurisdiction over the parties, can sit outside provincial boundaries to adjudicate a matter.

Inherent Jurisdiction Has its Limits

In considering the limits of inherent jurisdiction, the B.C.C.A. had the benefit of the S.C.C.'s decision in *Her Majesty the Queen v. Criminal Lawyers' Association of Ontario and Lawrence Greenspon* [*CLAO*].[24] The 2013 decision was released after Winkler C.J.O.'s judgment in *Parsons* but prior to the hearing of the *Endean* appeal. In the 5:4 split decision, the S.C.C. examined whether superior courts have the inherent jurisdiction to not only appoint *amicus curiae* in the context of a criminal case with an unrepresented accused but also fix their levels of compensation. The majority, after considering the scope of inherent jurisdiction, held that the court's control over its process allows for the appointment of *amicus curiae* but does not provide for the power to determine what Attorneys General must pay them.[25]

Inherent jurisdiction, while it may be amorphous, is not limitless. Canada's provincial superior courts trace their lineage to the Royal Courts of Justice, having inherited the powers and jurisdiction exercised by superior, district, or county courts at the time of Confederation.[26] Historically, the Royal Courts of Justice (courts of common law and equity) did not have the power to hold a hearing outside their respective territorial boundaries; as a result, a British Columbia court, at Confederation, did not have that power, and no legislative amendment has occurred to permit such an exercise of power. A superior court judge possesses the inherent power to make orders necessary to protect the judicial process and the rule of law as well as to safeguard the court's constitutional independence to assure the fairness of the judicial process.[27] Inherent jurisdiction, however, cannot be exercised so as to conflict with a statute or common law rule.[28]

In *Endean*, the B.C.C.A. concluded that no authority had been presented, which supported the use of inherent jurisdiction as a basis to declare that the British Columbia superior court could sit outside its jurisdiction and that such a use of inherent jurisdiction would be contrary and inconsistent with the common law and ancient usage.[29]

Permitting a Superior Court to Sit Outside Its Jurisdiction Is Not an Incremental Step

The B.C.C.A. did not end its analysis there. Recognizing that the common law is judge made and can be modified as circumstances change—indeed this is what the S.C.C. engaged in *Morguard* when it set out the test of the recognition and enforcement of foreign judgments—the Court of Appeal considered whether it was appropriate to modify the common law rule that prohibits judges from sitting outside their territorial jurisdiction.

While judges are able to adapt the common law to reflect modern realities, the B.C.C.A. noted jurisprudence from the S.C.C., providing that the judiciary should confine itself to those incremental changes that are necessary to keep the common law in step with modern realities.[30] Further, the Court of Appeal noted that where a proposed revision is major and its ramifications are complex, the courts should proceed with caution because major revisions are best left to the legislature.[31] These complexities include determining whether

(1) the foreign court could administer oaths and affirmations, remove persons from the courtroom, issue subpoenas and injunctions in the host province; (2) the foreign court would be immunized from judicial scrutiny in the host province; and (3) which rules of procedure would govern—that of the host jurisdiction or the foreign court. The first instance judges did not address these types of complexities.[32] The Court of Appeal noted that other jurisdictions have dealt with these complexities legislatively. For example, Australia and New Zealand have enacted reciprocal legislation permitting the High Court of New Zealand and the Federal Court of Australia to hold hearings in the other country in certain proceedings.[33]

The Final Word (for now) from the B.C.C.A.

The B.C.C.A. concluded that it would not be contrary to the common law rule that prohibits judges from conducting hearings outside British Columbia for a judge who is outside the province to conduct a hearing by video conference as long as the hearing itself takes place in a British Columbia courtroom. According to the Court of Appeal, there is no reason why the judge, counsel, or witnesses necessarily need to be physically present in British Columbia as long as the hearing takes place in a courtroom of the province. Although counsel and witnesses, for matters of convenience, could attend the location outside British Columbia, they could not be compelled to do so. In this way, the open court principle[34] would be maintained, and the rights of witnesses and counsel to be present in the courtroom will be preserved.[35]

Ultimately, the B.C.C.A. held that judges cannot conduct hearings that take place outside the province and it is for the legislature to decide whether this should be permitted. However, no common law rule would be violated, and inherent jurisdiction could be relied upon to permit a British Columbia judge who is not physically present in that province to conduct a hearing that takes place in a British Columbia courtroom by some communication medium.

What Next?

As the decision in *Parsons* influenced the reasons in *Endean*, it can be expected that the reasons in *Endean* will influence the reasoning in the *Parsons* appeal. While holding a single (joint) hearing instead of three could save expense as well as valuable resources and might be fair as well as meet the expectations of the parties for the purposes of the parallel class actions, inherent jurisdiction cannot be relied upon to overcome the limits imposed by the common law or statute. The S.C.C. has indicated that changing the law solely on the expectations of the parties in a specific case would not bear the hallmark of a rational system of law.[36]
The B.C.C.A. has determined that no matter how efficient and cost effective a joint hearing would be in the context of class actions, if it is to be permitted, it must be the result of legislative action. However, much remains to be said. The Ontario Court of Appeal will weigh in on this issue when it decides the appeal in *Parsons*, and so too may the S.C.C.

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1 *Endean*, [2013] B.C.J. No. 1304, 2013 BCSC 1074, rev'd [2014] B.C.J. No. 254, 2014 BCCA 61; leave to appeal to S.C.C. (April 22, 2014), 2014 CarswellBC 1416 [*Endean*].
2 *Parsons*, [2013] O.J. No. 2343, 2013 ONSC 3053 (Appeal filed January 6, 2014) [*Parsons*].
3 *Honhon c. Canada (Procureur général)*, [2013] J.Q. no 6643, 2013 QCCS 2782.
4 *Parsons*, supra note 2, paras. 39–40.
5 *Ibid.*, para. 32.
6 *Ibid.*, paras. 45–47.
7 *Ibid*., para. 48.
8 *Ibid.*, paras. 33–34, citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725, para. 15.
9 *Ibid*., para. 4.
10 *Ibid.*, paras. 21–22.
11 *Morguard*, [1990] S.C.J. No. 135, [1990] 3 S.C.R. 1077.
12 *Supra* note 2, para. 23.
13 *Ibid.*, paras. 24–25.
14 *Ewachniuk*, [1998] B.C.J. No. 372, 156 D.L.R. (4th) 1, para. 31.
15 *Parsons*, *supra* note 2, para. 31.

[16] *Pilarinos*, [2001] B.C.J. No. 2540, 2001 BCSC 1690.
[17] *Ibid.*, para. 12.
[18] *Ibid.*, para. 9.
[19] *Ibid.*, para. 11.
[20] *Ibid.*, para. 76, citing *R. v. Cook*, [1998] S.C.J. No. 68, [1998] 2 S.C.R. 597.
[21] *Pilarinos*, *ibid*., paras. 75–76.
[22] *Ibid*., para. 37.
[23] *Pilarinos*, para. 37.
[24] *CLAO*, [2013] S.C.J. No. 43, 2013 SCC 43.
[25] *Ibid.*, paras. 44 and 84.
[26] *Ibid*., para. 17.
[27] *Ibid.*, para. 39.
[28] *Ibid.*, para. 23.
[29] *Ibid*., para. 61.
[30] *Ibid.*, para. 70.
[31] *Ibid*., para. 63.
[32] *Ibid*., para. 66.
[33] *Ibid*.
[34] That principle provides that "justice is not a cloistered value". The S.C.C. has noted that the principle is a hallmark of a democratic society and is essential so that the public may see that justice is administered in a non-arbitrary manner according to the rule of law. Furthermore, as remarked by the S.C.C., an open court is more likely to be an independent and impartial court (*Vancouver Sun (Re)*, [2004] S.C.J. No. 41, 2004 SCC 43, paras. 31–32).
[35] *Endean*, supra note 1, paras. 79–80.
[36] *Ibid.*, para. 74, citing *Tolofson v. Jensen*, [1994] S.C.J. No. 110, [1994] 3 S.C.R. 1022.

BANK OF MONTREAL v. MARCOTTE: THE SUPREME COURT LOWERS THE THRESHOLD FOR CLASS ACTION AUTHORIZATION IN QUEBEC…AGAIN

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Introduction

In *Bank of Montreal v. Marcotte*,[1] the Supreme Court of Canada dismissed appeals brought by various banks contesting the applicability of the Quebec *Consumer Protection Act* [*CPA*][2] to conversion charges charged by banks on foreign currency transactions. The Supreme Court concluded that certain disclosure provisions of the *CPA* did apply to the conversion charges in issue. The Supreme Court rejected the applicability of the doctrines of inter-jurisdictional immunity and paramountcy invoked by the banks. The Supreme Court concluded that s. 12 *CPA* had been breached (giving rise to a reduction in obligations and punitive damages).

The Supreme Court also held that a representative plaintiff need not have a cause of action against each of the named defendants, that collective recovery and punitive damages are both available, and that punitive damages may be awarded in the circumstances if the impugned behaviour was "lax, passive or ignorant with respect to consumers' rights".

Requirement of a Legal Interest

First, the Supreme Court explained that although the Quebec *Code of Civil Procedure* ("C.C.P.") requires plaintiffs to have a "sufficient interest" (art. 55 C.C.P.), this provision must be read in harmony with the class action regime and the proportionality principle (art. 4.2 C.C.P.). Where the representative plaintiff has been able to establish that he or she is adequate and that the issues involving the defendants are identical, similar, or related, there will be a sufficient legal interest. This is true even if a direct cause of action does not exist between the representative plaintiff and each of the defendants. The approach favoured by the Supreme Court is consistent with the one taken by the courts of British Columbia (though it runs contrary to that of the Ontario courts, as elaborated in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*.[3]). In arriving at this conclusion, the Supreme Court clearly set aside the prior reasoning of the Quebec Court of Appeal in *Bouchard v. Agropur*,[4] where

Justice Pelletier had opined that a petitioner must demonstrate a sufficient interest with respect to each of the respondents he wishes to sue.

Conversion Charges as "Net Capital"

Second, the Supreme Court upheld the Court of Appeal's characterization of the conversion charges as "net capital"[5] rather than credit charges. The Supreme Court noted that the conversion charges were not specifically enumerated as a credit charge under s. 70 *CPA*. Because conversion charges are related to services ancillary to the actual granting of credit, it would be erroneous (and harmful to consumers) to confuse them with credit charges that are subject to their own specific disclosure regime. As a result, it was not necessary for the Supreme Court to consider whether Division III of the *CPA*, which deals with the disclosure of credit charges and the credit rate, conflicts with the provisions of the *Bank Act*[6] and the *Cost of Borrowing (Banks) Regulations*.[7] The Supreme Court did hold, however, that conversion charges are required to be disclosed by banks pursuant to s. 12 *CPA*, which states that "no costs may be claimed from a consumer unless the amount thereof is precisely indicated in the contract". Notably, s. 12 *CPA* does not deal with the disclosure of credit costs but is a general provision of law that applies to all consumer contracts much like the rules of contract found in the *Civil Code of Quebec*.

The Supreme Court left open the question as to whether other fees charged by banks constitute credit charges under the *CPA* and, if so, whether there would be a conflict between the provisions of the federal and provincial legislation with respect to the disclosure of these fees.

Rejection of Constitutional Arguments

Third, the Supreme Court dismissed (as had the judge of first instance and the Court of Appeal) the constitutional doctrines of inter-jurisdictional immunity and paramountcy raised by the banks. To the extent that the conversion charges did not form part of credit charges, which would have required their disclosure as part of the credit rate in a manner that may have differed from the provisions of the *Cost of Borrowing (Banks) Regulations* under the *Bank Act*, there was no operational conflict with the relevant provisions of the statute. In the Supreme Court's opinion, the disclosure required by s. 12 *CPA* does not impair or significantly "trammel" Parliament's ability to legislate in matters of banking. Likewise, the *CPA* does not frustrate or undermine the *Bank Act*. Rather, the *CPA* sets out rules comparable to the general contractual rules contained in the *Civil Code of Quebec*.[8]

Having disposed of the constitutional arguments, the Supreme Court concluded that (1) section 12 *CPA* had been breached by those banks that did not disclose the conversion charges, (2) the breach had prevented consumers from making informed choices (there is a legal presumption to this effect), and (3) it was appropriate to reduce the cardholders' obligations "in the amount of all conversion charges imposed during the period of non-disclosure", pursuant to s. 272 *CPA*.

Collective Recovery

Finally, departing from the Court of Appeal's reasoning, the Supreme Court stated that ordering collective recovery should not preclude an award of punitive damages. It restored the decision of the Superior Court, which had awarded punitive damages against those banks that did not disclose the conversion charges.

With respect to the standard to be applied when determining whether punitive damages should be awarded, the Supreme Court stated that "neither evidence of antisocial behaviour nor reprehensible conduct"[9] is required to award punitive damages under the *CPA*. According to the Supreme Court, it is sufficient, in examining the overall behaviour of a defendant, to award such damages if he was "lax, passive, or ignorant with respect to consumers' rights and to [his] own obligations" or if he

displayed "ignorance, carelessness or serious negligence".[10]

Significance and Conclusion

Bank of *Montreal v. Marcotte* is significant because of what it says about the applicability of the *CPA* to financial institutions and, more broadly, because of its implications for class actions in Quebec. This case can be seen as comprising a trilogy (together with *Infineon Technologies AG v. Option consommateurs*[11] and *Vivendi Canada Inc. v. Dell'Aniello*[12]) of decisions that emphasise the relatively low threshold imposed by the C.C.P. Not only must the criteria for class authorization be construed generously (art. 1003 C.C.P.), but the petitioner and representative plaintiff need not establish a personal legal interest against the persons they intend to sue. In this regard, although it is often repeated that class actions do not alter the rules of evidence or civil procedure, their unique composition and overtly stated policy objectives of judicial economy, access to justice, and behaviour modification set them apart from all other forms of litigation. This is particularly true in Quebec, where the authorization process is already streamlined and where a single common question can justify class proceedings if it can provide some meaningful benefit to the class members. *Plus ça change*...

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1 *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, 2014 SCC 55.
2 *CPA*, CQLR, c. P-40.1.
3 *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*., [2000] O.J. No. 4597, 51 O.R. (3d) 603.
4 *Bouchard v. Agropur*, [2006] J.Q. no 11396, 2006 QCCA 1342 (in French).
5 *Net capital* is the amount for which the credit is granted.
6 S.C. 1991, c. 46.
7 SOR/2001-101.
8 LRQ, c C-1991.
9 *Supra* note 1, para. 109.
10 *Ibid*.
11 *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, 2013 SCC 59.
12 *Vivendi Canada Inc. v. Dell'Aniello*, [2014] S.C.J. No. 1, 2014 SCC 1.