

Parallel Class Actions in Canada

Canadian provincial courts continue to analyze how to manage class actions that include class members from other provinces. While Canada is a federal country, it is acceptable for the court in a province to certify a class that includes members from other provinces. A difficulty arises if two provinces are each asked to certify a multijurisdictional class in respect of the same underlying claim.

Currently there are class actions against Merck Frosst in both Ontario and Saskatchewan in respect of Vioxx. In each of these provinces, the class action regime is “opt-out”, so that the class as defined catches all described members without any specific action on the part of a particular member. Merck moved to stay the Ontario action on the basis that it should not be subject to two multijurisdictional class actions that involve substantially the same plaintiffs and issues. In *Mignacca v. Merck Frosst Canada Ltd.* (an as-yet unreported decision of the Ontario Divisional Court, dated Feb. 13, 2009) the court refused to stay the Ontario action.

The court refused to adopt an approach that would defer to the court that first certified the class action: “a rule of swiftest to the finish line taking all encourages tactics that may well be contrary to the interests of justice” (para. 47). The court noted that in other cases parallel class actions involving jurisdictional overlap had been resolved through the cooperation of counsel and guidance from the court.

An unusual element of this case was the Ontario court’s concern about the lawyer representing the plaintiff class in the Saskatchewan proceedings. It noted that he had five disciplinary violations from 1972 to 2006. This strengthened the court’s desire to have the Ontario proceedings continue.