

**CARRIAGE MOTIONS ACROSS
JURISDICTIONS: TOUCHDOWN OR FUMBLE?**

**Class Action Seminar:
Recent Developments in Québec, in Canada and in the United States
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“The man who occupies the first place seldom plays the principal part.”

- Johann Wolfgang von Goethe

I. Introduction

Johann Wolfgang von Goethe must not have known of the importance of being the first solicitor of record in a Canadian class-action when he made the above comment. With more and more complex class-action cases being litigated across Canada, lawyers also face the daunting task of competing for carriage of these proceedings. The procedural vehicle for the beauty pageant to become lead counsel of a class-action proceeding is to bring a carriage motion before the court and then see what other contestants appear.

The simple goal of this short paper is to provide an overview of what is required to become lead counsel in a class action proceeding. A brief survey of the leading cases from across the nation will be considered. Thereafter, a checklist will be presented as (we hope) a helpful guideline for you to consider when bringing a carriage motion in Canada.

The remaining portion of the paper will also consider the recent developments in the United States and whether or not Canada might see similar trends in the future.

II. The Importance of Picking the Quarterback

It is now commonplace to see several class proceedings simultaneously brought before Canadian courts dealing with similar classes and subject-matter. In such circumstances, our courts will want to attempt to consolidate the class proceedings to avoid unnecessary duplication and conflicts¹. Inevitably, the direction and management of the new aggregated class (not to mention fees) is called into question.

¹ Ontario *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 138.

In most instances, counsel for the different representative plaintiffs will agree to work together to advance the claims thereby avoiding adjudication by the court. This can be done through a joinder of the actions and an agreement among counsel as to who will become the solicitor or solicitors of record. The recent settlement of the carriage fight over the Medtronic class action is an apt example. In that case, some of Canada's best known class action lawyers agreed to divvy up the case and allocate the co-lead counsel roles as between them, but not before the competing firms could make allegations of impropriety and conflict of interest in a hotly contested carriage motion before Justice Hoy. In the result, the settlement rendered adjudication by the court unnecessary.

However, agreement among counsel is by no means the likely or inevitable result. Counsel for the plaintiffs bring with them different styles and strategies, making disagreements over how to prosecute the proceedings a common basis for dispute.

Furthermore, there is a significant financial incentive to become the solicitor of record. The solicitor of record will usually generate the largest share of the fees given their time invested in court as well as on other matters including negotiating a settlement with the defendants. In many cases, when the class proceeding is done on a contingency basis, the incentive for counsel to have more control over the outcome of the case is increased. Moreover, class proceedings, especially those in the capital markets, are high-profile cases that can elevate the profile of counsel

In the class proceedings context, the mechanism for determining who will act for the plaintiff class is the carriage motion. In those provinces that have enacted class proceedings, there are no explicit provisions for carriage motions. Most of the provincial legislation is identical in wording and most often the carriage motion is brought under the provision that allows the court the authority to ensure fair and expeditious determination². Once decided, the remaining class proceedings can be stayed by the court³.

² In Ontario, the carriage motion is brought under section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6. s.12:

The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious

III. The Law of Carriage Motions across Canada

Although there have been a few cases in Canada involving carriage motions, there is a very limited substantive body of law on the subject. Instead, the criteria to become the solicitor of record continues to evolve as class counsel develop new arguments and hone existing ones.

A. Ontario

In Ontario, the basic framework in assessing carriage motions was set out in *VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.*⁴ Subsequent cases have added to the *VitaPharm* foundation. In *VitaPharm*, 10 class actions were brought against various combinations of defendants in a price-fixing suit. After examining the American approach to carriage, Justice Cummings outlined several factors to consider in determining who would be given carriage (the “*VitaPharm* test”):

- (a) The overriding criterion in deciding carriage motions is *striking a balance between the best interests of all the putative class members and fairness to the defendants*, while keeping in mind the policy objectives of the *Class Proceedings Act*⁵.
- (b) The objectives of the *Class Proceedings Act* are:
 - i. Judicial economy and efficiency;
 - ii. Improved access to justice; and

determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

A reference to other provincial statutes⁷ for carriage motions will be cited when discussing those provinces, *infra*.

³ S.O. 1992, c.6, s.13:

The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

⁴ [2000] O.J. 4594 (Ont. Sup. Ct. J.) [*VitaPharm*].

⁵ *Ibid.*, para. 48.

- iii. Behaviour modification of wrongdoers who cause widespread but perhaps individually minimal harm⁶.
- (c) A non-exhaustive list of factors to consider:
- i. The nature and scope of the causes of action advanced;
 - ii. The theories advanced by counsel as being supportive of the claims advanced;
 - iii. The state of each class action, including preparation;
 - iv. The number, size and extent of involvement of the proposed representative plaintiffs;
 - v. The relative priority of commencing the class actions; and
 - vi. The resources and experience of counsel⁷.

In *VitaPharm*, Justice Cumming then decided that there were no factors that made one class or counsel preferable to the other. Instead, Justice Cumming favoured the counsel who provided the least complicated and least expensive approach – namely, pursuing the various and divergent interests in separate actions.

Subsequent cases have affirmed the *VitaPharm* test and have expanded upon the factors that Justice Cumming provided. For example, in *Ricardo v. Air Transat A.T. Inc.*⁸, Justice Cullity commented that with respect to the number, size and extent of involvement of the proposed representative plaintiffs, the number of represented members of a class should be a relevant factor to be considered. Justice Cullity also held that the lead counsel role should be given to counsel who retained the lesser number of plaintiffs⁹. Furthermore, Justice Cullity gave carriage to counsel from Vancouver, instead of counsel from Toronto where the action was to be tried. Justice Cullity reasoned that any increase in the cost of litigation from having lead counsel in another province was offset by the knowledge, expertise, experience, and resources that lead counsel provided.

⁶ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

⁷ These factors were taken from an American text, *Newberg on Class Actions* 3rd ed. s. 9.35 (West Group, 1992), pp.9-96 [*Newberg*].

⁸ [2002] O.J. No. 2122 (Ont. Sup. Ct. J.) [*Ricardo*].

⁹ *Ibid.*, para. 25.

In *Gorecki v. Canada (Attorney General)*¹⁰, the court chose class counsel on the basis that they had started their actions first and that the class of plaintiffs proposed by the other counsel was overbroad; the court doubted whether the other counsel had standing to represent some of their proposed plaintiffs.

On the other hand, the court in *Genier v. CCI Capital Canada Ltd.*¹¹ found a broad claim against several defendants to be a factor in favour of counsel competing for carriage of the action. It should be noted that the broad claim by the chosen lead counsel was only one of the factors the court in *Genier* found favourable. Other considerations were:

- (a) uncertainty of whether one of the defendants' insurers would cover the defendants' losses;
- (b) leading counsel was further advanced in their investigations than the other counsel;
- (c) leading counsel had more experience with class actions and the industry;
- (d) leading counsel had more resources to commit to the action; and
- (e) other counsel had a possible conflict in that one of the representative plaintiffs was a friend of the defendant.¹²

The most recent or controversial case on carriage motions in Ontario was *Settingington v. Merck Frosst Canada Ltd.*¹³ *Settingington* not only applied the *VitaPharm* test but also advanced several other principles to guide decisions of carriage motions. First, the court held that such decisions must use a qualitative, rather than quantitative analysis, in that just because one proceeding names more defendants is not a sufficient basis on its own to award carriage. Second, unless an action is "fanciful or frivolous", a court should assess which claim is more likely to succeed¹⁴. Last, it is incumbent on the representative plaintiffs and their counsel to make full disclosure of all the factors that could impact the determination of the motion.

¹⁰ [2004] 47 C.P.C. (5th) 151 (Ont. Sup. Ct. J.) [*Gorecki*].

¹¹ (2005) 14 C.P.C. (6th) 297. (Ont. Sup. Ct. J.) [*Genier*].

¹² *Ibid.*

¹³ (2006) 26 C.P.C. (6th) 173 [*Settingington*].

¹⁴ This principle was first stated in *Gorecki, supra*, note 11.

With regards to the last principle – conflict of interest – it seems that one counsel failed to disclose to the court that they were representing a group of shareholders seeking damages against *Merck* as well as the putative class members. Justice Winkler reasoned that this was an issue that could rise to the level of a conflict in interest¹⁵. That is, the suit by the shareholders sought significant damages and if successful, could jeopardize the putative class’ ability to recover from *Merck*. This suggests that as securities class action become increasingly mixed with other class actions, the possibility of conflict of interest will become more pronounced.

B. British Columbia

In British Columbia the courts have read the British Columbia *Class Proceedings Act* (“BC CPA”) in conjunction with the *Law and Equity Act* to provide the legal authority to grant a stay on a carriage motion¹⁶. Section 10 of the *Law and Equity Act* reads:

In the exercise of its jurisdiction in a case or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

In *Giles v. Westminster Savings Credit Union*¹⁷, Justice Sigurdson followed the *VitaPharm* test after holding that the Court had jurisdiction under the *Law and Equity Act*¹⁸. What was unique to this case was that one of the actions did not want to proceed under the BC CPA. After following the *VitaPharm* test, Justice Sigurdson found no compelling reason to favour one action over the other. In the end, both actions were allowed to proceed under judicial case management.

¹⁵ *Ibid.* at para. 26-27.

¹⁶ *Law and Equity Act*, R.S.B.C. 1996, c.253.

¹⁷ 2002 BCSC 1583 [*Westminster Savings*]

¹⁸ *Ibid.*, at para. 44.

Following *Westminster Savings*, the British Columbia Supreme Court in *Nelson v. Merck Frosst Canada Ltd.* definitively held that certification was not a requirement in order for a carriage motion to be heard¹⁹.

What can be drawn from the British Columbia cases is that another layer is added to the carriage motion – that of the Court taking jurisdiction on carriage motions before certification of the classes. However, the courts will still follow the basic framework outlined in *VitaPharm*.

C. Manitoba

The most recent decision from Manitoba on carriage motions, *Grasby v. Merck Frosst Canada Ltd.*²⁰, endorses the *VitaPharm* test and adds another issue for counsel to consider when applying for carriage. Like the cases from British Columbia, in this case Justice McKelvey first had to consider the Court’s jurisdiction²¹.

What is of particular interest for this paper is Justice McKelvey’s decision to strike out portions of the affidavit material on the basis that they were too full, complex, and detailed as not to be needed at this stage of the proceedings²². Justice McKelvey further noted that the information in the affidavits “cried out for a response by Merck²³”. In the result, Justice McKelvey held, following *VitaPharm* that, while it is necessary to outline the theories of counsel to be advanced in support of the claims, that factor does not necessitate a full argument of the merits of the plaintiffs’ claim against the defendant²⁴. It is difficult to reconcile this holding with the *Settington* decision which asks the judge to assess which claim is more likely to succeed. That is, if counsel believes it does not require full argument on the merits, and the court decides to assess

¹⁹ (2006) B.C.S.C. 1549, [2006] B.C.W.L.D. 6471, 61 B.C.L.R. (4th) 157 [*Nelson*].

²⁰ [2007] M.J. No. 149 [*Grasby*]

²¹ Justice McKelvey found jurisdiction when reading together *The Class Proceedings Act*; CCSM c.c130, *The Court of Queen’s Bench Act* S.M. 1988-89, c.4, s. 38, 94; and the *Court of Queen’s Bench Rules*, Man. Reg. 553/88, s. 1.04(1), 6.01(1), 6.02.

²² *Grasby*, *supra*, at note 20, para. 79

²³ *Ibid*, at para. 80.

²⁴ *Ibid*, at para. 81.

the likelihood of success of the claims, anything less than full argument may be detrimental to such a decision.

D. The Unique Case of Québec

In 1978, Québec became the first province to introduce class action legislation. These rules were initially based upon Rule 23 of the United States *Federal Rules of Civil Procedure* and on the *Rules of Procedure* in the State of New York²⁵ but have since developed a structure and procedure unique to the province. Statutory authority for class action proceedings in Québec is codified in the Québec Code of Civil Procedure, Book IX (class actions) articles 999 – 1030, and in R.S.Q. Chapter R-2.1²⁶. There are also provisions set out in Article 3137²⁷, as well as Article 67²⁸, which may provide guidance to the court in matters relating to carriage motions brought in Québec.

Québec is an attractive jurisdiction to launch class proceedings for several reasons – not the least of which is the existence of the *Fonds d'aide aux recours collectif* (the assistance fund for class action lawsuits). The mandate of the fund is to help finance class action suits in first instance or on appeal, and to publish information on the filing of class

²⁵ Class Action Law Reform in Québec, online: Fasken Martineau
<[http://www.fasken.com/web/fmdwebsite.nsf/AllDoc/FCA2850DAED1CC4285256CAF00544159/\\$File/C_LASS_ACTION_LAW_REFORM_IN_QUEBEC.PDF!OpenElement](http://www.fasken.com/web/fmdwebsite.nsf/AllDoc/FCA2850DAED1CC4285256CAF00544159/$File/C_LASS_ACTION_LAW_REFORM_IN_QUEBEC.PDF!OpenElement)>.

²⁶ R.S.Q., chapter R-2.1.

²⁷ R.S.Q. c.64, s.3137:

On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

²⁸ 1965 (1st sess.), c. 80, a. 67; 1988, c. 21, s. 66.L

Two or more persons, whose claims have the same juridical basis or raise the same points of law and fact, may join in the same suit. The suit must be instituted before the Court of Québec, if that court has jurisdiction in each of the claims; otherwise it must be instituted before the Superior Court. At any time before the hearing, the court may order that claims joined in virtue of this article be disjoined, if it is of opinion that the interests of justice will thus be better served. Unless the court orders otherwise, unsuccessful co-plaintiffs are jointly and severally liable for the costs.

action suits²⁹. The other Canadian provincial class action regimes do not provide funding to the extent that Québec does. Thus, Québec has arguably become the jurisdiction of choice in which to launch national class action proceedings. To date in 2007 there have been 39 class action lawsuits launched in Québec whereas there have been only 41 class actions commenced in the remaining Canadian provinces and territories³⁰.

Although it appears as though there is a “first to file” rule in Québec, the Court in *Cloutier c. Infineon technologies AG*³¹ did not find that the date of filing automatically confers precedence over other cases and that other factors can be considered in the best interest of the class. While this holding may be vague, it opens the door for Québec to follow a similar analytical framework as that set out in *VitaPharm*.

E. A Practitioner’s Guide

What we can draw from all these cases? Here is our respectful, and we hope helpful, guideline when a lawyer is considering whether to compete for carriage:

1. Be proactive and thorough before beginning any proceeding in a class proceeding.
 - a. Make best efforts to have actual instead of potential plaintiffs.
 - b. Have a proposed schedule of fees drawn up and have the fees compared to market rates.
 - c. Create a budget for the amount of resources that you are willing to spend on any possible proceeding.
 - d. If not in your home jurisdiction, ensure that you have been called to the province or territory you wish to bring the class proceeding in.
 - e. Conflict check: although you have another matter against the same opposing side, be conscious of a possible conflict. For example, if one

²⁹ Online: Justice Québec: <<http://www.justice.gouv.qc.ca/English/ministere/organisation/organism-a.htm#recours>>.

³⁰ Online: CBA <http://www.cba.org/ClassActions/class_2007/main/index/default.aspx>.

³¹ [2006] J.Q. No 5812.

matter is a securities lawsuit that could potentially decrease the assets of the opposing corporate party, that suit may be in conflict with a product liability suit against the same corporate party since both matters could harm the respective abilities to recover from the same corporate party.

2. If your class has yet to be certified, and you wish to bring a carriage motion:
 - a. If not in Ontario, you must first lay out to the court how jurisdiction is permitted under the respective class proceedings acts before certification of the class.
 - b. You do not need to argue the case, and making allegations against the defendant at this early stage may not be advisable. Instead, the focus should be on why your claim best represents the interests of the putative class.
3. On the merits of your carriage motion:
 - a. You should demonstrate competence and experience in not only class-action litigation but also in the subject matter of the class.
 - b. You should demonstrate that you have ample resources dedicated to the matter.
 - c. You should demonstrate that your fee schedule is somehow more advantageous or in the best interests of the class.
 - d. It is debatable whether the claim should be more broad (and include more defendants) or more narrow. What counsel should be prepared for is to present a convincing argument as to why your theory of the case is most appropriate for the interests of the class.

IV. The American Approach: Choosing Lead Counsel

As seen in *VitaPharm*, many of the principles used in class proceedings are drawn from our American counterparts. Having dealt with more cases, and the greater litigiousness of plaintiffs south of the border, many lessons can be learned from the American approach to carriage motions. More importantly, the American experience can

also provide us with an insight into potential problems that may befall Canadian counsel as class proceedings grow in number and importance here.

a. The Federal Rules of Civil Procedure

Most state procedural legislations follow the Federal Rules of Civil Procedure for class actions. Class actions fall under FRCP Rule 23, and the appointment of class counsel fall under subsection (g)³². The key requirements of FRCP Rule 23(g) include:

- Unless a statute provides otherwise, requiring a court to appoint class counsel that also certifies a class;
- The attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class;
- When appointing class counsel, the court must consider:
 - The work counsel has done in identifying or investigating potential claims in the action;
 - Counsel's experience in handling class actions;
 - Counsel's knowledge of the applicable law;
 - The resources counsel will commit to representing the class;
- A catch-all requirement that allows the court to consider any other matter pertinent to counsel's ability to fairly and adequately represent the class; and
- *Where there is more than one applicant for class counsel, the court must appoint counsel who will best represent the interests of the class.*

It is this last portion of FRCP Rule 23(g) that is the part which authorizes the American carriage motion. However, the entire sub-rule resembles the test laid out in *VitaPharm* with regards to the core essentials. In the result, similar factors are considered by the American courts when determining who will act as lead counsel for the plaintiff class. Moreover, it should be noted that FRCP binds a court unless a statute provides otherwise.

³² *Federal Rules of Civil Procedure*, U.S.C. tit. 28 § 2075 (Federal Judiciary, 2006), online: U.S. Courts <<http://judiciary.house.gov/media/pdfs/printers/109th/31308.pdf>>.

In addition to the FRCP, changes in the American judicial system have seen the formation of The Judicial Panel on Multidistrict Litigation, as well as *The Private Securities Litigation Reform Act of 1995*, each of which greatly impact class proceedings in the United States.

b. The Judicial Panel on Multidistrict Litigation

The Judicial Panel on Multidistrict Litigation (MDL Panel) was established in 1968³³. The purpose of the MDL Panel is to “to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary.”³⁴ The role of the Panel has two primary aspects: (1) to determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings³⁵.

It is apparent from the purpose and function of the panel that class-actions in various districts can be consolidated and heard before the MDL Panel. Yet the MDL Panel is still governed by the Federal Rules of Civil Procedure and must follow FRCP Rule 23(g). Therefore the operation of FRCP Rule 23(g) should not change if a class action is consolidated by a MDL Panel.

c. *The Private Securities Litigation Reform Act of 1995*

As mentioned above, the role of the court in determining who is to be the lead counsel under FRCP Rule 23(g) is only displaced when a statute provides otherwise. One such statute that has garnered considerable attention is *The Private Securities Litigation Reform Act of 1995* (PSLRA).

³³ 28 U.S.C. § 1407

³⁴ Online: Judicial Panel on Multidistrict Litigation <<http://www.jpml.uscourts.gov>>.

³⁵ *Ibid.*

In a response to allegedly abusive private securities class action litigation, the United States Congress passed the PSLRA. The goal was to take control away from the lawyers (who allegedly brought baseless lawsuits with the hope of simply extracting settlements) and handing the reins to injured shareholders themselves³⁶. The PSLRA attempts to do this by enacting “provisions for appointment by the court of a lead plaintiff, and approval by the court of lead plaintiff’s selection of lead counsel.”³⁷ One of the criteria for choosing the lead plaintiff is to determine which party has the largest financial interest in the action. Congress apparently hoped that with such provisions large institutional investors would become lead plaintiffs and due to their sophistication, would take a more active role in safeguarding the interests of the plaintiff class instead of the lawyers³⁸. It is debatable whether or not the PSLRA has achieved this goal, but what it has done is create a variety of approaches to choosing lead counsel³⁹.

The PSLRA states that “[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.”⁴⁰ However, “[t]he judgment of a lead plaintiff or proposed lead counsel is not dispositive in the appointment of lead counsel.”⁴¹ In other words, the lead plaintiff shall select lead counsel but this choice is subject to the court’s discretion.

Although the provisions on the PSLRA appear to displace the role of FRCP Rule 23(g) in the selection of lead counsel, when exercising the discretion of the court, judges have looked to FRCP Rule 23(g) as a guideline⁴². As Keith Johnson noted in his article in the *Institutional Investor Advocate*, lead plaintiffs can insulate their selection of lead counsel and pressure the court to give deference by emphasizing these points:

³⁶ John H. Henn, et. al. “The Lead Plaintiff and Lead Counsel Provisions of the PSLRA: A Defense Perspective” (2004) 37 *The Review of Securities & Commodities Regulation* 9 at pg. 83.

³⁷ *Ibid.*

³⁸ Steven M. Pesner & Andrew J. Rossman, “Choosing Lead Plaintiffs Under The Private Securities Litigation Reform Act: Who Shall Lead?” (1999) *Securities Regulation Law Journal*.

³⁹ Keith L. Johnson, “Selecting Lead Counsel in the Midst of Judicial Chaos” (2001) 3 *Institutional Investor Advocate*, online: <<http://www.blbglaw.com/advocate/adv2001Q3.pdf>>. Some US courts, in order to ensure that the plaintiffs indeed benefit from the litigation, have instituted auctions by competing counsel in terms of fees to determine who should become lead counsel.

⁴⁰ 15 U.S.C. § 78u-4(a)(3)(B)(v); 15 U.S.C. § 77z-1(a)(B)(v).

⁴¹ *In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, 222 (D.N.J. 1999).

⁴² *In re Cree, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 23244, *9 (M.D.N.C. 2003).

- Include a process for selecting lead counsel in your lead plaintiff procedures;
- Establish a record to justify the basis for your lead counsel recommendation to the court, including compensation arrangements;
- Provide some mechanism for evaluating competitive market fees in each case, whether by soliciting proposal from law firms or comparing the lawsuit to similar cases where competitive fee levels were established;
- Remember that the goal is to obtain the best “net” outcome for the class and balance qualitative factors (e.g., experience, reputation, case analysis) with quantitative fee considerations;
- Insulate lead counsel selection decisions from political manipulation by including independent participants in the process where such concerns are present; and
- Consider the different methods for setting fees (e.g., negotiated at the beginning or end of the case, set on an increasing or decreasing schedule as the amount of recovery rises, set at a single percentage regardless of recovery amount) and be ready to explain why you think your method is appropriate⁴³.

d. Lessons to be learned from the American Approach

Although there is no Canadian equivalent to the PSLRA, nor is it arguably acceptable for our federal courts to consolidate multi-provincial class actions in a manner similar to the U.S. Federal Court, there are lessons to be drawn from the American approach to choosing lead counsel.

It must first be noted, however, that in the Canadian judicial system, different classes jockeying under the respective class proceedings acts do not necessarily mimic the American game. The usual outcome in Canada is for one class to gain certification and be allowed to proceed in a given province, while having similar class proceedings cooperate or stayed pending the outcome. Nevertheless, the principles of evaluating who

⁴³ *Supra*, at note 39.

should become lead counsel or solicitor of record are quite similar and it is on that basis that American jurisprudence can provide guidance for Canadian practitioners.

With changes to securities laws in Canada, commentators expect class-action lawsuits to be more easily pursued and thus begin to resemble the experience in the United States⁴⁴. If this is true, practitioners would be wise to brace themselves for the same type of legislative and judicial changes which resulted in the passing of the PSLRA. That is, should the judiciary begin to question who controls the litigation, and in effect whether this best represents the class as a whole, importing some rational guidelines would at least make it appear that the best lead counsel has been chosen.

In Canada, a recent concern in the financial sector has been the ever growing fears over asset-backed commercial paper. Now it appears that prominent class-action lawyers, such as Harvey Strosberg, have been monitoring these events and one can only presume it is with an eye for possible cases⁴⁵. Unlike widely-held and publicly-traded securities, these securities, and the derivatives that were mixed in, were predominantly held by institutional investors. It may just be the perfect case for Canadian practitioners to adopt a more American approach when competing to become the solicitor of record for any potential class proceeding.

V. Conclusion

The efficacy of the Canadian national class action system has come under scrutiny recently when multiple class-actions regarding restitution for aboriginals displaced from their communities were settled in December of 2006⁴⁶. The lawsuits took over a decade covering across six provinces and three territories. The duplicity in the proceedings was noted with concern by practitioners and judges across Canada.

⁴⁴ Randy C. Sutton, "Securities Class Actions in Canada: The Dawn of New Era?" (2007), online: <<http://www.acc.com/resource/v8352>>.

⁴⁵ Sandra Rubin, "Class-action guys see profit in subprime mess" (September 5, 2007) *Globe and Mail*.

⁴⁶ Beppi Crossariol, "Class actions" (January 31, 2007) *Globe and Mail*.

Recently, the Canadian Bar Association created The National Class Action Database (NCAD) following a recommendation by a Uniform Law Conference of Canada's Working Group on Multi-jurisdictional Class Actions⁴⁷. The NCAD is an attempt to streamline multi-jurisdictional class actions in the same manner of the US Federal Courts and the MDL Panel. Once a class action is begun, plaintiffs can submit their case to the database describing the subject matter, title, defined class group, as well as the corresponding statement of claim. The NCAD functions as a notice board for practitioners and judges to view the current status of several class proceedings and to coordinate their efforts more. Currently, several jurisdictions have passed practice directions that mandate the use of the NCAD for class proceedings⁴⁸. Judges have endorsed the NCAD if only to ensure access to justice for plaintiffs while attempting to minimize legal costs⁴⁹.

If the judiciary in different provinces cooperate, national class proceedings will become the likely method of most proceedings for class-action lawyers. Suffice it to say, carriage motions and who becomes the solicitor of record will be of ever increasing importance in the future. Following the American experience, and satisfying the *VitaPharm* test, will give potential quarterbacks a reasonable chance of winning the carriage game.

⁴⁷ Online: CBA <<http://www.cba.org/classactions/main/gate/index/about.aspx>>.

⁴⁸ Current jurisdictions with practice directions regarding the NCAD are: British Columbia, Québec Superior Court – Montreal Division, Québec Superior Court – Québec Division, Toronto Judicial Region, Ontario, Yukon, Alberta.

⁴⁹ See Crossariol, *supra*.