SHOPPING FOR JUSTICE:
JURISDICTION AND CLASS ACTIONS IN SECURITIES LITIGATION

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Choice has always been a privilege of those who could afford to pay for it.

Ellen Frankfort

To suggest that Ontario's civil litigation and justice system is expensive is, to say the least, a gross understatement. Absent an unusual combination of personal wealth and market losses so great they are worth pursuing, even to the point of financial ruin, access to speedy and cost effective justice is often an illusion for a substantial portion of Ontario's market participants. This is especially so for thousands of small investors, with broadly-based portfolios, who suffer relatively minor losses as a result of misconduct by market participants. The obvious difficulty is to be noted by the ease with which we deem investor losses 'relatively minor' in the face of individual circumstances and daunting corporate (and often bank-owned) defendants. Put simply, the deck is stacked against most shareholder plaintiffs.

In Ontario, as in other jurisdictions with class proceedings legislation[1], these access to justice concerns are addressed, in part, by the Class Proceedings Act ('CPA'). As the Supreme Court of Canada noted in *Western Shopping Centres Inc. v. Dutton*[2] "class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually." Chief Justice McLachlin reinforced this statement when she stated unequivocally that "without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims."[3] Thus, it is clear that a number of Canadian legislatures and the Supreme Court are quite certain in their conviction that a class action system is necessary to facilitate the bringing of claims within the modern legal framework of overburdened courts and prohibitively expensive litigation.

This raises at least two important questions: Firstly, if 'choice' in securities litigation is defined, at least in part, as the ability of an individual to access his or her judicial 'due', should this opportunity be extended to allow plaintiffs to pursue their rights in the forum

[1] As of the date of publication of this paper the following Canadian provinces have class proceedings legislation: Ontario, British Columbia, Saskatchewan, Newfoundland and Labrador, and Quebec.
[2] [2001] 2 S.C.R. 534
[3] Ibid.

that offers them the greatest likelihood of success? And secondly, has the race to buttress the ability of the individual to litigate their claims, infringed upon the right of the usually corporate defendants to be protected from frivolous and vexatious litigation and in effect doing more harm than good to those very persons whom we were seeking to protect? It is because of these concerns that courts in both Canada and the United States have recently been making odd decisions on jurisdictional and choice of law issues, and it is with these considerations in mind that the author's of this paper consider the impact of these decisions on both the Canadian capital markets and its participants. We hope to provide a little understanding of the conflict and securities law issues in play, the concerns that underlie these issues, and the anticipated impact of the many changes currently on the horizon.

Why a Class Action?: The suitability of class proceedings in the securities context .

As we suggested above, the archetype of the modern investor provides a natural plaintiff for a class proceedings approach to litigation: moderate income levels, modest amounts of capital available for investing and often heavily diversified portfolios will usually give rise to a case where the losses of one do not warrant the costs associated with litigation. Add to this mix a hint of market volatility, perhaps a Nortel and a couple of Bre-X's and Mr. Justice MacPherson's comment in *Carom v. Bre-X* that 'disasters spawn litigation'[4] begins to show the suitability of class proceedings in the securities field. In addition, the 'deep pockets' theory (corporations and banks have lots of money, they can afford to be sued) and the enforcement theory (suing them is an effective means of encouraging the requisite full, true and plain disclosure in the capital markets) also provide plenty of encouragement for pursuing legal remedies as a class.

One final aspect of the suitability of litigating securities matters, by means of a class proceeding, deserves special attention. The 'settlement factor' of class proceedings has made quite the name for itself. We refer, of course, to the infamous American 'strike-suit'. Coined in the 1930's, the term refers to "a derivative action whose nuisance value

[4] MacPherson J.A. in *Carom v. Bre-X* 196 D.L.R. (4th) 344.

gave it a settlement value independent of its merit."[5] Chief Justice Rehnquist of the United States Supreme Court was a little more direct in his description of the strike suit problem when he described them as having "a settlement value to the Plaintiff out of any proportion to its prospect of success at trial."[6]

The Canadian Class Action: Avoiding the Strike Suit.

While strike suits are not purely an American phenomenon, there are aspects of the American legal system which render it more susceptible to strike actions; the most significant of which is the US approach to costs. The widespread availability of contingency fees (allowing counsel to bare the risks) and the responsibility of parties to ordinarily pay their own costs, irrespective of outcome, allows class action plaintiffs to proceed with very little personal risk. More importantly than any inherent legal differences, however, hindsight is always 20/20 so that by the time the Canadian provinces were prepared to enact class proceedings legislation, they had a list of concerns thanks, once again, to our neighbours to the south.

One of the mechanisms employed against the strike suit problem has been the certification process whereby a plaintiff must obtain court approval to commence a class action.[7] Another is the Canadian cost structure which increases plaintiff risk by awarding costs to the winner. Furthermore, while the various provincial acts provide for contingency-based fees[8], the provisions are restrictively drafted (fees must be reasonable) and judicial interpretation has been modest. The 1998 Ontario decision in *Menegon v. Philip Services Corp*[9] provides an example. In this case Crane J. held that a contingent retainer agreement, including a consideration of the reasonableness of the fees payable to counsel, is subject to the unfettered discretion of the Court.

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[5] T. Brandi, "*The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action,*" (1994) Dick L.R. 355 at page 357.

[6] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723.

[7] *Class Actions Act*, Newfoundland and Labrador, s.3; *Quebec Code of Civil Procedure*, Book IX, Title II, Article 1002; *Class Proceedings Act*, British Columbia, s.4; *Class Actions Act*, Saskatchewan, s.4; *Class Proceedings Act, 1992*, Ontario, s.5.

[8] Ontario Act, s.33; Saskatchewan Act, s.41; BC Act, s.38; Newfoundland and Labrador Act, s.38.

[9] [1998] O.J. No 4684

On the American front, changes have been implemented to curb the strike suit problem[10] and while the success of these changes is clearly beyond the scope of this paper, suffice it to say that that the number of class action proceedings has not decreased.[11] In the meantime Canadian courts have been fervent in their attempts to bar strike suit actions: in a recent Ontario decision Cumming J. defined a strike suit as "a class proceeding that is properly regarded as abuse of process,"[12] ultimately determining that the proposed action was brought to benefit entrepreneurial lawyers and nominal plaintiffs rather than the shareholders in whose names it was brought. Nevertheless, fears of a US-style strike bar (what ambulance chasers are to personal injuries, the strike bar is to the capital markets) developing in Canada abound.

Piecemeal legislation: laying the groundwork for jurisdictional disputes.

Class proceedings legislation began in Canada in 1979 in Quebec and, some would argue, ended with the recent Supreme Court of Canada decision in *Western Canadian Shopping Centres*.[13] In the meantime legislation was enacted in Ontario, British Columbia, Saskatchewan and Newfoundland and Labrador. In addition, the Alberta Law Reform Institute published its Final Report No. 85, in December 2000, recommending the enactment of class action legislation in that province. Interestingly, the decision in *Western Canadian Shopping Centres* can be viewed as reinforcing these recommendations while at the same time rendering them somewhat unnecessary. This is due to the fact that the Supreme Court of Canada essentially filled the procedural vacuum in provinces without class proceedings legislation by empowering 'the courts [to] fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them.[14]

However, the court did acknowledge that provinces lacking comprehensive class proceedings legislation do not have access to the same procedural mechanisms as their

[10] Private Securities Litigation Reform Act, 1995; Securities Litigation Uniform Act of 1998.
[11] Tamara Loomis, "Securities Reform: What Went Wrong?" *New York Law Journal*, October 26, 2000.
[12] *Epstein v. First Marathon Inc.* [2000] O.J. No 452
[13] see note 2.
[14] Ibid.

class action-legislated counterparts. For instance, under the various Acts the process of certification prevents a plaintiff from pursuing its action without the approval of the court. This is not the case in jurisdictions without an Act – there, it is up to the defendant to file a motion to strike. Thus, even with the power to fill the gaps it is still, in the Supreme Court of Canada's opinion, advisable for every jurisdiction to have class proceedings legislation.

And so it is, then, that we find ourselves with one issue (the right to bring an action as a class), five different class proceedings acts to address it, and a judiciary encouraged to legislate from the bench. In these circumstances the potential for jurisdictional disputes is quite obvious and given the fact that globalization has produced a market where "modern wrongs do not stop at provincial or even national jurisdictional borders"[15] it is hardly surprising that class action plaintiff's will themselves want to border shop in pursuit of the best remedy. This is known, rather critically, as forum shopping and it is this conduct that best proves the idea that even the most trifling difference between jurisdictions can possibly make all the difference to a potential plaintiff. The limits of this paper also prevent us from undertaking a comprehensive analysis of the many class proceedings acts.[16] However, an understanding of the jurisdictional issues does require, at the very least, some discussion of the concerns that animate these issues. For this reason we will briefly review some of the most substantive differences.

Why Forum Shop?: Cross-Border and Inter-Provincial Diversity in Class Proceedings Legislation.

> "*As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune*."[17]

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[15] Alberta Law Reform Institute, *Work in Progress*, Current Projects: Class Actions.
[16] The following paper by Clint Docken and Andrea Walden contains an excellent compare and contrast chart of the various Acts: "*Canadian Class Action Jurisdictional Issues: Opting IN or Opting OUT?*." Prepared for the Canadian Institute's Calgary Seminar on Litigating Class Actions May 30-31, 2002.
[17] *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 2 All E.R. 72.

Lord Denning's eloquent portrayal of the United States, as a haven for litigants, continues to be an impression that is widely held and we agree. Particularly in the securities field, there are many aspects of the American legal system, in addition to those we touched upon earlier involving costs, that provide plenty of incentive for Canadian litigants to try to establish an American nexus (not the least of which is the proximity between the Canadian and American capital markets).

Secondary Market Trades

The first and perhaps the most significant of these incentives is the claims available under the US system for secondary market trades.[18] Currently none of the Canadian provinces makes provision for a private right of action for purchases in the secondary market. The Ontario Securities Act provides a good example. A gap exists under ss.130 and 131 as they are only applicable to the initial primary market trade. These provisions (which establish civil liability for misrepresentations in an offering prospectus and take-over bid circular respectively) deem the purchaser to have relied on any misrepresentation contained therein. In contrast, secondary market purchasers must resort to the common law, which requires them to show individual reliance on the alleged misrepresentations. The difficulty of every class member, in a potential class of thousands or even tens of thousands, being able to show that they each relied, to their detriment, on a particular misrepresentation, becomes immediately apparent. Furthermore, imagine the logistical nightmare of a court attempting to certify a class on this basis.

Fraud on the Market

This brings us to another material difference between the US and Canadian systems: the fraud on the market theory, so well established in the United States, does not form part of Canadian jurisprudence: *Carom v. Bre-X*. In effect, this theory removes the need to prove individual reliance so long as it can be shown that the alleged misrepresentation acted as

[18] Rule 10(b)5 promulgated under section 10 of the Securities Act 1934 extends protection to the secondary market: *Superintendent of Insurance v. Bankers Life & Casualty Co.* 404 U.S. 6 (1971).

a fraud on the market: *Basic Insurance v. Levinson*.[19] This creates the rather unfortunate situation whereby the less likely an individual is to succeed at showing the requisite reliance, the more incentive there is to find a nexus to the United States. Granted, US courts have been quick to find that a failure to recognize fraud on the market does not render Ontario an inadequate forum.[20] However, this does not preclude a US court from allowing a class action to proceed where a nexus can be established on other grounds. The fact remains that the lack of protection afforded to Canadian purchasers on the secondary market, and the heavy onus on them to show reliance, encourages Canadian litigants to seek refuge in the American system. Not any longer.

Although it has been a long time coming, change is, finally in the works. Acting upon the 1997 report of the Toronto Stock Exchange Committee on Corporate Disclosure (the Allen Report) and the recommendations of the Ontario Securities Commission (Request for Comment, May 1998) Bill 198 was approved in December 2002. This new legislation contains, among other things, a private right of action, against properly authorized individuals, and extends to secondary market trades. So long as the misrepresentation in question is contained in a 'core document' (defined in s.138.1, for example, an annual information form, proxy circular or MD&A) a plaintiff does not have to prove reliance on, or even knowledge of, the misrepresentation. Thus, the concept of deemed reliance, so sought after by Canadian litigants south of the border, will finally be imported into the Canadian legal regime.

In effect, these changes should lessen the desirability of forum shopping by Canadian litigants. At least in so far as the losses of class participants can be traced to a misrepresentation in either documentary disclosure (s.138.3(1)) or public oral statements (s.138.3(2)) the impetus to establish an American nexus has been mitigated.

Common Issues vs. Individual Issues

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[19] 485 U.S. 224 (1988)

[20] *DiRienzo v. Philip Services Corp.* (2000) 6 Int'l Update 166.

There is one final distinction between the Canadian and American systems that we would like to touch upon. This is the common issue/individual issue dichotomy. In the United States common issues must dominate over individual issues: Federal Rule 23 provides that 'an action may be maintained as a class action if … the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.' In Canada, by way of contrast, the relevant consideration in obtaining certification of a class proceedings application is whether one common issue exists that should be dealt with by way of a class proceeding.[21] Thus, in Canada, the existence of individual issues is not fatal to class certification.

There are countless other distinctions between the Canadian and US class action regimes. These differences run the gamut from rudimentary legislative differences (for example the 'numerosity' test of US Rule 23 requires the number of class members to be large enough to preclude the joinder of individual actions, this is not found in any Canadian province[22] excepting Quebec) to differences turning on choice of language and the interpretation thereof (for example the Canadian 'preferable procedure' prerequisite versus the American 'superior method' test). In addition, there are as many significant differences within our borders with each inevitably providing some incentive to forum shop.

Then there are the considerations that arise in respect of class size that are completely separate from any legislative differences between jurisdictions. For instance, a large class will normally be sought by class counsel both for its settlement value and its potential fee value. On the other hand, a defendant will normally prefer a smaller class in the hope that those persons in jurisdictions without class proceedings legislation will lack the financial resources to bring an individual action (since the decision in *Western Canadian Shopping Centres* this is no longer an important consideration in Canada). The opposite will be true where a defendant wishes to settle – here the motivation becomes the broadest case possible so as to obtain the maximum reach of the settlement.

[21] *Abdool v. Anaheim Management Ltd.* (1993) 16 C.P.C. (3d) 141.
[22] In *Peppiatt v. Nicol* (1993) 20 C.P.C. 272 the Ontario Court (General Division) specifically precluded the application of any numerosity requirement in Ontario class action proceedings.

This brings us to the question of how the courts are dealing with the jurisdictional and choice of law issues that are arising out of this patchwork of class proceedings legislation.

Curbing the Urge to Shop: Conflict of Laws Issues Arising in Class Action Proceedings.

The jurisdictional and choice of law issues that arise in the class action context can be viewed as the last bastion against rampant forum shopping by litigants keen on finding the forum most favourable to their desired outcome. As an area of law, Conflicts is, at its simplest, an attempt to answer two questions: where should an action be heard and which law should be applied. Conflict of laws is not a creature of statute. For the answers to these questions we must look to the courts.

Finding Jurisdiction

The determination of the appropriate jurisdiction is actually made up of two parts: firstly, *can* the court decide the case? (*jurisdiction simpliciter*); and secondly, if so, *should* the court decide the case? (is this the most appropriate forum or can it be said that the selected jurisdiction is *forum non conveniens*). In order for a Canadian court to find that it has jurisdiction over a matter, a real and substantial connection must be established between the place of judgment and the events/subject-matter of the action.[23] Nevertheless, as is often the case in securities matters, another jurisdiction may be equally as connected. As the Supreme Court of Canada stated in their seminal decision in *Morguard Investments* "the underlying principles of comity and private international law must be adopted."[24] Mr. Justice LaForest went on the stipulate "that in a federation this implies fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation."[25]

[23] *Morguard Investments Ltd. v. DeSavoye* [1990] 3 S.C.R. 1077.
[24] Ibid.
[25] Ibid.

The impact of this decision cannot be overemphasized. The traditional common law tests of presence and attornment were conveniently replaced with the real and substantial connection test. More importantly, the inability/unwillingness of provinces to give up jurisdiction, which resulted, at best, in a multiplicity of proceedings and at worst in conflicting decisions, was swept away to be replaced by a new willingness to respect the jurisdiction of other forums. Three years later the British Columbia Court of Appeal extended the principles espoused in *Morguard Investments* to foreign judgments thereby encouraging Canadian courts to allow class actions to proceed in the US when it is apparent that it is the more appropriate forum.[26]

In the United States, as the traditional means of determining jurisdiction has evolved, two alternative tests[27] have been articulated by the courts. The first of these tests, known as the 'conduct test'[28], looks to whether the alleged fraudulent conduct occurred in the United States. In *Paraschos v. YBM Magnex*[29] the Court admitted that although the jurisprudence is not clear as to the type of activities required to satisfy this test, the test is based "on the idea that Congress did not want the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."[30] The second test, known as the 'effects test'[31], addresses extraterritorial conduct and its impact on US investors or US securities markets. The US Court of Appeal for the Second Circuit described the test, and its application in the securities context, as follows:

> Impairment of the value of American investments by sales by the issuer in a foreign country, allegedly in violation of the Act, has in our view, a sufficiently serious effect upon United States commerce to warrant assertion of jurisdiction for the protection of American investors and consideration of the merits of the plaintiff's claim.[32]

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[26] *Moses v. Shore Boat Builders* (1993) 83 B.C.L.R. (2d) 177 C.A. Appeal denied, 1994.
[27] It has been held that satisfaction of either test is sufficient to confer subject-matter jurisdiction on the court: *Robinson v. TCI/US West Communications*, 117 F.3d 900 (5th Cir.1997).
[28] *Leasco Data Processing Equip. Corp v. Maxwell*, 468F.2d 1326 (2d Cir.1972).
[29] 2000 US Dist. LEXIS 3829.
[30] *IIT v. Vencap, Ltd*., 519 F.2d 1001, 1017 (2d Cir.1975).
[31] *Schoenbaum v. Firstbrook*, 405F.2d (2d Cir.1968), overruled on other grounds, 405 F.2d 215 (2d Cir.1968)
[32] *Schoenbaum v. Firstbrook*, 405 F.2d 200.

How, then, have Canadian and American courts been handling the barrage of jurisdictional disputes that have arisen with the ever-increasing number of class action suits? In most cases, post-certification jurisdictional issues arise in a class action proceeding in much the same way as an ordinary civil proceeding – that is, the representative plaintiff having obtained certification in the forum of their choice the defendant then seeks a stay on the basis of forum non conveniens. The test to be applied here is that laid out by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*:[33] whether there is clearly a more appropriate forum in which the case should be tried. A recent Ontario decision provides an example of the potential complexities that can arise in the application of this test.

Vitapharm Canada v. F. Hoffman LaRoche[34] involved several class actions, in both the US and Canada, alleging a worldwide price fixing scheme. The defendant's, all multinational corporations based in Europe with subsidiaries in North America, brought a motion challenging jurisdiction on the basis that Ontario was forum non conveniens. In addition, one of the defendant's argued that as they did no business in Canada, there was no real and substantial connection with the jurisdiction and thus Canada lacked jurisdiction simpliciter. The court disagreed, finding that Ontario had jurisdiction to hear the action on the basis that it had the closest connection to the parties.

The Vitapharm litigation gave rise to other interesting decisions as well[35]. For example, a motion brought by the defendant's, seeking to enjoin the plaintiff's from proceeding with a US motion to gain access to documentary evidence from discovery in the US litigation, was dismissed, in part, because US motions should be governed by applicable US law in a US court.[36] We will revisit this issue again in the substantive/procedural context.

How Much is Enough?: Market Activity and Establishing Jurisdiction.

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[33] [1993] 1 S.C.R. 897.
[34] *Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* [2002] O.J. No 298.
[35] This litigation gave rise to the first Canadian carriage motion, whereby counsel vied for the right to represent class members in litigation: *Vitapharm Canada Ltd. v. F. Hoffman LaRoche Ltd.* (2000) 4 C.P.C. (5th) 169 (Ont. Gen. Div.).
[36] Ibid.

The following two American decisions dealt with the issue of how much market activity is enough for a court to find it has jurisdiction. *McNamara v. Bre-X Minerals*[37] involved actions brought by shareholders in both the United States and Canada. However, the American action sought to include Canadian shareholders and the defendant's objected on the basis that the American court had no jurisdiction to consider such claims. The court agreed finding that there was insufficient conduct in the United States to enable the Canadian plaintiff's to base a claim on US securities laws. In particular the court noted that "not a single Canadian plaintiff has alleged that he or she relied on (or was even aware of) any statements, reports or filings which emanated from the United States."[38]

This decision can be contrasted with that in *Paraschos v. YBM Magnex International*[39] where the court initially allowed the Canadian plaintiff's to pursue US statutory remedies even though the defendants successfully showed "that many of the legal issues in this case arise from circumstances that are transnational (Canadian) in nature." Justice Newcomer stated his decision to take jurisdiction as follows:

> …the reasons for maintaining jurisdiction of this case are more compelling. To the extent that subject matter jurisdiction over this case is proper, plaintiffs, even foreign plaintiffs, should be permitted to bring their claims in the forum of their choice. More importantly, the deciding factor for this Court is plaintiff's choice of law. The Canadian plaintiffs bring their claims under US securities law, not Canadian law.[40]

This decision was not, however, destined to last. Within a matter of months a series of subsequent events[41] and a consolidation motion, brought before the same judge, culminated in the US action being stayed "in deference to Canadian law and the Canadian courts on the basis of international comity."[42] In particular, the court noted that "the overwhelming evidence of Canada's interests in this action dictates that the Court defer

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[37] 32 F. Supp. 2d 920 (January 7, 1999 E.D. Tex, Texarkana).
[38] Ibid.
[39] May 29, 2000. E.D. Penn.
[40] *Paraschos v. YBM Magnex Int'l Inc.*, 2000 US Dist. LEXIS 3829.
[41] Including, but not limited to, the addition of seven additional Canadian defendants.
[42] *Paraschos v. YBM Magnex Int'l Inc.*, May 29, 2000. E.D. Penn.

to the Canadian legal system."[43] This decision is hardly surprising given the fact that the magnitude of Canadian interest in this case was indisputable: YBM was incorporated in Canada under Canadian law, with its registered office in Canada; the company was not registered on any US stock exchanges; and the majority of the parties, plaintiffs and defendants alike, are Canadian.

Choice of Law

Once a court decides to take jurisdiction over a matter a second determination must be made in respect of the law to be applied. Generally speaking, it is up to the parties, and the parties alone, to bring foreign law to the attention of the court. If this is not done the court is entitled to assume application of the *lex fori* (law of the forum). This does not, however, apply to procedural law, which is always the law of the forum, and thus it does not apply to class proceedings legislation, which is procedural. This has complicated the jurisdictional disputes considerably.

The caselaw provides some insight into the difficulties being experienced by the courts in this area. In *DeRienzo v. Philip Services*[44] the plaintiff's sought to commence a class action in the United States on the basis that the fraud on the market theory was not available in Canada, thereby rendering Ontario an inadequate forum. The court rejected this argument on the basis that procedural differences do not an inadequate forum make. This created the rather unfortunate circumstance that a plaintiff who could not prove the reliance required in Canada was unable to pursue his options elsewhere on the basis that those requirements were merely procedural. Yet, a defendant who is subject to another jurisdiction still has the benefit of any substantive defences available in other jurisdictions.[45]

Freedom of Choice vs. Certain Chaos

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[43] *Paraschos v. YBM Magnex Int'l Inc*., 2000 US Dist., 130 F.Supp. 2d 642, Decided December 5, 2000.
[44] (2000) 6 Int'l L. Update 166.
[45] *Harrington v. Dow Corning* (1996) 22 B.C.L.R. (3d) 97.

At the beginning of this paper we posed two questions. The first, raised the issue of a plaintiff's freedom to have their action heard in the forum of their choice. The second, addressed the possibility of defendant's being harassed by unnecessary and unsubstantiated actions. The answer, we suggest, lies somewhere in the middle. The positive effects of a system that encourages access to justice are obvious: defendant's, particularly larger-than-life corporate entities, are called to account for their actions, or risk being found liable in massive, financially troubling or devastating, class action suits. On the other hand, defendant's have a right to be protected from a barrage of groundless actions and from the vagaries of jurisdictional disputes. In addition, there are other considerations that come to bear. Most importantly, once a forum takes jurisdiction it is absolutely essential that that jurisdiction then controls the entire action, thereby avoiding a multiplicity of proceedings. Furthermore, once a decision is rendered in one jurisdiction, it is just as essential that that judgment is recognized in other jurisdictions so as to allow both plaintiffs and defendant's some finality.

There ought to be a simpler approach. For example, what would happen if US and Canadian courts required the action to go forward in the jurisdiction where the shares of the issuer are listed and posted for trading (i.e. usually Ontario and New York)? The Canadian plaintiff's would sue in Ontario while the American plaintiff's would sue in New York. Then, these two courts would try to cooperate in a manner similar to those found in the new Bankruptcy and Commercial Court cross-border mechanisms. Yes we are well aware that there are many problems associated with this approach: timing, damage calculations, enforcement and collection are only a few examples. But unless and until we have some sort of international court of Commercial Justice, any coordinated approach to jurisdiction is surely better than the current regime. Or is it? You decide.