The National Class as Extraterritorial Legislation

Jeffrey Haylock

University of Cambridge

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This article argues that provincially constituted multijurisdictional class actions violate the constitutional law of extraterritoriality. It begins with a brief overview of the law of adjudicative jurisdiction, then provides a longer overview of the separate body of law that imposes extraterritorial limits on substantive provincial legislation. The author then demonstrates the substantive character of class action legislation, which necessarily entails the applicability of the law of extraterritoriality. However, much of the relevant jurisprudence, as well as some of the relevant academic literature, has ignored this important issue. Application of the law of extraterritoriality does, indeed, raise serious constitutional concerns, as the article's central section demonstrates. The desirable efficiencies of national classes may, however, be largely preserved through the use of co-ordinated parallel provincial classes. These have already worked in practice, and the flexibility of existing class action legislation can easily accommodate them.

* The author holds an Honours B.A. from the University of Toronto, an LL.B. from Dalhousie University and an M.Phil. from the University of Cambridge, where he is currently pursuing an LL.M. He expresses heartfelt thanks to Professor Vaughan Black for his insightful help with this project. [Ed. note: This paper was awarded the 2009 Tory Award for Excellence in Legal Writing at the Dalhousie University Schulich School of Law.]
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Introduction

La Forest J. wrote that the subject matter in *Hunt v. T&N plc* lay "at the confluence of private international law and constitutional law." The same could be said of this article. Soon after the common law provinces began to pass class action legislation, multijurisdictional classes emerged. Predictably, a sizeable body of Canadian scholarship on the subject

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followed. Much of this scholarship discusses the constitutionality of national classes from the perspective of court jurisdiction; so do the cases. For many, the issue seems to have been put on the back burner. In Canada Post Corp. v. Lépine, LeBel J. implicitly accepted the constitutionality of national classes by writing that “the need to form...national classes does seem to arise occasionally,” while in Bondy v. Toshiba of Canada Ltd., Brockenshire J. recently wrote that “national class actions are now very much an unremarkable part of class proceedings litigation.” However, other voices, most notably the Québec Court of Appeal in Hocking c. Haziza, have recently resurrected the constitutionality of national classes as a live issue. This article aims to add to recent discussion of this topic, by suggesting deficiencies in the analyses that established national classes’ constitutional security.

After a broad overview of the relevant law, this article will show how the case law and the surrounding scholarship have largely limited

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their treatment of the constitutional implications of the national class to
discussion of the constitutional limits on jurisdiction that have emerged
from Morguard v. De Savoye\(^6\) and Hunt v. T&N plc.\(^7\) This narrow focus
has missed something important. It has ignored the important implications
of the Supreme Court’s recent jurisprudence on extraterritoriality.\(^8\) An
application of this law to class actions’ preclusive effects on claims
will raise serious questions about provinces’ ability to create national
classes, at least on an opt-out basis. It is an unsatisfying result, but one
that is unavoidable. The article will conclude by suggesting a partial—if
imperfect—way forward.

I. A Morguard refresher
Whether in the law journals or in the courts, almost every Canadian
analysis of the interaction between national classes and the constitution
has focused on Morguard. The main point of this article is that this
has been a mistake—that an undue focus on the constitutional issue of
adjudicative jurisdiction has obscured the equally relevant constitutional
issue of extraterritoriality. However, because of Morguard’s central place
in Canadian thinking on national classes, almost everything that follows
in this article necessarily presupposes familiarity with that case, and its
constitutionalization in Hunt.\(^9\)

Morguard was a case about the recognition of interprovincial judgments.
In it, La Forest J. revolutionized the field, considerably expanding the
old common law test.\(^10\) He determined that within a federal state such
as Canada, courts should extend “full faith and credit” to the judgments
of their extra-provincial counterparts, provided that the action enjoyed a


\(^{7}\) Hunt, supra note 1.

\(^{8}\) Principally Unifund Assurance Co. v. Insurance Corp. of British Columbia, 2003 SCC 40,
[2003] 2 S.C.R. 63 (Unifund); British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49,
(Castillo).

\(^{9}\) Hunt, supra note 1.

\(^{10}\) Before Morguard, the basic rule, shorn of its nuances, was that the court of one province would
recognize the judgments or orders of a court in another if the defendant in that latter court had been
served within its territorial jurisdiction, or had attorned to its jurisdiction by participating in the
proceedings. See, for example, Emanuel v. Symon, [1908] 1 K.B. 302 (C.A.).
“substantial connection with the jurisdiction where the action took place.” Consideration of the appropriate circumstances of enforcement also led La Forest J. to consider the circumstances under which a court could exercise jurisdiction in the first place. In his opinion, the two questions had the same answer, and original and enforcement jurisdiction should be seen as co-extensive: “It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties.”

In Morguard, La Forest J. alluded to the possibility of jurisdiction and enforcement as constitutional matters, but he declined to decide on the matter definitively. In Hunt, he took the matter head on. In declaring a Québec statute inapplicable because it purported to block discovery in a British Columbia case and thus to prevent enforcement of a British Columbia order, La Forest J. confirmed that the principles enunciated in Morguard were, indeed, principles of the Canadian constitution. The requirements of enforcement were “constitutional imperatives.” The Québec statute was therefore constitutionally inapplicable to the orders of other provinces. With regard to adjudicative jurisdiction, La Forest J. wrote that “courts are required, by constitutional constraints, to assume jurisdiction only where there are real and substantial connections to that place.”

II. The law of extraterritoriality

This article is in large part concerned with the boundaries that limit the scope of provincial legislation. The subject matter that falls under the provinces’ purview is to be found, of course, in s. 92 of the Constitution Act, 1867, which is subject to the general geographical limit of “In each Province.” Because I am concerned with class actions’ preclusive effect on absent class members’ civil rights, the provision of real interest here is

11. Morguard, supra note 6 at para. 52. Although it lies outside the scope of this article, it should be noted that the recent judgments in Hocking, supra note 5; and Lépine, supra note 3 indicate that in the context of class actions, Canadian courts (or, at least courts applying the Civil Code of Québec, S.Q. 1991, c. 64, Articles 3155 and 3164) may be open to considering issues of procedural fairness even within Confederation. For an example of a Canadian court refusing enforcement in Ontario of an American class action settlement for reasons of adequate notification (which the Court imports into the test for adjudicative jurisdiction simplicitier) see Currie v. McDonald’s Restaurants of Canada Ltd., [2005] 74 O.R. (3d) 321 (C.A.).


13. Morguard, ibid. at paras. 39 and 52.

14. Hunt, supra note 1 at para. 56.

15. Ibid. at para. 63.

Along with s. 92’s general introduction to the provincial heads, this subsection reads as follows:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein after enumerated; that is to say,—

(13) Property and Civil Rights in the Province.

The section betrays an emphatic concern to limit the territorial reach of legislation—a concern that characterized nineteenth-century theories of legislative power. Austen Parrish writes that before the rise of American legal realism in the early twentieth century, the field of private international law was dominated by the theory that all rights vested in a particular jurisdiction. The discovery of where rights were vested was choice of law’s primary goal. The theory of territorial vesting also had consequences for the scope of legislative authority: as a concomitant of its sovereignty, a legislature had the sole authority to create, alter or annihilate rights located within its territorial purview. Section 92 of our constitution might fairly be thought of as a constitutionalization of these modes of thought: in the field of provincial competency, nineteenth-century thinking has been the starting point for Canadian jurisprudence and has remained the touchstone.

In Churchill Falls, McIntyre J. analyzed the constitutionality of a Newfoundland statute that terminated a contract between Hydro-Québec and a federal corporation that had developed hydro resources at Churchill Falls, Labrador, granting the former the right to almost all of the electricity generated at the site. The Newfoundland Court of Appeal had found the Act to be intra vires the province, but the Supreme Court overturned that ruling on the grounds of extraterritoriality. McIntyre J.’s analysis of the issue took the traditional form of a “pith and substance” analysis. Formulated to take into account extraterritorial concerns, this requires that a court determine the enactment’s central subject matter, as well as the location of that subject matter. It will be noted that this analysis depends on

17. Ibid., s. 92(13).
the notion that all subject matters—including intangible civil rights—have roots in a particular jurisdiction. Incidental effects on extra-provincial rights are permissible, but where in pith and substance legislation affects such rights, it is *ultra vires* the enacting province. The analysis in this particular case referred to the pith and substance of an entire statute, but McIntyre J. implied elsewhere that particular sections might also be severed from otherwise valid legislation by reason of their being aimed at extraterritorial subject matter.

In applying the test, McIntyre J. found that the act in pith and substance derogated from Hydro-Québec’s contractual rights, which it fell to him to locate. In order to do this, he applied traditional choice of law rules: because the contract provided that the Québec courts were to have jurisdiction over any disputes arising under the contract, the rights’ location was Québec. The Newfoundland legislature could not legislate with respect to them, and the act was *ultra vires*.

Decided several years after *Morguard*, *Unifund* briefly left some uncertainty about the status of *Churchill Falls*’ pith and substance approach to extraterritoriality. In *Unifund*, the respondent was an Ontario insurer of faultless Ontarian victims of an automobile accident that had occurred in British Columbia. The respondent sought contribution from the British Columbia insurer of a British Columbian driver who was at fault in having caused the accident. The Ontario legislation would have allowed such contribution; British Columbia legislation would not have. The question was whether the Ontario statute was applicable to this situation.

Writing for the majority, Binnie J. began his analysis by referring to *Morguard*, which he acknowledged to be a case not about extraterritorial applicability, but about adjudicative jurisdiction. *Morguard*’s principles, however, could still inform an applicability analysis. He wrote,

> Consideration of constitutional applicability can conveniently be organized around the following propositions:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;

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28. In a dissenting judgment, Bastarache J. applied the pith and substance analysis of *Churchill Falls*, supra note 20, and found the Ontario legislation to be constitutionally applicable, reasoning that it affected extraprovincial rights only incidentally.
2. What constitutes a “sufficient” connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;

3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;

4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.\(^{29}\)

After setting out these considerations, Binnie J. made clear that the connection needed to support legislative jurisdiction was stronger than that needed under Morgard to support adjudicative jurisdiction. Such are the requirements of territorial sovereignty.\(^ {30}\)

As Edinger and Black point out, Binnie J. then continued by interpreting numerous Canadian extraterritoriality cases as instantiations of the “sufficient connection” principle.\(^ {32}\) In locating specific rights, past cases seemed, really, to be determining the jurisdiction to which those rights had the closest connection. Edinger and Black further point out that “[t]he majority appears to believe that it is possible to use Morguard to create watertight territorial compartments to which entities are allocated and by whose regulatory regimes all activities will be regulated.”\(^ {33}\) This suggests that the majority had in mind a kind of strong Morguard test: a statute is constitutionally applicable if its enacting province enjoys the most real and substantial connection to the matter in issue.

The extent to which Unifund’s Morguard-inspired approach would penetrate into the law of constitutional extraterritoriality was uncertain for several years following.\(^ {34}\) In 2005, Imperial Tobacco\(^ {35}\) confirmed that the pith and substance approach would remain the standard mode of analysis in determining the validity of statutes impugned for extraterritorial effect. This approach, however, would benefit from Unifund’s insights.

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\(^{29}\) Unifund, supra note 8 at para. 56.

\(^{30}\) Ibid. at para. 58.


\(^{32}\) Unifund, supra note 8 at paras. 63-66.

\(^{33}\) Edinger & Black, supra note 31 at 182-183.

\(^{34}\) Edinger & Black, ibid. at 163 write that “Unifund’s implications are anything but clear. It may turn out to be a relatively unimportant decision with little impact outside the field of interprovincial automobile insurance law. Or it could come to stand as a significant turning point, especially in the law pertaining to judicial scrutiny of the territorial limits on provincial regulatory statutes.”

\(^{35}\) Imperial Tobacco, supra note 8.
The case concerned a British Columbia statute that granted the provincial Crown a right of action against tobacco companies for recovery of tobacco-related health care costs. The tobacco companies were liable only for activities that constituted breaches of duties owed to people in British Columbia. One of the three questions before the court was whether the statute was ultra vires the British Columbia legislature by reason of extraterritoriality. Writing for a unanimous court, Major J. answered in the negative. To begin his analysis, he set out the standard Churchill Falls pith and substance test, which looks first to the legislation's "essential character or dominant feature." It is once this pith and substance has been determined that Unifund enters the picture. Major J. cast a view to Churchill Falls through Unifund spectacles:

In Churchill Falls, an examination of those relationships [viz., among the enacting territory, the subject matter of the law and the persons subject to the law's regulation] indicated that the intangible civil rights constituting the pith and substance of the Newfoundland legislation at issue were not meaningfully connected to the legislating province, and could properly be the subject matter only of Quebec legislation. This statement reinforces the proposal above that Unifund was articulating a kind of strong Morguard test, perhaps akin to the "closest and most real connection test" that the common law employs in deciding choice of law in contract. This test will ensure the fulfilment of s. 92's dual purpose, "namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories." Major J. then went on to apply these principles to the impugned legislation, finding that "no territory could possibly assert a stronger' relationship to that cause of action than British Columbia." Churchill Falls' notion that intangible rights do have locations was thus retained, but the analysis for ascertaining

37. Imperial Tobacco, supra note 8 at para. 10.
38. Ibid. at para. 25. The other two questions, which do not concern this article, were whether the act unconstitutionally interfered with judicial independence, and whether it unconstitutionally offended the rule of law.
39. Ibid. at para. 29.
40. Ibid. at para. 35.
42. Imperial Tobacco, supra note 8 at para. 36.
43. Ibid. at para. 38.
these locations was transformed from one rooted in choice of law into one rooted in connections.44

Bastarache J.’s concurring minority judgment in Castillo further clarified how the Imperial Tobacco “meaningful connection” test for legislative scope works in practice, and what it applies to. Castillo dealt with the constitutionality of an Alberta statute, s. 12 of which read as follows:

12. The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.45

Major J. interpreted the statute as merely curtailing Alberta adjudicative jurisdiction over still-viable foreign actions that would be time-barred by Alberta limitation periods. The act had no effect on the substantive validity of the claim; it was simply a “legislative policy” limiting the circumstances under which Alberta courts would entertain claims governed by foreign law.46

Bastarache J., alone in his judgment, declined to decide between two possible interpretations of the section. The first of these was Major J.’s. The second was that the section represented an attempt on the part of the Alberta legislature to get around Tolofson, which had decided that in a tort action, limitation periods, like all substantive law, should be assessed under the lex loci delicti.47 Under this second interpretation, the statute purported to extend the benefit of longer Alberta limitation periods to claims that, under choice of law rules, would be time-barred by the lex causae. Either way, Bastarache J. believed that the law had serious implications for extraterritorial substantive rights. He applied the test that Imperial Tobacco laid out. His view of the test was as follows. First the court must determine the pith and substance of the section and the head of power under which it falls. If this head of power is provincial, the court must then consider whether this pith and substance enjoys a strong relationship among the “enacting territory, the subject matter of the legislation and the persons made subject to it” and also whether the section “pays respect to the legislative sovereignty of other territories.”48

45. Limitations Act, R.S.A. 2000, c. L-12, s. 12.
46. Castillo, supra note 8 at para. 5.
48. Castillo, supra note 8 at para. 33.
Following Tolofson’s characterization of limitation periods as substantive, Bastarache J. found that in pith and substance s. 12 of the act related to civil rights under s. 92(13) of the Constitution Act, 1867.\textsuperscript{49} The Alberta Legislature could not simply re-classify limitation periods as procedural to bring them under its jurisdiction per s. 92(14), “Administration of Justice in the Province.”\textsuperscript{50} Because laws relating to limitations are substantive, they are subject to the Imperial Tobacco’s test for the location of intangible civil rights. Bastarache J. therefore sought a meaningful connection between Alberta and the affected right. Significantly, he was careful to articulate that “a real and substantial connection is not equivalent to a meaningful connection as defined in Imperial Tobacco.”\textsuperscript{51} A “meaningful connection” requires something more. He noted, further, that “[t]he parties are making arguments that, should they be accepted, would bring this court to conflate the constitutional threshold for adjudicative jurisdiction and the constitutional threshold for legislative jurisdiction.”\textsuperscript{52} The only connection that Bastarache J. could find between this substantive provision and the enacting jurisdiction was a “real and substantial” one: it applied whenever Alberta could properly take jurisdiction over a foreign claim. This was not enough.

Bastarache J. believed that regardless of how it was interpreted, the section purported to affect one of the parties’ rights. If Major J.’s interpretation was correct, it destroyed a plaintiff’s right to bring suit. If the Tolofson-dodge interpretation was correct, it destroyed a defendant’s right to be free from suit, while reviving the plaintiff’s dead substantive claim.\textsuperscript{53} Despite the questionability of his conclusion on the former interpretation,\textsuperscript{54} Bastarache J.’s conclusion on the latter interpretation seems unarguable, and for our purposes is the real point: the strictures on extraterritorial effect disallow the alteration of substantive claims arising in other jurisdictions.

A quick summary of the current Canadian law on provincial legislation’s extraterritorial effect is as follows. Because of s. 92 of the Constitution

\textsuperscript{49} Ibid. at para. 35. Constitution Act, 1867, supra note 16, s. 92(13).
\textsuperscript{50} Castillo, supra note 8 at para. 37; Constitution Act, 1867, supra note 16, s. 92(14).
\textsuperscript{51} Castillo, ibid. at para. 41.
\textsuperscript{52} Ibid. at para. 44. See also Edinger, supra note 44 at 310 on this point in Bastarache J.’s judgment. Unifund, supra note 8 at para. 58, has similar things to say.
\textsuperscript{53} Castillo, ibid. at para. 47.
\textsuperscript{54} Declining to hear a case does not amount to destroying a substantive right, at least when there are other—probably more appropriate—forums to hear the action. Major J.’s interpretation of the act gives it the effective function of forcing the Alberta court to declare itself to be forum non conveniens where its limitations periods would preclude the action if it were governed by Alberta law. The claim itself is still valid, and not subject to any judgment that would preclude suit elsewhere.
Act, 1867, provices legislate on matters “In each Province.” If a provincial statute or a section thereof is challenged on the grounds of extraterritoriality, the court will first ascertain the legislation’s pith and substance. Assuming that this pith and substance falls under a s. 92 provincial head of power, the court will then determine whether the pith and substance has a “meaningful connection” to the enacting jurisdiction. This connection is significantly stronger than the connection needed to validate adjudicative jurisdiction. Legislation’s constitutional validity requires, too, that it not trench on other provinces’ sovereignty. What this really all requires is the province’s having a connection to the subject matter that is closer than that of any other province. Even if a statute or section is found in pith and substance to relate to matters “In each Province” and therefore to be valid, it may be found to be constitutionally inapplicable to subject matter to which it applies on its wording, but which is more meaningfully connected to another jurisdiction.

III. Class actions as substantive law
Extraterritoriality concerns have received such short shrift in Canadian jurisprudence in part because of the unscrutinized assumption that class actions do not create or derogate from substantive rights. Writing in Carom v. Bre-X Minerals Ltd., Winkler J. (as he then was) was dismissive of the possibility that class action statutes have substantive effects:

The CPA [Class Proceedings Act] is an entirely procedural statute. The statute confers broad powers on the case management judge including the jurisdiction to hear all motions in the proceeding. However, the Act confers no substantive rights[.]

The understanding Winkler J. evinces in Bre-X is initially plausible. Craig Jones captures the argument well:

Class proceedings are a means to a remedy, and most provisions in the relevant legislation are not designed to affect substantive rights. They do not make conduct that was previously lawful unlawful, they simply permit a different avenue of recourse and, in so doing, engage the economic advantages of aggregation in a way that will substantially (indeed in many cases overwhelmingly) affect recovery.

55. Constitution Act, 1867, supra note 16.
56. For a discussion between the difference between validity and applicability, see Unifund, supra note 8 at para. 67, where Binnie J. refers to the appellant’s argument about this distinction, and, to all appearances, assumes it to be correct.
Provincial class action statutes do not determine which substantive law will determine the outcome of actions. In a multijurisdictional class action, courts will apply standard choice of law rules to each claim. All that class actions do, so the argument goes, is give pre-existing substantive rights their day in court by allowing the aggregation of litigation costs.

This article's position, however, is that class actions do have effects that fit within the law's understanding of what makes law substantive. On this point, Tolofson is instructive. One of the more specific questions that case had to answer was whether the law of limitations should be characterized as substantive—in which case the limitation period of the place of the tort was applicable—or procedural—in which case the limitation period of the forum was applicable. The traditional common law position had been that limitation periods related not to rights but to remedies, and so were procedural law. In contrast, the civilian tradition held that "all statutes of limitation destroy substantive rights." La Forest J. denied the continuing relevance of the old justifications for the common law approach and cited relatively recent Canadian cases that had been "chipping away" at the old rule by considering limitation periods as vesting rights against suit in the defendant. La Forest J. made clear in Tolofson that from that point forward, limitation periods would be considered substantive in Canadian law.

Like limitation periods, class actions have preclusive effects on claims. All class action regimes in Canada operate on an opt-out basis within the province. This means that all residents fitting a class definition are considered to be class members unless they take some positive step, as defined by the court, to pull themselves out. The legislation in Ontario, for example, provides as follows:


61. Tolofson, supra note 47.

62. Ibid. at para. 80.

63. Ibid. at para. 81.

64. Ibid. at paras. 82-85.
9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.65

All provincial class action legislation contains a similar provision. Consent to membership, then, is not based on any positive action, but is instead inferred from silence.66

The effect of opt-out class actions is not only that potential plaintiffs are able to benefit from the results of a court decision or settlement without having to take any active steps; potential plaintiffs who have not positively opted out are also barred from bringing future suits once a claim has been resolved. The relevant sections of the Ontario Class Proceedings Act are these:

17. (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

... 

(6) Notice under this section shall, unless the court orders otherwise,

... 

(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding.

27. (2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

65. Class Proceedings Act, S.O. 1992, c. 6, s. 9.
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(c) relate to relief sought by or from the class or subclass as stated in the certification order.

29. (3) A settlement of a class proceeding that is approved by the court binds all class members.67

These provisions mean that provincial class action legislation grants courts the power to preclude class members from bringing any further claims against defendants.

Some commentators have suggested that the real usefulness of notice is to raise awareness of the action among enough plaintiffs to ensure adequacy of representation.68 Canadian courts, however, have generally seen notice as the means by which to procure plaintiffs’ consent—actual or constructive—to join the aggregated claim. This thinking applies equally to non-residents. Writing for the Ontario Divisional Court, Zuber J. wrote in Nantais v. Telectronics Proprietary (Canada) Limited that “It is clear that the Ontario legislature and the Ontario courts are not simply imposing jurisdiction on non-residents. Those outside the jurisdiction who are included in the class are free to opt out in the same manner as those inside Ontario may do.”69 This demonstrates an understanding of opt-out rights as creating the needed voluntariness for a court to take jurisdiction over and determine the outcome of a plaintiff’s substantive claim.

Courts’ reliance on opt-out rights to create the consent needed to justify the application of res judicata seems poorly grounded. Courts are willing to accept figures of less than 100% actual notice. In Currie v. McDonald’s Restaurants of Canada, a case that refused enforcement of an Illinois multijurisdictional settlement, Sharpe J.A. wrote that “if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of notice afforded to the unnamed plaintiff.”70 It is nearly impossible, however, to notify every affected party of the suit. Courts will accept some degree of failure of notification as the price to be paid for the benefits of class actions. The facts in Currie were that only about 30% of potential Canadian plaintiffs would have received

67. Ontario Class Proceedings Act, supra note 65, ss. 17, 27 and 29.
68. See Fiss, supra note 60. For an example of a statutory provision relating to notice, see the Ontario Class Proceedings Act, supra note 65, s. 17.
70. Currie, supra note 11 at para. 28. See, too, Hocking, supra note 5; and Lépine, supra note 3 for similar expressions of an understanding of notice as a means of procuring consent. Jones (2003), supra note 2, argues that the wide discretion that Canadian class action statutes grant to courts in crafting notice may indicate what he calls a “public law,” rather than a “private law” purpose for notice. However, Canadian courts have been consistent in emphasizing the latter.
notice of the American action, as opposed to 72% of American plaintiffs.\textsuperscript{71} The former number was too low for Sharpe J.A. to accept that Ontarians had been afforded a reasonable option to opt out, but all indications were that he would have found the latter figure to be acceptable. Furthermore, as Theodore Eisenberg and Geoffrey Miller have demonstrated, in a typical class action, fewer than 1% of potential class members exercise their opt-out rights.\textsuperscript{72} They write:

If class members only rarely object or opt-out, we might infer that in many cases the right to opt-out is not very meaningful for class members. This fact would seem to somewhat undermine the value of these rights, as well as the functions allocated to them under existing law.\textsuperscript{73}

Nagareda reports similarly low figures for settlement take-up rates—a fact which is even more revealing.\textsuperscript{74} Many class action plaintiffs simply do not know that their rights are being adjudicated, altered or vindicated. This means that the court is willing to interfere with and alter the rights of entirely unwitting parties.

Courts’ power to terminate substantive rights in class actions therefore do not come from plaintiffs’ approaching the court to resolve their claims. It does not even come from plaintiffs’ declining to pull out of an action. It comes simply from a statute, which itself therefore affects plaintiffs’ substantive rights. It is this concern which seems to be animating the recent decision in \textit{Frey v. Bell Mobility Inc.}, in which Gerein J. refused an application to modify a certification order to include an opt-out extra-provincial class. Gerein J. decided that Saskatchewan’s recent introduction of opt-out extra-provincial classes into its class action jurisdiction was a substantive change, reasoning, “[u]nder the initial situation, a person could participate as a plaintiff only if that person positively expressed a desire to do so. Now that person is automatically included by reason of a unilateral action by the court.”\textsuperscript{75} Further reasoning

\textsuperscript{71} Currie, \textit{ibid.} at 35. In \textit{Dutton, supra} note 60 at para. 49, McLachlin C.J. wrote that the enforceability of a class action may demand 100% notification, but made no definitive pronouncement on the question.
\textsuperscript{73} \textit{Ibid.} at 1531.
\textsuperscript{74} See Nagareda, \textit{supra} note 66 at 644-645 for discussion.
that substantive statutes do not have retroactive effect unless there is clear legislative intent to the contrary, Gerein J. dismissed the application.\textsuperscript{76}

It should be noted that for extraprovincial classes some provinces make provision for opt-in, rather than opt-out classes. For example, s. 16 of the British Columbia Class Proceedings Act, reads as follows:

\begin{quote}
16. (2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.\textsuperscript{77}
\end{quote}

Opt-in provisions require active attornment on the part of plaintiffs. On the above analysis, they are therefore better regarded as procedural provisions providing for jurisdiction than as substantive provisions allowing courts to alter substantive rights under the power of statute.

A second way in which class action legislation affects substantive rights is by suspending the operation of limitation periods. For example, s. 28 of the Ontario act states that once a class proceeding begins, limitation periods are suspended for all class members unless they opt out, their certification motion fails or the class proceeding is dismissed, abandoned or settled. Upon such occurrence, a limitation period picks up where it left off.\textsuperscript{78} Tolofson, as we have seen, made clear that limitation periods are substantive. Provisions such as this one, then, also affect substantive rights by lengthening the time in which plaintiffs can bring claims and putting off defendants' rights not to face action.

Class action legislation, then, has unmistakably substantive effects, giving courts the power to preclude and lengthen claims. I described above in Part II how a law's substantive status triggers the constitutional law of

\textsuperscript{76} Whether Gerein J.'s concern stemmed from the legislation's having been passed after the causes of action arose or after the initial certification order is unclear. If the former, the logic of his position would dictate that there could, in fact, be no opt-out class actions (uni- or multi-jurisdictional) including claims that arose before the relevant class action legislation came into effect. In this regard, Gerein J.'s decision on the issue of retroactivity contradicted the approach taken in early decisions such as Bendall et al. v. McGhan Medical Corp. et al. (1993), 14 O.R. (3d) 734 (Gen. Div.).


\textsuperscript{78} Ontario Class Proceedings Act, supra note 65, s. 28.
extraterritoriality. It would therefore be surprising to find that the case law and secondary literature on national classes lacked a full discussion of extraterritoriality’s implications for national classes. However, as the following section will suggest, such a gap is exactly what we find.

IV. Views on the national class and the constitution
Discussion of the constitutionality national classes in Canada has almost invariably focused on the issue of jurisdiction. This began with Nantais, and has continued with precious few exceptions up to the present day, both in jurisprudential and academic writings. It is not my intention to go over the cases’ jurisdictional discussions in great detail, or to assess them. The cases explicitly dealing with the constitutional implications of national classes have received quite complete treatment in the literature, and academics have offered varying takes on how the courts have treated the adjudicative jurisdiction issue. What I do want to do is to show how the cases have framed the constitutional discussion in jurisdictional terms and, for the most part, ignored the issue of extraterritoriality. Furthermore, the courts have set the parameters of the constitutional discourse in the secondary literature, which I will show largely to suffer from the same limitation of scope as does the jurisprudence.

1. The cases
Questions of constitutionality have arisen since the birth of national classes in Canada. In Nantais, the first Canadian case to certify a national class, Brockenshire J. framed the issue that the defendants raised like this:

"Can a court, under this Ontario statute, include in a proposed class, members outside of Ontario, who have not specifically requested inclusion, so that they would be prevented from taking action in their own jurisdictions?"

The question involved aspects of constitutionality and of statutory interpretation, since the Ontario Class Proceedings Act is silent on the matter of multijurisdictional classes. Brockenshire J. treated the two questions in the same short analysis, assessing them on the standard

79. Nantais, supra note 69.
80. Lamont, supra note 2; Jones (2003), supra note 2 at 161-182; Morrison, Gertner & Afarian, supra note 2; Cassels & Jones, supra note 2 at 449-459.
81. Nantais, supra note 69 at 4.
of whether it was "plain and obvious" that the national class should be disallowed.\footnote{Ibid. at 11. Lamont, supra note 2 points out that the application of the "plain and obvious" standard to the question of whether national classes were unavailable under the Ontario statute was an error. That standard was only applicable to the motion alleging that the statement of claim disclosed no valid cause of action, which Brockenshire J. also dealt with in the judgment.}

His analysis did not wrestle with any constitutional issues at all—jurisdictional or extraterritorial—and was focused more on the potential benefits of national classes. He took from \textit{Hunt} the proposition that "the federal government had power and authority to solve any problems" to do with multijurisdictional litigation—a slightly faulty understanding of what \textit{Hunt} actually says—and then quoted \textit{Hunt} on the subject of provincial powers to legislate with respect to the enforcement of foreign judgments:

\begin{quote}
[S]ubject to these overriding powers [of federal competence] I see no reason why the provinces should not be able to legislate in the area, subject, however, to the principles in \textit{Morguard} and to the demands on territoriality as expounded in the cases.\footnote{\textit{Hunt}, supra note 1 at para. 60, quoted in \textit{Nantais}, supra note 69 at 11.}
\end{quote}

Brockenshire J. took the quotation as giving leeway to the provinces to legislate with respect to national problems, and then continued by citing the potential benefits of national classes, concluding that such classes are, indeed, available under the Ontario statute.

The quotation from \textit{Hunt}, however, had more to say than Brockenshire J. acknowledged. In it, La Forest J. had been careful not to give provinces \textit{carte blanche} to legislate outside "the demands on territoriality as expounded in the cases." In \textit{Hunt} itself, this phrase was followed by "most recently in \textit{Reference Re Upper Churchill Rights Reversion Act}.\footnote{\textit{Hunt}, supra note 1 at para. 60, referring to \textit{Churchill Falls}, supra note 20.}" La Forest J.'s reference to a case about extraterritoriality when discussing the issue of legislating on judgment enforcement should have alerted Brockenshire J. to the concern of extraterritorial legislation, which is an ever-present concern in provincial statutes touching on multijurisdictional issues. A second important point coming from the quotation is the care La Forest J. took in differentiating between "the principles in \textit{Morguard}" and "the demands on territoriality." They are not the same thing. The former principles establish when the courts of a province can determine rights. The latter principles establish how a provincial legislature can create or alter them.

Conflation of the two ideas—or, more accurately, subordination of extraterritoriality to the law of jurisdiction—quickly became a common
theme in the jurisprudence. Even in dismissing leave to appeal the
decision to the Ontario Divisional Court, Zuber J. wrote that "it may be
asked what is the reach of the Ontario legislature and the Ontario courts
acting under it," referring to the two separate notions between which La
Forest J. differentiated in the above quotation from Hunt. But as soon as
they were brought up, they were amalgamated. The following paragraph
reads, "It is clear that the Ontario legislature and the Ontario courts are
not simply imposing jurisdiction on non-residents. Those outside the
jurisdiction who are included in the class are free to opt out in the same
manner as those inside Ontario may do." Whether opt-out rights took
care of the jurisdiction problem or not, the possibility that the Ontario
Class Proceedings Act confers or detracts from substantive rights was far
from view.

In Bre-X, Winkler J. continued this trend. His was the first national
class action decision to tackle constitutional questions in detail, but despite
the depth of his analysis, he overlooked the question of extraterritoriality
just as Brockenshire J. and Zuber J. had done in Nantais. After first
accepting Nantais's holding on the interpretation of the Ontario Class
Proceedings Act, Winkler J. turned
to the question of whether the legislation in the present circumstances
is constrained by constitutional considerations and the principle of
territoriality. The defendants submit that the Canadian constitution
empowers the legislature of the province to make laws in respect of
property and civil rights or the administration of justice within the
province. However, they contend that the Ontario legislature has no
constitutional authority to affect civil rights outside of the province or to
confer power on an Ontario court to do so.

Winkler J.'s description of the defendants' submissions indicated that
they had attacked national classes on the grounds of both adjudicative and
legislative jurisdiction. They mentioned both the power of the Ontario
courts and the power of the Ontario legislature. In reference to the latter,
Winkler J. indicated that the defendants had pleaded important cases on

85. Nantais, supra note 69 at 13. The Ontario Divisional Court's refusal of leave is reported in an
appendix to Nantais in the Ontario Reports.
86. Ibid.
87. Bre-X, supra note 57.
88. Ibid. at para. 27.
extraterritoriality such as *Royal Bank v. The King*,89 *Churchill Falls*90 and *Interprovincial Co-operatives Limited v. Dryden Chemicals Limited*.91

However, Winkler J. did not engage with these cases. Nor did he give any serious consideration to the notion of class actions as affecting substantive rights, having previously referred to class actions statutes as "purely procedural."92 Directly after mentioning the defendants' reliance on *Churchill Falls* and *Interprovincial Co-operatives*, he wrote, "The decisions in *Morguard* and *Hunt* require Canadian courts to apply the principle of territoriality in the context of the Canadian federal system."93

Once mentioned, these two cases dominated the analysis. After going over their holdings, Winkler J. wrote in summary that "*Morguard* and *Hunt* permit the extra-territorial application of legislation where the enacting province has a real and substantial connection with the subject matter of the action and it accords with order and fairness to assume jurisdiction."94 He then listed the contacts between the defendant *Bre-X* and Ontario, and concluded, "I am therefore satisfied that there is a 'real and substantial connection' between the defendants and the subject matter of the actions to Ontario, thus meeting that requirement in *Morguard* and *Hunt* for the assumption of jurisdiction."95 Over the course of the judgment, two separate constitutional arguments had become one. Extraterritoriality, in Winkler J.'s analysis, seemed to be just another word for appropriate assumption of jurisdiction. Indeed, he was so focused on jurisdictional issues that he was able to dismiss two of the defendants' constitutional arguments without even referring to the constitution. The first argument was that s. 28 of the *Class Proceedings Act*,96 which suspends limitation periods between the commencement of the action and the certification decision, could not apply to absent plaintiffs' claims. Winkler J. answered this by stating that if extraprovincial class members are to be bound by class settlements or judgments, they should also benefit from the provisions on limitation periods.97 I have already proposed in Part III that the provisions on limitation periods and on the binding effect of judgments are indeed

96. *Ontario Class Proceedings Act*, supra note 65, s. 28.
97. *Bre-X*, supra note 57 at para. 44.
linked, but because they are both substantive, not because they confer correlative burdens and benefits.

Winkler J. also referred to another of the defendants’ extraterritorial arguments, which held that,

because all of the members of the class are not known, in the case of non-resident plaintiffs it cannot be assumed, by reason of their not opting out, that those plaintiffs wish to participate in the class action. In consequence they state the act cannot be applied extra-territorially to affect such plaintiff's property and civil rights in the absence of a specific attornment to the jurisdiction.\(^8\)

The basic premise of the argument is that foreign plaintiffs who willingly litigate in a particular forum are agreeing to be bound by that forum’s decision, which will therefore have the effect of res judicata. In the case of class actions, though, plaintiffs have done nothing to attorn to the jurisdiction that is affecting their rights. The Ontario legislature has conferred this power on the courts, which then have the ability to curtail civil rights located in other provinces. This is substantially similar to the discussion this paper will present in Part V.

Winkler J. dismissed the argument summarily. Having decided that Ontario properly had jurisdiction over the foreign claims (which under his analysis meant that Ontario legislation was applicable), he stated that “a necessary corollary of this court’s assumption of jurisdiction is the application of Ontario legislation to the proceedings.” Despite their clearly having been pleaded, class actions’ effects on extraterritorial civil rights seemed to be of little concern to the court. For Winkler J., all constitutional doubts were answered by establishing the propriety of the court’s taking adjudicative jurisdiction over the multijurisdictional claims.

The next case to certify a multijurisdictional class did so internationally. This was Robertson v. Thomson Corp,\(^9\) which offered no discussion on constitutional issues beyond declining to consider the enforceability of Ontario national classes in foreign jurisdictions. In the short judgment in Webb v. K-Mart Canada Ltd.\(^10\) Brockenshire J. took for granted that Nantais and Bre-X had established the constitutionality of national classes, despite the fact that neither case had really engaged with the extraterritorial issue. The constitutional analysis was therefore limited to finding a “real and substantial connection” between the national claim and Ontario.

\(^8\) Ibid. at para. 47.
Although the case’s reasoning on jurisdiction over the claim as a whole contains much fodder for discussion, I will restrict my comments to a statement that follows the passage on adjudicative jurisdiction. Brockenshire J. wrote,

> Obviously, from the points of view of both the national corporation and its employees across the nation, there should not be great disparities in treatment arising solely from an accident of geography. The lack of comparable class action legislation elsewhere in Canada, except for British Columbia and Quebec, is a telling argument for extending the reach of the Ontario legislation. Here, I regard the common interests of the class members, the commercial realities of the situation, and the broad objectives of the Ontario Act, as outweighing any concerns expressed over extra territorial involvement of the Ontario Court.\(^{101}\)

The entire quotation bespeaks a rather cavalier attitude towards constitutional concerns: class actions are good policy, and the entire nation should benefit from them, on Ontario’s terms. The sentiment echoed what Winkler J. had said to close his judgment in *Bre-X*:

> The plaintiffs allege a mass wrong transcending provincial boundaries involving the sale of Bre-X shares in Canada largely in Ontario. The class definition including non-resident plaintiffs, as proposed by the plaintiffs, meets the aims of the CPA of promoting access to justice, judicial economy and the modification of behaviour of wrongdoers.\(^{102}\)

I am far from suggesting that a judicial desire to spread the benefits of class actions nationally is leading judges to ignore the requirements of the constitution intentionally, but it may, at the very least, be one factor in explaining why the extraterritorial affect of class actions on substantive rights has received such short shrift when it has come up, and why constitutional focus has largely been on the more flexible subject of court jurisdiction.

Two judgments in *Wilson v. Servier Canada Inc. et al.*\(^{103}\) offered further analysis of the constitutional implications of national classes. The case concerned weight loss drugs, Ponderal and Redux, which were alleged to cause hypertension and valvular heart disease. At the time of the 2000 certification decision, the defendants were Servier, the Québec distributor, and Biofarma, Servier’s French parent corporation. The proposed class definition included “All persons resident in Canada who were prescribed

\(^{101}\) *Ibid.* at 10.

\(^{102}\) *Bre-X*, supra note 57 at para. 56.

and ingested the diet drugs marketed under the brand name Ponderal and/or Redux."¹⁰⁴ Much like the defendant had done in Bre-X, the defendants in this case raised the separate issues of whether the CPA was ultra vires the Ontario legislature and whether the Ontario court lacked jurisdiction over non-residents’ claims.¹⁰⁵ Cumming J. evinced an understanding that these are two distinct issues. He began his consideration of the first issue by referring to the provincial heads of power under which class action legislation might fall: s. 92(13), “Property and Civil Rights in the Province”; s. 92(14), “The Administration of Justice in the Province”; and s. 92(16), “Generally all Matters of a merely local or private Nature in the Province.” He then referred to Churchill Falls for the proposition that “the pith and substance of provincial legislation must relate to matters within provincial legislative powers, while extraprovincial effects must be merely collateral or incidental.”¹⁰⁶

Thus far, Cumming J. was talking in real territorial terms. Indeed, later he quoted Winkler J. in Bre-X as stating that “Morguard and Hunt permit the extra-territorial application of legislation where the enacting province has a real and substantial connection with the subject matter … and it accords with order and fairness to assume jurisdiction.”¹⁰⁷ Cumming J. seemed uncomfortable with this understanding of Morguard and Hunt. He wrote,

I prefer to restate this view of the law as follows. Morguard and Hunt stand for the proposition that if there is a real and substantial connection between the subject matter of the action and Ontario, then the Ontario court has jurisdiction with respect to the litigation and can apply Ontario’s procedural law. Ontario may not necessarily apply its substantive law since there must be a determination of the choice of law that applies.¹⁰⁸

This statement of the law as the Supreme Court has set it out was unimpeachable. There was no conflation of principles as we see in the earlier cases, but Cumming J. still dismissed the extraterritoriality challenge. This was because his understanding was that “the CPA is procedural and remedial in nature.” Extraterritoriality was not a problem because class actions affect only remedies, not rights. He therefore followed the examples that Nantais, Bre-X, Robertson and Webb set, and looked no further after finding a real and substantial connection between

¹⁰⁵. Ibid. at 58.
¹⁰⁶. Ibid. at 61.
¹⁰⁷. Cumming J. reproduces this quotation in ibid. at 82. The quotation itself is from Bre-X, supra note 57, at para. 33.
The National Class as Extraterritorial Legislation

the claim and Ontario.\textsuperscript{109} The constitutional discussion in \textit{Wilson} (2002) was substantially similar, to the extent of being identical word-for-word in certain passages.

More recent is \textit{Brito v. Pfizer Canada Inc.}, where, in addition to an argument based on jurisdiction, the defendants made a clear extraterritorial argument:

\[
\text{[L]es membres visés par la requête qui résident à l’extérieur du Québec pourraient se voir entraîner dans un recours collectif contre leur gré et sans en être informés. Ce serait cette inclusion par défaut des membres absents et ses conséquences - l’autorité de la chose jugée du jugement final - qui confèreraient aux dispositions attaquées le caractère extraterritorial qui les rend constitutionnellement inapplicables dans les circonstances.} \textsuperscript{110}
\]

The defendants further argued that these extraterritorial concerns might be met were Québec to allow only for opt-in extraprovincial classes, or were extraprovincial classes to be abandoned in favour of parallel provincial ones.\textsuperscript{111} Grenier J. began her analysis by stating that class action legislation does indeed affect residents of other provinces, but went on to state that such effects are incidental and relate to adjudicative jurisdiction, paying little attention to the issue of extraterritoriality. Because of this jurisdictional focus, Grenier J. sought simply to find a real and substantial connection between the cause of action and the province of Québec. So long as the Québécois legislation did not permit exorbitant jurisdiction, its constitutionality was assured. In support of this proposition she cited \textit{Unifund}.\textsuperscript{112} That case, however, had dealt only with the applicability of substantive law, and had carefully distinguished between this and the law of adjudicative jurisdiction. Indeed, she made clear that she was not thinking of the effects of Québec’s class action legislation on extraprovincial rights by writing that “malgré l’existence d’un lien suffisant eu égard à la compétence d’un ressort à l’égard d’un litige, ce lien peut toutefois ne pas être suffisant pour que les lois de ce ressort décident de l’issue du litige.”\textsuperscript{113} Of course it is correct that the law of other provinces may apply to substantive claims. But implicit in Grenier J.’s dismissal of the extraterritorial argument was an understanding that Québec’s class action legislation itself had no extraterritorial substantive effects. In this her analysis resembled the analyses offered a decade earlier in \textit{Nantais

\textsuperscript{109} Ibid. at para. 90.
\textsuperscript{110} \textit{Brito v. Pfizer Canada Inc.}, 2008 QCCS 2231, [2008] R.J.Q. 1420 (Sup. Ct.) at para. 91 [\textit{Brito}].
\textsuperscript{111} Ibid. at paras. 127 and 136.
\textsuperscript{112} Ibid. at paras. 111-113.
\textsuperscript{113} Ibid. at para. 123.
and Bre-X. The main question was one of real and substantial connection. The issue of class actions’ substantive extraterritorial effects was not in the picture.

Despite the above jurisprudence, however, current judicial opinion does not seem to be unanimous. In *Englund v. Pfizer Canada Inc.*,\(^{114}\) Klebuc J. (as he then was) declined to stay a Saskatchewan provincial class action that could soon be covered by an Ontario national class. The Ontario class had not yet been certified, so Klebuc J. considered the motion to stay premature. He also demonstrated some hostility to the idea of the national class:

> I reject BI Canada’s submission that the Ontario CPA allows for the creation of a “national class” that binds non-Ontario residents unless they opt out of a class action certified in Ontario because the laws of Saskatchewan do not recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or other breach of the law committed within the Province.\(^ {115}\)

The Saskatchewan Court of Appeal reversed Klebuc J.’s ruling, but without engaging with his discussion of the notion of class actions’ extraterritorial effects. In his discussion, Klebuc J.’s thinking seemed to be in line with the thinking that has animated this article. Class actions preclude substantive claims, meaning that discussion of their constitutional status cannot limit itself to jurisdiction.

Also significant is Bich J.A.’s recent judgment in *Hocking*, a case in which a split Québec Court of Appeal denied recognition of an Ontario class settlement. In a long discussion in *obiter* she raised several constitutional doubts about national classes. After a long introduction to the law of extraterritoriality, referring especially to *Morguard*,\(^ {116}\) *Tolofson*\(^ {117}\) and *Unifund*,\(^ {118}\) she focused much of her discussion on issues of adjudicative jurisdiction, and on the Ontario court’s having ignored questions of choice of law with regard to the mortgages and hypotheces at issue.


\(^{115}\) *Pfizer (2006)* ibid. at para. 44. It should be noted that part of Klebuc J.’s aversion to the notion of a national class covering Saskatchewan may stem from the faulty assumption that a national class would preclude Saskatchewan claimants from using Saskatchewan law should the class action get to trial. See para. 43. It should also be noted that Klebuc J. was later quite comfortable with the notion of a national class in *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKQB 229, reversed in *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43.

\(^{116}\) *Morguard*, supra note 6.

\(^{117}\) *Tolofson*, supra note 47.

\(^{118}\) *Unifund*, supra note 8.
This application of Ontarian substantive law had violated extraterritorial principles.\(^{119}\) Of greater relevance to this article are statements Bich J.A. made at the end of her discussion. Moving on to what she called "un autre ordre d'idées,"\(^{120}\) she cited a passage from Branch and Rhone, asking "does the removal of this right to sue [on a provincial substantive claim] not come within the local province's jurisdiction to govern property and civil rights?"\(^{121}\) She then drew from her earlier discussion of the law of extraterritoriality, asking as follows:

\[ \text{[C]omment, en effet, le tribunal étranger, tribunal de l'Ontario en l'occurrence, peut-il constitutionnellement imposer à des non-résidents, et plus exactement à des justiciables qui ne relèvent pas de sa compétence et n'ont pas eux-mêmes saisi ce for, l'obligation de s'exclure du recours collectif institué devant lui?}^{122} \]

Here, the constitutional issue for Bich J.A. was a province's grant of power to its courts to curtail extraprovincial substantive claims. Furthermore, in Bich J.A.'s view, arguments about the efficacy of national classes or about the need to avoid conflicting judgments on the same matter may well be insufficient to get around the problem of national classes' contravention of hard and fast constitutional principles.\(^{123}\) However, she declined to render a definite opinion on the constitutional questions she had raised, as the parties had not framed their arguments in constitutional terms. She went on to deny recognition of the Ontario decision on other grounds, and in this was joined by Baudouin J.A., who himself declined to venture any opinion on the constitutional points his colleague had raised.\(^{124}\)

2. Academic commentary

Taking their cue from the Ontario cases, most Canadian commentators on the constitutionality of national classes have focused on the issues of original or enforcement jurisdiction. Stephen Lamont, for example, gives a searching critical analysis of the bases on which Ontario and British Columbia courts have found a "real and substantial connection" between the forum and extraprovincial plaintiffs.\(^{125}\) On the enforcement side, Jones

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\(^{119}\) Hocking, supra note 5 at paras. 150-157. In her judgment in Brito, supra note 110 at para. 123, Grenier J. indicated an understanding that this was the key issue for Bich J.A. For a case that refused certification of a multi-jurisdictional class because of the complex choice of law issues such a class would introduce see McNaughton, supra note 59.

\(^{120}\) Hocking, ibid. at para. 159.

\(^{121}\) Ibid., citing Branch & Rhone, supra note 2 at 15.

\(^{122}\) Ibid. at para. 160.

\(^{123}\) Ibid. at para. 164.

\(^{124}\) Ibid. at paras. 247-249.

\(^{125}\) Lamont, supra note 2.
and Baxter\textsuperscript{126} and Monestier\textsuperscript{127} offer commentary on recent cases denying enforcement,\textsuperscript{128} while Poltak\textsuperscript{129} and Walker\textsuperscript{130} offer broader discussions of enforcement beginning with first principles.

In the Canadian literature, reference to potential extraterritorial concerns has been uncommon. F. Paul Morrison, Eric Gertner and Hovsep Afarian raise the issue of legislative extraterritoriality in their article on “the possible demise of the national class in Canada”—a demise which they see arising from constitutional concerns.\textsuperscript{131} After going over the reasons of \textit{Nantais},\textsuperscript{132} \textit{Bre-X},\textsuperscript{133} \textit{Webb},\textsuperscript{134} \textit{Wilson (2000)}\textsuperscript{135} and \textit{Harrington},\textsuperscript{136} the authors move on to a potential problem that these cases missed: “A provincial legislature has no competence to legislate extra-territorially.”\textsuperscript{137} They then refer to \textit{Churchill Falls},\textsuperscript{138} and to the “in the Province” qualification on s. 92(13) (property and civil rights) and s. 92(16) (matters of a merely local and private nature).\textsuperscript{139} They follow this introduction, however, by writing that “[t]he territoriality test, based on the notion of the pith and substance legislation as opposed to its incidental effect, is... subsumed by the real and substantial connection test.”\textsuperscript{140} They do mention \textit{Unifund},\textsuperscript{141} but the rest of their argument takes the form of a criticism of the previously mentioned judgments’ treatment of the “real and substantial connection” test coming out of \textit{Morguard} and \textit{Hunt}. Mention of extraterritorial creation or alteration of substantive rights, which is what an extraterritorial analysis should really concern itself with, is missing. Like the judges in \textit{Nantais} and \textit{Bre-X}, the authors begin with a question based in the law of extraterritoriality, but give an answer based in the law of adjudicative jurisdiction.

Coming closer to the position suggested in this article are two papers, one by Ward Branch and Christopher Rhone and another by Colin Irving and

\begin{thebibliography}{99}
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\bibitem{126} Jones & Baxter, \textit{supra} note 2.
\bibitem{127} Monestier, \textit{supra} note 2.
\bibitem{129} Poltak, \textit{supra} note 2.
\bibitem{130} Walker (2008), \textit{supra} note 2.
\bibitem{131} Morrison, Gertner & Afarian, \textit{supra} note 2.
\bibitem{132} \textit{Nantais, supra} note 69.
\bibitem{133} \textit{Bre-X, supra} note 57.
\bibitem{134} \textit{Webb, supra} note 100.
\bibitem{135} \textit{Wilson (2000), supra} note 59.
\bibitem{136} \textit{Harrington, supra} note 95.
\bibitem{137} Morrison, Gertner & Afarian, \textit{supra} note 2.
\bibitem{138} \textit{Churchill Falls, supra} note 20.
\bibitem{139} \textit{Constitution Act, 1867, supra} note 16.
\bibitem{140} Morrison, Gertner & Afarian, \textit{supra} note 2 at 79.
\bibitem{141} \textit{Unifund, supra} note 8.
\end{thebibliography}
Mathieu Bouchard. For their part, Branch and Rhone clearly differentiate extraterritoriality from adjudicative jurisdiction, and query whether an Ontario statute can require non-residents to take active steps in the form of opting out to preserve their rights from determination in an Ontario action, but mention this only as a side note and do not seek to advance any analysis on the issue. In a short and tightly argued article, Colin Irving and Mathieu Bouchard present an analysis similar to that suggested here, pointing to class action legislation’s effects on the validity of claims and then raising Royal Bank v. The King, Ladore, Churchill Falls and Unifund, which lead them to conclude that “a provincial statute authorizing an opt-out class action is unconstitutional to the extent that it applies to non residents of that province.... It cannot be said that a court has acted within its jurisdiction when its judgment is based on a statute which is unconstitutional on its face, or which has been interpreted so as to make it unconstitutional.”

Craig Jones, too, recognizes that class action legislation has substantive effects both by suspending limitation periods and by binding potential plaintiffs to actions to which they have not consented. He seems to accept, without engaging in much discussion on the topic, that the application of class action legislation nationally does offend the strictures on extraterritoriality. However, where Jones’s real interest lies is in getting around the problem. Since this is the real focus of his discussion, I will hold off on further description of what he has to say until the following sections, where I offer my own thoughts on the constitutional implications of class actions’ substantive character.

3. Conclusions

In many Canadian analyses of the national classes, constitutional concerns of extraterritoriality take a back seat to constitutional concerns of jurisdiction. There are several potential explanations for this. In Nantais, Bre-X, Webb

142. Branch & Rhone, supra note 2 at 11-12. Branch and Rhone regret the fact that the extraterritoriality issue is unlikely to come before appellate review. Before class action legislation was widespread in Canada, defendants had reason to challenge national classes. If their challenges were successful, they would be immune from aggregated actions in much of the country. However, now that class action legislation exists in almost every province, they argue, a successful challenge would simply result in a costly multiplicity of provincial proceedings. The incentive for constitutional challenge is gone.

143. Irving & Bouchard, supra note 2.

144. Royal Bank v. The King, supra note 19

145. Ladore, supra note 19.

146. Churchill Falls, supra note 20.

147. Unifund, supra note 8.

148. Irving & Bouchard, supra note 2 at 120.

and Brito, and in Morrison, Gertner and Afarian’s paper, the jurisdictional focus was due in large part to the view that legislative extraterritoriality was governed by Morguard and Hunt. Bre-X, especially, seemed to suffer from this misunderstanding. Brockenshire J.’s judgments in Nantais and Webb also focused on the benefits of class actions and the desirability of extending these benefits across the country. Such concerns may well have distracted focus from countervailing constitutional issues. In Wilson, extraterritorial concerns faded into the background because Cumming J. thought of class actions in purely procedural terms. In all this case law, the constitutional status of national classes has been all but assured, such that Janet Walker has been able to write with confidence that “there is simply no credible challenge to be made to the basic jurisdiction of Canadian courts to certify multijurisdiction class actions.” The following section presents just such a challenge.

V. Class actions as extraterritorial legislation

In Part III, this paper established the substantive character of class actions’ preclusive effects. Class action legislation grants courts the power to terminate potential plaintiffs’ substantive rights, while simultaneously vesting in defendants a right not to be sued. Courts have the power to do this without a plaintiff’s knowledge or express consent. Class action statutes also grant courts the power to suspend limitation periods. In class action legislation, as in Imperial Tobacco and Castillo, provincial legislatures are legislating with respect to civil rights under s. 92(13). Such legislation, therefore, will be subject to the constraints of extraterritoriality.

Some provincial class action legislation makes specific provision for the preclusion of extraprovincial claims. The relevant sections in the Saskatchewan Class Actions Act, for example, read as follows:

6.1 (1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class action, including the following:

(a) an order certifying the action as a multi-jurisdictional class action if:
   (i) the criteria set out in subsection 6(1) have been satisfied; and
   (ii) having regard to subsections 6(2) and (3), the court determines that Saskatchewan is the appropriate venue for the multi-jurisdictional class action;

28 (1) A judgment on common issues of a class or subclass binds every

150. Walker (2008), supra note 2 at 459.
151. Saskatchewan Class Actions Act, supra note 77.
member of the class or subclass, as the case may be, who has not opted out of the class action, but only to the extent that the judgment determines common issues that:

(a) are set out in the certification order;
(b) relate to claims described in the certification order; and
(c) relate to relief sought by the class or subclass as stated in the certification order.

(2) A judgment on common issues of a class or subclass does not bind a party to the class action in any subsequent action between the party and a person who opted out of the class action.

38 (4) A settlement of a class action or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class action, but only to the extent provided by the court.

The combined effect of these provisions is to give the court the power to alter the substantive rights of non-residents of Saskatchewan. The Ontario statute,\textsuperscript{152} which makes no direct reference to extraprovincial class members, has been interpreted to have extraterritorial reach, and so the same effect as other provincial statutes that make their extraterritorial effect more explicit.\textsuperscript{153}

In both cases, the constitutional inapplicability analysis of \textit{Unifund} seems more appropriate than the pith and substance analysis of \textit{Imperial Tobacco} and Bastarache J.'s judgment in \textit{Castillo}. The statutes as whole entities are not directed in pith and substance at extraterritorial rights. Winkler J. states in \textit{Bre-X} that class action legislation is "purely procedural."\textsuperscript{154} One of the tasks of this article has been to demonstrate that this is not entirely correct. Still, a description of "mostly procedural" might still be appropriate. Class actions allow for the aggregation of claims, and relate less to rights than they do to the manner in which they can be vindicated. This would place the statutes as a whole under s. 92(14) of the \textit{Constitution Act, 1867}:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

(14) The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both

\textsuperscript{152} Ontario \textit{Class Proceedings Act, supra} note 65.
\textsuperscript{153} \textit{Nantais, supra} note 69 at 12.
\textsuperscript{154} \textit{Bre-X, supra} note 57 at para. 19.
Likewise, no particular section appears to be aimed at extraterritorial civil rights, even in the statutes that make specific provision for the certification of extraprovincial classes. In Saskatchewan’s statute, for example, s. 6.1(1) permits the court to “make any order it considers appropriate in an application to certify a multi-jurisdictional class action.” By itself, this provision relates not to the substantive claims to be precluded, but simply to adjudication itself. Following Major J.’s analysis in Castillo, it falls under s. 92(14) and is intra vires the province. It may be that these provisions do violate Morguard and Hunt’s constitutional requirement of a real and substantial connection for adjudicative jurisdiction. Bich J.A.’s judgment in Hocking certainly points to this possibility, while the judgments in Nantais, Bre-X and Harrington, and Lépine, inter alia, point the other way. Consideration of the arguments on either side falls outside the scope of this article, but readers should at least be alert to the possibility that national classes may be unconstitutional for reasons other than extraterritoriality.

Sections such as ss. 28 and 38(4) of the Saskatchewan act, quoted above, also do not seem to be in pith and substance directed at extraterritorial rights. They are similar to the recovery provisions in the Ontario Insurance Act which were the subject of Unifund. They make no particular reference to extraterritorial effect, and so seem, in pith and substance, to be directed at Saskatchewan rights. The same could be said of the Ontario provisions relating to preclusive effect. Under a Unifund analysis, though, they may still be inapplicable to extraterritorial rights. As described above, Unifund focuses on the right in question. The analysis looks to “the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it.” This is what I have called a kind of “strong Morguard test,” which looks for the “most real and substantial connection.”
also accords with *Imperial Tobacco*'s later concern for the "legislative sovereignty of other territories."166

An application of these principles to the preclusion provisions of provincial class actions statutes yields a clear result. Let us take the situation in *Wilson* (2000).167 There, the Ontario court certified a national class of plaintiffs who had been adversely affected by pharmaceuticals produced by a French corporation with a Québécois distributor. In the case of Ontario plaintiffs, the dual requirements of strongest connection to Ontario and respect for other provinces’ sovereignty would be met. But what of plaintiffs in other provinces who were included in the class? Many of these plaintiffs would have had no connection to Ontario, had suffered their harm outside Ontario and had consumed products unrelated to Ontario. Yet the Ontario court, enabled by an Ontario statute, included these plaintiffs in a national class. Many of the plaintiffs would not have even known of this or of any resulting settlement, yet the application of the Ontario statute would have precluded their ability to sue. Ontario legislation had killed the claims.

Furthermore, by taking over the extraprovincial plaintiffs’ claims, Ontario was interfering with other provinces’ ability to alter their own citizens’ rights. Brockenshire J. underscored the serious nature of the interference in *Webb* when he explicitly extended the benefits of class actions to provinces where they were then still unavailable.168 In the current legal landscape, this concern may be less pressing, now that most Canadian jurisdictions have class action legislation in place, but this does not minimize the results of the analysis. This is the kind of extraterritorial application of provincial legislation that *Unifund* disallows.

The extension of extraterritorial limitation periods is similarly impermissible. The only case to deal with the issue explicitly was *Bre-X*. As noted above in Part IV, Winkler J. wrote as follows:

> The defendants also argue that s. 28 of the CPA [*Class Proceedings Act*], which provides for the suspension of limitation periods upon commencement of a class proceeding, cannot apply to residents outside the province. I disagree. If the CPA applies it applies in its entirety.169

The parallel with *Castillo* is clear. Here Winkler J. was proposing that Ontario legislation had the power to lengthen limitation periods. Bastarache J. made clear in his judgment in *Castillo* that to affect extraprovincial rights

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166. *Imperial Tobacco,* supra note 8 at para. 36.
169. *Bre-X,* supra note 57 at para. 44.
in such a way was contrary to the territorial bounds of provincial legislative sovereignty. Once again, *Unifund’s* notion of constitutional inapplicability should be engaged to prevent the extraterritorial application of a provincial statute to substantive rights that are more closely connected to another jurisdiction than they are to Ontario. In sum, both class actions’ preclusive effect and class actions’ extension of limitation periods are substantive. The Supreme Court’s jurisprudence makes clear that provincial substantive law must not apply outside provinces’ constitutionally mandated territorial spheres. The national opt-out classes that courts have been certifying over the past thirteen years have therefore offended the constitutional principles of extraterritoriality.

Is there a way around this conclusion, so that courts can, in fact, certify extraprovincial opt-out classes? Craig Jones proposes that there is. I briefly mentioned at the end of Part IV that Jones acknowledges class actions’ substantive effects. After making this acknowledgement, he conducts a searching and detailed analysis, with the aim of buttressing national classes’ constitutional status. He begins his proposal with the major premise of his monograph, which is that the aggregation of claims allows for greater compensation and maximal deterrence. Under a regime without class actions, defendants facing similar suits can benefit from greater economies of scale than can plaintiffs. Legal work completed for one claim can be used again in defending against a similar one, and litigation costs per claim are quite low. Defendants therefore have little interest in settling, and risk-averse plaintiffs will often drop their suits. Class actions fix this problem. The more claims are aggregated, the lower plaintiffs’ *per capita* litigation costs become. Lower plaintiffs’ litigation costs yield higher settlement values, since plaintiffs have increasingly less to lose in going to trial. This reasoning leads to the conclusion that national classes are desirable: “the defendants’ litigation scale is national, and therefore so must be the plaintiffs’.”

That class actions are beneficial to plaintiffs and to society drives Jones’s constitutional solution, which is to pick up on *Morguard’s* emphasis on “order and fairness” in private international law. To Jones, these principles call for exceptions to be made in the law. With regard to class actions’ effects on limitation periods, he suggests, for example, that courts could consider class actions to be exceptions to *Tolofson’s* *lex loci delicti* rule. Alternatively, courts could consider limitation periods procedural.

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in class action law suits. A further approach would be to look to the spirit of Hunt, which Jones sees as being a desire to facilitate efficient litigation. Because extraprovincial limitation periods impede class action lawsuits, they should be considered constitutionally inapplicable to cases in which a particular province has taken jurisdiction.

With regard to class actions’ preclusive effect on non-resident plaintiffs, Jones continues down the route of “order and fairness.” Because maximally aggregated claims are beneficial to plaintiffs, binding plaintiffs is not unjust. This, in turn, should inform the extraterritoriality analysis. Placing too much emphasis on plaintiffs’ autonomy by requiring them to consent explicitly to an action by opting in fact hurts everyone by diminishing plaintiffs’ recovery. For Jones this fact is enough. Courts should recognize the benefits of national aggregation, and certify binding extraprovincial classes.

Jones’s arguments about the benefits of national classes, both in his discussions of national classes and throughout his book, are perceptive and strongly reasoned, but his solutions come across as unsatisfying. They really amount to this: national class actions benefit plaintiffs and deter future harms. The legal definitions of substantive/procedural and the constitutional law of extraterritoriality must therefore be manipulated so as to secure national classes’ constitutional status. Jones’s proposal that limitation periods could be considered procedural runs afoul of what Bastarache J. said in Castillo:

That distinction [viz., the distinction between procedural and substantive] must be based on something other than what a province says. It should in my view be based on the actual effects of the law. The effects of limitation periods were made clear in Tolofson: they cancel the substantive rights of plaintiffs to bring the suit, and they vest a right in defendants to be free from suit. This is the reality Alberta cannot ignore.

Jones is asking the courts to turn a blind eye to what limitation periods really do in order to facilitate an advantageous policy. Castillo clarifies the unavailability of such a route.

Jones’s proposals on ignoring the rule of lex loci delicti for tort claims, and allowing opt-out class actions’ preclusive effects in the interests of “order and fairness” seem equally impermissible. As I have set it out in

172. Jones (2003), supra note 2 at 188.
175. Ibid. at 191.
176. Ibid. at 196-7.
177. Castillo, supra note 8 at para. 37.
this article, the law of extraterritoriality should forbid such proposals. In Unifund, Binnie J. was not concerned with the justice or injustice of applying a particular recovery statute to a particular accident—that is, he was not asking whether such application would lead to a good result for the parties. He was, instead, concerned with the more general question of the justice of applying a statute of one province to an accident that occurred in another. He did pay heed to the principles of “order and fairness,” but not in the way that Jones proposes. Order in Confederation would be undermined if provincial law were permitted extraterritorial application. Binnie J. also made clear that any considerations of “order and fairness” will not loosen the territorial boundaries that the constitution places on the provinces’ legislation:

It would be unwise in this case to embark on a general discussion of “order and fairness”. The question before us is quite specific: Does the respondent have a statutory cause of action against the appellant given the constitutional limits on the reach of the Ontario Insurance Act?178

Similarly, in Churchill Falls180 and Interprovincial Co-operatives181 the focus was not on the wisdom of the laws under discussion. Instead, statutes were struck down because the constitution mandated it. Each judgment in those cases—majority and dissent—was concerned with locating the right involved. Whatever motivations may have been working under the surface of the judges’ reasoning, constitutional considerations of territoriality were front and centre in the judgments. Jones’s approach is entirely different. He begins with a desired result, and does little other than assert that in the pursuit of this result the courts should ignore the constitution. The notion of constitutionally entrenched territorial limits simply makes this kind of reasoning unavailable. As Bich J.A. wrote in Hocking,

Dans le cas où l’on serait a priori d’avis qu’un recours collectif national ou multiprovincial risque de contrevenir au principe de la territorialité, les arguments de facilité, de commodité et d’efficacité dans la gestion ou l’économie des ressources judiciaires ainsi que le désir d’éviter des jugements contradictoires ou de limiter les cas où un défendeur devrait répondre à plusieurs actions identiques dans diverses provinces pourraient-ils justifier un tel recours? Je n’en suis pas certaine, la nature de notre organisation fédérale imposant des contraintes dont les effets peuvent

178. Unifund, supra note 8 at para. 71. Binnie J.’s statement on the requirements of order and fairness was, in this case, specifically referring to the disorder that would result from the application of many provinces’ laws to one car crash, but it seems fair to generalize as I have done.
179. Ibid. at para 81.
181. Interprovincial Co-operatives, supra note 91.
This paper will therefore conclude by sketching in broad strokes how the provincial and federal legislatures should proceed, given that opt-out national class actions are *ultra vires* the provinces.

**Conclusion: A way forward**

Although I reject Jones's suggested constitutional solutions, I do accept his endorsement of national classes. They conduce to optimal levels of deterrence and plaintiff recovery. I also accept that defendants need certainty in class action litigation—certainty provided by class actions' preclusive effect. Defendants must know how many future claims they may face before settling.\(^1\)\(^\text{183}\) I would consequently not endorse the adoption of opt-in national class legislation, even though I have suggested above that such legislation would probably not violate s. 92 of the constitution.\(^2\)\(^\text{184}\) As Cassels and Jones point out, opt-in class actions will almost invariably create smaller classes. This means that litigation costs are not maximally dispersed among all plaintiffs, and the plaintiffs who do form part of the action will willingly settle for less than they would if the class were larger. Quite simply, suing costs more, so settling for less makes sense.\(^3\)\(^\text{185}\) Furthermore, because national opt-in classes would not have preclusive effect on extraprovincial claims, national opt-in classes would likely be brought in several jurisdictions. This would remove the certainty that induces defendants to settle class actions, while at the same time wasting plaintiffs' resources by requiring duplicative steps in litigation and duplicative national notice.\(^4\)\(^\text{186}\)

Instead, I would suggest that provincial legislatures should modify existing provincial legislation to eliminate all reference to national classes. Of course, legislation that makes no such references—viz., that of Ontario, Québec and Nova Scotia—would simply be read to respect the extraterritorial limits the constitution imposes on provincial legislation. Because I have interpreted the limitation period and claim-preclusive sections of class action legislation as substantive law, subject to a division of powers analysis, these sections in provincial legislation will apply only to matters within their respective provinces' legislative competence.

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\(^{182}\) Hocking, supra note 5 at para. 162.


\(^{184}\) Constitution Act, 1867, supra note 16.

\(^{185}\) Cassels & Jones, supra note 2 at 443.

\(^{186}\) Jones (2003), supra note 2.
There is another consequence to these provisions' being substantive: they will have no effect on substantive rights under federal competence. Naturally, Parliament alone has jurisdiction over such rights. Parliament can, and does, pass limitation legislation with regard to matters under its constitutional jurisdiction, and would have the right to pass legislation mandating the suspension of limitation periods and the preclusive effect of class actions brought in respect of federal law. This legislation would refer only to these substantive matters, since, as I have argued above, the procedural aspects of class action legislation are *intra vires* the provinces under s. 92(14). All of these changes would have the effect of putting an end to national classes, save for the case of classes brought on the basis of a federal substantive claim. Assuming we accept the jurisdictional solutions offered in *Nantais*, *Bre-X* or *Harrington*, federal claims could have preclusive effect on a national scale, since s. 91 of the constitution would place no territorial limits on the federal preclusion and limitations provisions. For the majority of claims, though, the following solution would be the best permissible approximation of national class actions.

Claims dealing with provincial rights should proceed nationally by means of parallel provincial opt-out classes. Under this approach, the substantive effects of provincial class action legislation would manifest themselves only within their respective provinces’ jurisdiction. This is, essentially, how the plaintiffs in the Canadian Red Cross tainted blood scandal conducted their litigation. Three class actions began at the same time: one in Ontario, one in Quebec and one in British Columbia. The Ontario class was multijurisdictional, which, of course, differs from my proposed approach. Counsel in the three actions coordinated closely, and the parties reached a pan-Canadian settlement amounting to a sum above $1 billion. The settlement depended on approval from all three courts, so as to provide certainty to the Red Cross and the governmental defendants. All three courts approved.

A similar approach was recently taken by a team of lawyers in a continent-wide class action concerning tainted pet food. Each province

188. *Constitution Act*, 1867, supra note 16.
189. *Nantais*, supra note 69.
190. *Bre-X*, supra note 57.
194. *Parsons*, ibid. at para. 32.
save for Prince Edward Island had its own class, with Ward Branch in British Columbia acting as lead Canadian counsel. Nine provincial superior court judges held parallel settlement hearings, linked by closed-circuit video. The British Columbian counsel made all submissions and answered questions from all nine judges. The work of the lawyers in each province was minor, and appeared mostly to involve receiving draft orders from the British Columbian counsel's office and reworking them to accord with each local forum's requirements. The settlement required unanimous approval to be effective. Approval was delayed by some of the judges' minor objections to the restrictions that the draft order placed on the court to modify the settlement in future orders, but the settlement was soon after approved. The process, however, worked quite smoothly and approximated the benefits of national classes quite closely—within constitutional bounds.

In discussing settlements such as this, Cassels and Jones make the case that plaintiffs lose out:

In province-by-province certification, per-claim litigation costs will increase for plaintiffs at a greater rate than defendants, settlement incentives for defendants will decrease below the optimal, compensation per claim will decrease, and fewer valid claims will ever be brought.

Whereas defendants "can employ the same experts, use the same legal research and even employ the same lawyers in each jurisdiction where the issues are common," plaintiffs in each jurisdiction will have to pay for these services redundantly. The Uniform Law Conference of Canada has similar things to say about parallel provincial actions' effect on plaintiffs' economies of scale.

There are two ways in which to answer these claims. The first is to reiterate the central point of this article, which is that the national class option is simply not constitutionally available in Canada. National classes' superiority is therefore irrelevant. The second is to point out that in litigation such as that in the tainted blood scandal and in the pet food litigation, the provincial groups were not acting independently, but rather in a coordinated effort. Under such an arrangement, sharing legal work,

195. The settlement hearing was held in all provincial superior courts, save for that of Prince Edward Island, November 3, 2008. The author attended the Nova Scotia hearing, presided over by Coughlan J. The settlement itself can be found in Des Gâteaux c. Menu Foods Grenpar Ltd., 2008 QCCS 6561.
196. Cassels & Jones, supra note 2 at 435-436. For proposals for coordinating national classes that take for granted the constitutionality of such classes, see Dafoe, supra note 2 and Walker (2008), supra note 2.
197. Cassels & Jones, supra note 2 at 735.
research and expert reports under the coordination of lead counsel would be nearly as easy as it would be for the lawyers of the defendant. Under the proposed scheme, then, defendants and plaintiffs would suffer from similar decreases in efficiency of litigation, and settlement values should not be depressed.

The close coordination of plaintiffs’ provincial counsel would also answer Cassels and Jones’s other main objection to parallel provincial classes, which is the problem of “free riding.” The authors explain:

Factual information gained through discovery or trial, legal research, and arguments all represent expensive investments by plaintiff’s counsel, and each may be obtained for only token cost by a “free rider” who wishes to exploit the investor’s work product, provided that the case proceeds to hearing or trial. If [a class action] was certified in Ontario, a class counsel could file in British Columbia. Once certified there, the British Columbia counsel could do no work, expecting that the Ontario counsel would be willing to share all its work product in exchange for any fraction of the fee.¹⁹⁹

Once we accept that counsel in each province will work closely and share litigation costs equally, the strength of this argument diminishes, since costs to each provincial class will be fairly low and the incentives to “free ride” would simply not be there: participation would be cheap. Furthermore, Cassels and Jones are forced to make two assumptions in their argument. The first is that the legal work has been done, and the expert reports completed. This requires that the first class action has proceeded to trial, which, in practice, is exceedingly rare.²⁰⁰ It also requires that the first class’s counsel be willing to part with his or her work for a low fee. Free riding would have the effect of forcing the entirety of the litigation costs on earlier classes. This would depress the amount of these earlier classes’ eventual recovery after paying litigation costs. In all likelihood it would also negatively affect counsel’s contingency fees. It seems doubtful, then, that class action practitioners would willingly contribute to this trend by giving up their work to free-riding colleagues.

As a final point, it seems doubtful that courts would encounter the problem of lawyers unwilling to participate in a co-operative national scheme, given that such schemes keep costs down and raise settlement values by comparison with uncoordinated provincial classes. However, if ever a court encountered an uncoordinated provincial class competing with a nationally coordinated one, it could easily stay the former proceeding

¹⁹⁹. Cassels & Jones, supra note 2 at 436, note 12.
²⁰⁰. See generally Nagareda, supra note 66.
under existing legislation. Section 13 of the Ontario Act, for example, reads as follows:

13 The court, on its own initiative, or on the motion of the party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.\textsuperscript{201}

Under such provisions, which exist in all provincial class action legislation, courts could give preference to coordinated actions, which, because of their obvious benefits, would almost invariably exist. Indeed, this is exactly what occurred in the pet food litigation, where the national consortium was granted carriage in disputed carriage motions in British Columbia,\textsuperscript{202} Ontario,\textsuperscript{203} and Québec.\textsuperscript{204} Such provisions would also give courts the ability to consolidate parallel classes within the province, where each of them seeks to join the same coordinated national action.

My proposal, then, is simple. The provinces and the federal government should restrict or enact substantive class action legislation. Such legislative action would allow class actions based on federal claims to remain national in scope, subject, of course, to the law on adjudicative jurisdiction. Because federal substantive law applies nationally, so might the substantive effects of class actions based on federal substantive claims. National classes, however, are constitutionally unavailable to provincial legislatures. Class actions based on provincial claims will therefore be limited to provinces' territorial bounds. This is an unfortunate consequence, since it renders the benefits of full aggregation unavailable to national groups of plaintiffs. The best solution is parallel provincial classes, each proceeding under their respective provincial statutes and coordinated nationally. This would come close to giving plaintiffs maximal economies of scale, while ensuring that defendants can settle claims definitively.

This paper has suggested that a major issue, often overlooked, is the extraterritorial effect that provincially enabled class actions have on substantive rights. Class action legislation precludes the claims of extraprovincial parties who have taken no steps to join litigation. In many cases, these parties do not even realize that they are parties to an action at all. The preclusion of their claims, therefore, derives from extraterritorial

\textsuperscript{201} Ontario Class Proceedings Act, supra note 65, s. 13.
\textsuperscript{202} Joel v. Menu Foods Genpar Ltd., 2007 BCSC 1482.
\textsuperscript{204} Sirois c. Menu Foods Income Fund, 2007 QCCS 5808. For a summary of these disputed carriage motions, see Ward Branch's blog, "Class Actions in Canada," available online: <http://classactionsincanada.blogspot.com>.
I have shown why this is impermissible under Canada's constitutional arrangements. This result may be an unfortunate one for plaintiffs' prospects of recovery, but I have concluded with a suggestion of coordinated provincial classes, which class counsel has already adopted in some cases, and which should come close to approximating the benefits of the national class.