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OUTSIDE PERSPECTIVES

Class Actions Canadian Style

DAVID KENT
HILARY CLARKE

U.S. exports to Canada are booming in a niche market – class actions. From vitamins to pharmaceuticals to polybutylene, Canadian class counsel are importing U.S. based lawsuits at an ever increasing rate. This has introduced a wide range of U.S. companies and their corporate counsel to the joys of litigating in Canada. But litigating cross-border class actions in Canada takes more than learning to spell “defence” with a “c”. Here are six key differences.

National/Rational Classes

Canada’s judicial system lies primarily in the hands of the individual provinces. Each has a superior court with plenary jurisdiction. While Canada also has a Federal Court, it should not be confused with its U.S. counterpart. Instead, Canada’s version is a statutory court with severely limited jurisdiction.

As a result, class actions are almost always brought in one or more provincial courts. But only some of these courts have modern class action rules anything like U.S. Federal Rule 23. And these rules, where they exist, are all slightly different. To make it more complicated, there is no Canadian equivalent to the MDL system which permits the agglomeration of multiple suits in the U.S.

These jurisdictional problems might nevertheless be manageable if any one of the provincial courts with a class action rule was capable of certifying a national class on an opt-out basis. While the courts in one jurisdiction (Ontario) believe they are capable of doing just that, it is a controversial proposition which has never really been tested. As a result, with no MDL program available, it is not uncommon to see parallel class actions brought by non-cooperating class counsel going forward in different jurisdictions, requiring defendants to defend in an uncoordinated way on multiple fronts.

Preponderance Not Required

While they differ in various subtle ways, none of the Canadian provinces have a “preponderance” requirement for certification akin to that set out in U.S. Federal Rule 23. Instead, a class will typically be certified in Canada if:

- the pleadings disclose a cause of action;
- there is an identifiable class of two or more people;
- the class members’ claims raise common issues;
- a class proceeding would be the preferable procedure for the resolution of those issues; and
- there is an appropriate representative party.

Until recently, Canadian appellate

courts had suggested that the existence of any common issues was sufficient to certify a class. More recently, however, the test has been stiffened. The Supreme Court of Canada ruled in 2001 that a class action would not be a “preferable procedure” unless the resolution of the common issues was capable of moving the action forward “significantly”. Accordingly, while not requiring preponderance, Canadian courts will only certify where the common issues are sufficiently extensive or weighty that determining them in a class setting makes sense.

Antitrust Suits - No Illinois Brick

Many proposed class actions in Canada and the United States involve antitrust allegations, particularly price fixing. But Canada has not (yet) adopted *Illinois Brick*. These cases therefore raise fundamental differences between Canada and the U.S. which must be appreciated by counsel in both countries.

Illinois Brick means that, in the U.S. (at least at the federal level), an antitrust defendant faces a relatively homogenous class of direct purchasers and is deprived of the “pass-on” defence. In Canada, on the other hand, indirect purchasers can sue and the pass-on defence is alive and well. As a result, it is common in Canada to face a heterogeneous class of direct purchasers, end-consumers and every conceivable purchaser of the relevant

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product or its derivatives in between. No one yet knows whether and how this kind of class can or will be certified – no price-fixing class action has yet been certified in Canada in the approximately ten years the modern class action rules have existed.

Strike Suits Struck

Attempts by class counsel to import strike suits into Canada have failed miserably. The highest profile flame-out involved an attack on the National Bank of Canada's proposed merger with First Marathon Inc. The proposed class alleged that the First Marathon board had breached its fiduciary duties to minority shareholders by consenting to the merger. Although the plaintiffs sought \$300 million in damages, they soon settled (before certification) for a payment of \$190,000 to cover class counsel's fees.

But the judge to whom the settlement was taken for approval would have none of it. He decried the use of strike suits and described them as abusive. In the result, he not only dismissed the proposed class action but also barred the defendants from paying anything to class counsel, even though they had already agreed to do so. No class counsel has seriously tried a strike suit since.

Vultures and Cherry Pickers

Perhaps because the class action industry is still relatively young in Canada, there is so far no equivalent

to the subset of the U.S. bar which preys on class actions started or settled by others. For example, there has been little organized opposition when class action settlements have been considered at fairness hearings, and objectors are rarely represented by counsel. Similarly, we are not aware of any attacks on the sufficiency or implementation of any notice program. And so far, at least, lawyers have not seriously attempted to cherry pick settlement classes in order to cobble together groups of opt-out plaintiffs capable of continuing to fight settled litigation on a non-class basis. But it is probably just a matter of time before the secondary features of the U.S. class action market find their way to Canada.

Costs

Canadian courts generally operate on a "loser pay" basis. This usually means that the loser of any proceeding, or even of a step within a proceeding, is required to pay the other side's legal costs (albeit often on a partial indemnity basis).

Some Canadian jurisdictions have established a no costs regime for class actions. However Ontario, Canada's largest jurisdiction, has not. In each of a pair of decisions in mid 2002, the Ontario courts required plaintiffs to pay about \$200,000 in fees and disbursements to defendants who had fended off certification. These decisions may affect the traditional plaintiff/defendant dynamic in proposed class actions. Class

counsel, who must now accept the risk of paying defence legal fees as well as the traditional risk of losing their sunk time and disbursements, may have second thoughts about starting or continuing weak cases for the purposes only of pursuing their settlement value.

Conclusion

Canadian class actions are heavily informed by their U.S. counterparts. And as the popularity of class actions increases, and the class counsel bar grows, more and more U.S. companies will find themselves enjoying the hospitality of Canadian courts. When that happens, remember the importance of retaining counsel who speak the language.

David Kent and Hilary Clarke are senior litigation partners in the Toronto law firm McMillan Binch LLP (www.mcmillanbinch.com). David is also a member of the firm's Competition/Antitrust Group. David's practice focuses on complex litigation, with an emphasis on competition/antitrust and class actions. Hilary's practice focuses on financial institutions, bankruptcy and insolvency and pensions/trusts litigation, and on class actions in those fields. David can be reached at 416.865.7143 or david.kent@mcmillanbinch.com and Hilary can be reached at 416.865.7286 or hilary.clarke@mcmillanbinch.com

MCMILLAN BINCH LLP