Defending Cross-Border Class Actions

Chantelle Spagnola
Davies Ward Phillips & Vineberg LLP

February 19, 2015

DAVIES

Outline

A. **Introduction to Cross-Border Class Actions**

B. Differences in Approaches for Dealing With Parallel Class Proceedings

C. Areas of Divergence in the Tests for Certification

D. Access to Pre-Certification Discovery

E. Enforcement of Foreign Settlements in Parallel Proceedings

F. Miscellaneous Practice Points

A. Introduction to Cross-Border Class Actions

- Following the introduction of class proceedings legislation in Canada in the early 1990s, there has been a steady proliferation of class actions across the country
- Canadian class proceedings legislation requires that plaintiffs bring a motion (or application) to "certify" an action before it can move forward as a class proceeding
  - Must satisfy the five-part test for certification (generally consistent across Canadian jurisdictions)
- Canadian courts have historically taken a liberal approach to certification
  - The Supreme Court of Canada (SCC) has recently confirmed that certification is purely procedural and not merits-based

- It has become common for Canadian plaintiffs' counsel to pursue actions which parallel those commenced south of the border, in particular in the areas of competition and securities litigation
- As well, Canadian plaintiffs' counsel are increasingly asserting claims on behalf of global classes of plaintiffs, including claims by non-resident plaintiffs with little connection to the Canadian jurisdiction where the claim is commenced
  - ➢ This can create complications for foreign class counsel who are prosecuting parallel actions in their home jurisdiction
- There are a number of important differences between the class proceedings regimes in Canada and the U.S. that counsel should be aware of before attempting to navigate cross-border actions

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B. Differences in Approaches for Dealing with Parallel Class Proceedings

- Multiple similar/overlapping actions are often commenced in more than one Canadian province/territory, as well as in more than one U.S. Federal district
- Unlike in the U.S., there is no formal regime in place in Canada to deal with circumstances where different groups of plaintiffs commence separate class proceedings involving similar issues in a number of jurisdictions

U.S. Approach – MDL System

- Two or more actions commenced in U.S. Federal Courts with common factual and legal allegations can be coordinated using multi-district litigation (MDL) rules (similar state-level processes also exist)
- MDL rules serve to transfer all pending civil cases with common questions of fact to a single federal judge for coordination of pre-trial matters
  - Case is remanded back to original court for trial
- Streamlines the pre-trial process by allowing for consistent rulings on pre-trial motions, eliminating duplicative discovery

MDL System

- Decision to transfer to single MDL judge is made by panel of seven judges (the Judicial Panel for Multi-District Litigation) appointed by the Chief Justice of the U.S. Supreme Court
- Three requirements must be satisfied (same criteria apply to both class and individual actions):
  1. There must be two or more cases with common questions of fact pending in different districts;
  2. A transfer would serve the convenience of the parties and witnesses involved; and
  3. A transfer promotes the just and efficient conduct of the actions

Canadian Approach

- No procedure equivalent to MDL system in Canada
- If matter is commenced in multiple provinces, superior courts of each province where an action is commenced may have overlapping jurisdiction
  - Result is the potential for multiple overlapping proceedings in different jurisdictions
  - Concerns about inconsistent results

Canadian Approach

- When faced with parallel class proceedings across multiple Canadian jurisdictions, defendants have historically relied on:
  - Cooperation and coordination of the parties and their counsel (*e.g.* agreement among plaintiffs' counsel to restrict classes in various actions by residence of class members to avoid overlap, agreements among counsel as to order and timing of various parallel actions)
  - Motion for a stay of proceedings in one or more of the actions
- Given the absence of an MDL system and the limited options available to defendants, creative solutions can be necessary to avoid a multiplicity of overlapping proceedings

A Creative Approach

- The decision on the carriage motion in *Mancinelli v. Barrick Gold*, 2014 ONSC 6516 presents a novel solution to the problem of parallel proceedings
- Both groups of competing plaintiffs counsel agreed to the defendants' requested undertaking that the successful plaintiffs' consortium undertake to take all necessary steps to permanently stay or dismiss any parallel Canadian proceeding that they or their local agents have commenced and not to facilitate or encourage the commencement of other parallel Canadian proceedings
- Justice Belobaba directed the successful consortium to abide by its undertaking to the defendants

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C. Areas of Divergence in the Tests for Certification

- The test for certification of actions in the U.S. Federal Courts is found in U.S. Federal Rule 23
- In Canada, there is no national equivalent to Rule 23 – each province has its own class proceedings legislation (substantively similar across all common law provinces)
- **Certification Under the Ontario *CPA***: plaintiffs must establish: (i) cause of action disclosed in the pleadings; (ii) identifiable class of two or more persons; (iii) claims raise common issues; (iv) class action would be the 'preferable procedure' for resolving the common issues; and (v) there is an adequate representative plaintiff

- **Certification Under U.S. Rule 23(a)**: plaintiffs must establish: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation
- In order to be entitled to assert a claim for monetary relief, as well as provide class members with notice and opt-out rights, U.S. plaintiffs must also satisfy the requirements of **Rule 23(b)(3)** (most U.S. Federal class actions are of this type)
- Rule 23(b)(3) requires plaintiffs to establish that issues common to the class **predominate** over individual issues, and that the class action be superior to other methods available for resolving the class members' claims

Primary Differences Between Canadian and U.S. Certification

- The primary substantive differences between the various Canadian tests for certification and the test set out in U.S. Rule 23:
  1. Procedural versus merits-based
  2. Absence of predominance
  3. Absence of numerosity
- The practical effect of these differences is that the Canadian standard for certification is generally considered to set a lower bar for plaintiffs than its U.S. Federal equivalent

1. Certification is Purely Procedural

- Canadian certification motions are intended to focus on the form of the action and serve a **purely procedural** function, and certification judges should accordingly not focus on the underlying merits of the claims asserted
- Canadian plaintiffs must tender evidence showing that there is "some basis in fact" to establish each of the certification criteria (other than the requirement that the pleadings disclose a cause of action) [see *Hollick v. City of Toronto*, 2011 SCC 68; reaffirmed in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57]
- U.S. Federal Courts may assess to some degree the underlying merits of the claims asserted in deciding whether to certify an action
    - An increasing number of U.S. Federal Courts endorse a more rigorous assessment of the certification criteria, whereby judges can make findings of fact that go to the merits of the action

2. Absence of Predominance

- U.S. Federal Rule 23(b)(3) requires that “questions of law or fact common to class members predominate over any questions affecting only individual members”
- While Canadian courts will weigh common issues in relation to individual issues as part of the preferability analysis, there has been an explicit rejection by Canadian courts of the requirement that common issues predominate over individual issues

3. Absence of Numerosity

- Pursuant to U.S. Federal Rule 23(a)(1), U.S. plaintiffs must establish that a proposed class is so large that "joinder of all members if impracticable"
- Canadian plaintiffs do not bear this same burden, and are instead required to demonstrate that "there is an identifiable class of two or more persons that would be represented by the representative plaintiff"

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D. Pre-Certification Discovery

- No statutory right to pre-certification discovery in Canada
- Limited pre-certification discovery may however be available if the evidence sought it relevant to the matters at issue on the certification motion (*i.e.* whether there is an identifiable class, whether issues are common to the class)
- U.S. plaintiffs, on the other hand, benefit from extensive discovery (both documentary and oral) prior to certification
  - In line with the reality that U.S. courts will resolve factual and legal disputes at the certification stage, even if those determinations overlap with the merits

- As a result of the expansive approach to pre-certification discovery in the U.S., Canadian plaintiffs from time to time seek to gain access to documents produced by parties in corresponding U.S. proceedings
- Canadian plaintiffs may obtain **letters of request/letters rogatory** from the domestic court [see Ontario Rules 36.03, 34.07(2)-(3); note that most other Canadian provinces have similar provisions]
  - Once letters of request are issued by the Canadian court, litigants must then apply to the foreign court to have the letters of request enforced/have the evidence compelled
  - While obtaining letters of request is the conventional first step to obtain evidence from a foreign jurisdiction, this step is not always required for plaintiffs to obtain assistance in gaining access to discovery provided in the context of U.S. proceedings

- U.S. Federal Courts have broad powers to assist Canadian counsel seeking to obtain access to documents produced in U.S. proceedings (28 U.S.C., Title 22, Chapter 24, Subchapter I §1782)
  - Although §1782 refers specifically to assistance being provided on the basis of letters rogatory/letters of request, the provision allows for an order to be made "upon the application of any interested person", absent formal letters of request
- U.S. Federal Courts will often balance the liberal scope of pre-certification discovery by granting a protective order pursuant to Federal Rule 26(c) – such orders can defeat or significantly reduce the scope of assistance orders issued under §1782
  - Note that Canadian plaintiffs can seek to intervene in U.S. proceedings and amend Rule 26(c) protective orders in an attempt to gain access to U.S. discovery materials

The *Vitapharm* Case

- *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* [2001 O.J. No. 237 (S.C.J.)] – multijurisdictional competition class action alleging conspiracies to fix the prices and allocate market shares for vitamins and food additives
- To get around the U.S. protective order, the Canadian plaintiffs made an application to the U.S. asking to be named as parties to the U.S. Federal action to gain access to discovery materials
- Ontario court rejected an "anti-motion" by the Canadian defendants seeking to enjoin the Canadian plaintiffs from getting access to discovery materials disclosed in corresponding U.S. litigation

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E. Enforcement of Foreign Settlements in Parallel Proceedings

- When a class proceeding with a multinational component is commenced in Canada, the relevant court must assess its jurisdiction over the action and the parties
- Similarly, a Canadian judge asked to enforce the order of a foreign court must assess the validity of that foreign court's jurisdiction over the proceeding and parties
- Canadian common law courts have generally taken an liberal approach to the assumption of jurisdiction over foreign parties and foreign claims

- Canadian courts will generally apply the "real and substantial connection" test to determine whether there is sufficient connection between the Canadian forum and the foreign claim and/or parties (see SCC Jurisdiction Trilogy: *Club Resorts v. Van Breda*, 2012 SCC 17; *Éditions Écosociété Inc. v. Banro Corp*., 2012 SCC 18; and *Breeden v. Black*, 2012 SCC 19)
  - Assumption of jurisdiction in Quebec is governed by Book Ten of the Civil Code of Quebec, while the provinces of B.C., Saskatchewan, Nova Scotia and the Yukon Territory have adopted codified regimes based in whole or in part on the *Uniform Court Jurisdiction and Proceeding Transfer Act* (UCJPTA) developed by the Uniform Law Conference of Canada

- In deciding whether to enforce a foreign settlement, Canadian courts will apply the three part test set out by the ONCA in *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321:
  1. Is there a **real and substantial connection** between the proposed cause of action and the foreign jurisdiction?
  2. Were the non-resident class members accorded **procedural fairness**, including adequate notice?
  3. Were the non-resident class members **adequately represented** in the foreign class action?

Silver v. IMAX Corp.

- *Silver v. IMAX Corp.*, 2013 ONSC 1667 - In 2006, U.S. and Canadian investors commenced class actions in both the U.S. and Canada against IMAX Corp. and others alleging secondary market misrepresentation in respect of financial reporting and recognition of revenue for theatre systems
- The Ontario plaintiffs were grated leave to proceed under the *OSA* and a global class was certified which included all persons who acquired IMAX securities on the TSX or NASDAQ, regardless of geographic location
- Subsequently, the U.S. court certified a class of all persons who acquired IMAX securities on the NASDAQ, resulting in overlapping classes

- In 2012, the parties in the U.S. action entered into a settlement agreement
- U.S. court made the settlement conditional on amending the Ontario class definition to carve out NASDAQ purchasers
- Justice van Rensburg – applied the factors set out by the ONCA in *Currie v. McDonald's Restaurants of Canada Ltd.* In concluding that the Ontario class definition should be amended and the U.S. settlement should be recognized and enforced

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- **Protection of Information Disclosed on Discovery**
  - *U.S.*: common practice to obtain a protective order that applies to all productions and transcripts of depositions in U.S. class actions (particularly antitrust proceedings)
  - *Canada*: parties generally rely on the application of the "deemed undertaking" rule which prevents the use of information gathered during discovery from being used for any other purpose than the lawsuit for which the evidence was obtained
- **Joint Defence Agreements**
  - *U.S.*: formal JDAs are common practice amongst groups of defendants sharing a common interest in the defence of the litigation in U.S. class actions
  - *Canada*: while formalized JDAs are becoming increasingly common, defendants have historically relied on informal agreements amongst counsel

- **Opt-Outs**
  - *U.S.*: common for large institutional or corporate class members to opt-out of U.S. proceedings in favour of pursuing an individual claim – will often provide worldwide releases upon settling claims
  - *Canada*: less common to have opt-outs – important for Canadian defence counsel to be aware of any significant opt-outs in parallel U.S. proceedings and scope of any release
- **Use of Testifying Experts**
  - Counsel should consider whether to use the same or different testifying experts in parallel proceedings
  - Risks associated with a potential decision touching on an expert's credibility or analysis tainting parallel proceedings
  - Risks associated with "tainting" an expert with documents and information relevant to one proceeding prior to testifying in another