Cross-Border Class Actions: Opportunities and Challenges

By Geoffrey Cowper, QC, Paul Martin and Andrew Borrell
Fasken Martineau DuMoulin LLP

This brief article summarizes Canada's rapidly developing and distinctive class action culture. Canadian legislatures and courts have embraced the attractions of class actions somewhat later than their US counterparts and are both learning from US experience and striking out in new directions. In some areas certification is now easier to achieve in Canada. However, the absence of treble damages, modest punitive damages, and narrower statutory and common law substantive liability make Canadian actions very different contests.

The robust federalism of the Canadian justice system dictates that class actions remain a cooperative endeavor within Canada itself, with ongoing statutory and other differences between provincial jurisdictions in respect of both procedural and substantive matters. The Supreme Court has endorsed a generous approach to foreign judgment recognition, but translating that approach to class actions proceedings is proving a complex and varied experience.

The area is also rapidly changing, with important recent decisions respecting both certification and liability issues requiring changes to both strategy and tactics on the part of plaintiff and defense counsel alike. One distinctive feature of the Canadian experience relates to merit determinations: even in class action proceedings some merit determinations have occurred before certification.

Generous Certification Standards

Canadian plaintiffs do not need to establish numerosity, typicality or predominance in order to achieve certification. The provincial legislation which generally governs certification requires only that there be common issues between a group of plaintiffs the resolution of which would significantly advance their common interest against one or more defendants. While the class action process must be preferable to individual proceedings the absence of some of the US requirements means that certification in areas like product liability has proven far easier to achieve in Canada.

The receptiveness of Canadian courts to the expansion of class actions generally is demonstrated by the Supreme Court of Canada's recognition of class actions even in the absence of enabling provincial legislation. Nine of the 10 Canadian provinces and the Federal Court system now have specific rules governing class actions.

Three recent decisions by Canadian appellate courts also evidence the judicial determination to make class actions workable in Canada. In a recent Québec decision, the court employed an averaging method in determining class member entitlement to overcome practical problems of proof at the expense of overcompensating – and undercompensating – some class members. In a case involving cash advance fees, the Ontario Court of Appeal made use of a statutory aggregate damage provision to render certification practical where the determination of damages for individual claimants appeared impossible. In British Columbia, the court of appeal held that the question of whether liability to plaintiffs in a criminal interest proceeding involving overdraft charges could itself be determined on a class basis could itself be determined as a common issue, thus certifying a class action before determining in effect if a class action was workable. Judges in other cases have observed that certification might have to be revoked if the proceeding proves unworkable, but the Canadian approach to

date seems tolerant of deferring this critical question until after the machinery of class certification is fully engaged.

One possible exception to this trend was the recognition by the Supreme Court of Canada of contractual arbitration clauses in a consumer contract involving Dell computers. This exception may well be short-lived since Ontario and Québec legislation now makes arbitration clauses unenforceable in consumer contracts and a body of caselaw from British Columbia has held that its class action legislation trumps the arbitration legislation where class actions are preferable to arbitral resolution.

One other deterrent to class actions in Canada is our loser-pay costs system. Although British Columbia's statute provides that no costs can be awarded against representative plaintiffs once the case is certified, an award of costs has been made where the case was summarily dismissed. Other jurisdictions do not uniformly insulate unsuccessful plaintiffs from the possibility of adverse costs awards. In *Danier Leather*, involving securities disclosure, the Supreme Court recently declined to overrule an Ontario judge's award of costs against a well-funded representative shareholder plaintiff.

The International Class

While Canadian courts have yet to export a Canadian class action settlement internationally, some Canadian courts have recognized the jurisdiction of US courts to approve settlements involving Canadian resident plaintiffs. In *Pro Swing*, the Supreme Court has now determined that non-monetary international judgments are now eligible for enforcement in Canada on the broad ground of judicial comity.

In the first case involving the McDonald's restaurant chain, the Ontario Court of Appeal refused to enforce the US settlement on the basis that the notice to Ontario plaintiffs was inadequate. However, the court held that in other circumstances such a settlement could prevent an Ontario class action from proceeding if there were a real and substantial connection with the foreign jurisdiction, the rights of Ontario class members were adequately represented, and there were procedural fairness including adequate notice to Ontario class members.

In a second case, an Ontario court endorsed a settlement originating in the US as binding on the Canadian class, but specifically retained continuing jurisdiction to supervise the settlement. Thus, Canadian class members would have recourse in the Ontario courts if for some reason the settlement went awry.

The importance of international settlement classes was demonstrated in the US case of *Rosner v. United States*, the so-called Hungarian Gold Train case. The case involved the mishandling and misappropriation of valuable goods that had been confiscated by the Nazis from Jews in Hungary, and subsequently recovered by the US Army in a train found shortly after V.E. Day. Plaintiffs' counsel heard from over 7,000 potential claimants worldwide. In the absence of parallel foreign proceedings, the US District Court took jurisdiction and certified an international settlement class.

By far the more common practice has been for plaintiffs' counsel in the US to cooperate with Canadian plaintiffs' counsel in the commencement and management of co-ordinated or follow-on class actions.

As in the US there has developed some rivalry between firms seeking to represent the greatest portion of the class. To date those natural tensions have been largely resolved amicably, but there have been contested applications to be recognized as lead counsel for the plaintiff class. In British Columbia, a judge stayed an action brought by a competing representative plaintiff where it was held that the one case was better set to "carry" the cause.

The National Class

From the outset the desirability of national class actions has encountered the challenges inherent in Canada's federal system which until recently treated judgments from other provinces in the same category as truly foreign decrees. Some courts have proved resourceful in seeking ways to facilitate national proceedings and settlements, while provincial legislatures and some provincial courts have sought to preserve a degree of distinctiveness and autonomy.

Canada does not have the equivalent of the MDL system. However, the courts have worked cooperatively, particularly where settlements have been achieved requiring national implementation. Large settlements have been effected by obtaining judicial approvals from several provincial superior courts. In 2005, the Canadian Uniform Law Conference published recommendations intended to facilitate a truly national class actions practice.

Ontario courts have from the outset approved national classes based on opt-out provisions. The constitutionality of achieving attornment by non-resident plaintiffs through passive opt-out provisions coupled with notice protections has not yet been definitively addressed at the appellate level. Some provincial statutes prohibit national class certification, and several others have more recently raised the bar to recognition of extra-provincial class actions.

In contested cases there now exists statutory bases in some

provinces for resisting enforcement of national classes certified in Ontario. Further, the *Civil Code of Québec* and that jurisdiction's long tradition of procedural and substantive distinctiveness founded on the Napoleonic Code will likely prevent any truly national approach.

Jurisdictional Issues

Jurisdiction is a similar question with similar standards and vocabulary in Canada. The best opportunity for defendants to resist the plaintiff's choice of forum, and to thereby glean an advantage from differences in procedural or substantive law, is at the interlocutory motion stage. Jurisdictional motions generally take place in advance of the certification motion, and can be based upon an absence of jurisdiction *simpliciter* and/or *forum non conveniens*. The test for jurisdiction *simpliciter* requires a real and substantial connection between the subject matter and the forum. *Forum non conveniens* motions as in the US involve arguments about the comparative convenience of different forums.

These challenges are meeting with a decreasing degree of success in Ontario. In one Ontario class action involving an American defendant corporation that did not carry on business in Canada, the Ontario court held that it did have jurisdiction *simpliciter* over the parties, finding that the defendant manufacturer was connected to the subject matter of the action, through its alleged sales activities, and that there was a sufficient real and substantial connection between the subject matter and Ontario.

US class plaintiffs must also respond to similar challenges in US courts. In the infamous Bre-X securities litigation, for example, the Federal Court for the District of Eastern Texas held that it lacked subject matter jurisdiction over the prospective Canadian plaintiffs who had purchased shares on Canadian exchanges. The Texas ruling resulted in a parallel Ontario class action which was subsequently certified and settled as against one of the defendants.

A more aggressive tool than a stay is also available to courts on both sides of the border: the anti-suit injunction, by which the court enjoins a party from pursuing an action in the foreign court. In one pitched jurisdictional battle involving a class action alleging harm caused by asbestos exposure, a class of plaintiffs who were primarily resident in British Columbia brought an action in a Texas court for damages. The defendants successfully moved for an anti-suit injunction in the British Columbia Supreme Court, only to be met with an anti-anti-suit injunction issued by the Texas court, enjoining the defendants from bringing another such motion. The British Columbia injunction was eventually overturned on appeal to the Supreme Court of Canada, on the basis of comity. The Supreme Court held that the Texas court had been advised by counsel that the jurisdiction of the British Columbia court did not apply with respect to the anti-suit injunction, and therefore the Texas court was not attempting to defeat the proceedings in British Columbia so the principle of comity applied.

Product Liability Cases

Certification of a wide variety of product liability cases and medical device and pharmaceutical cases continues apace across Canada. Most recently the Ontario Court of Appeal upheld the certification of a class proceeding respecting claims against the makers of VIOXX.

The absence of a typicality requirement means that a representative plaintiff need not have an identical claim against every defendant. Thus when a type of product is manufactured negligently by a number of different manufacturers, Canadian courts have allowed cases to be brought by multiple representative plaintiffs, each of whom will have a claim against one or more of a group of defendants. In this way, a single class action can aggregate the claims of all end-users, for example, against an entire industry of manufacturers.

From the certification of breast implant cases in the early days of the practice to other medical devices such as pacemakers and defibrillators, Canadian courts have been generous in extending certification in cases involving even locally modest numbers of plaintiffs.

Competition Law

In the competition law context, there are several notable advantages to the US antitrust statutes when compared to similar Canadian statutes. The most significant example is the availability of treble damages under the *Sherman Act*, which has no Canadian equivalent. Similarly, the US legislation establishes conspiracy as a *per se* offense, whereas the corresponding Canadian offense requires proof that the alleged misconduct is likely to unduly limit competition. Moreover, the US body of caselaw in this area is far more advanced than that in Canada, as is the area-specific expertise among the judiciary. For all of these reasons, it would frequently be advantageous for an individual Canadian plaintiff to join a US antitrust class action, and opt out, if necessary, from a Canadian action.

However, a 2004 ruling of the United States Supreme Court limited the ability of Canadian plaintiffs to access US antitrust law. In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, a case involving allegations of a price-fixing conspiracy among

vitamin manufacturers, the court ruled that under the *Foreign Trade Antitrust Improvements Act of 1982*, the *Sherman Act* did not apply to conduct involving independent foreign harm (i.e., harm suffered by foreign plaintiffs that was independent of US domestic harm). The government of Canada had filed an *amicus* brief stating that treble damages would supersede Canada's national policy decision with respect to competition law remedies.

Cross-Border Discovery and Production Issues

Canadian jurisdictions generally do not require discovery prior to the certification motion. Counsel for either a plaintiff class or a defendant in a Canadian class action can, on occasion, make use of evidence gathered in pre-certification discovery in a parallel US action. This is especially true in situations where counsel have working relationships with firms on the other side of the border. Indeed, in a recent ruling on an "anti-motion motion", the Ontario courts declined to prevent a putative Canadian representative plaintiff from moving in a US court for access to the discovery evidence in the US action (in this case, the parallel action was the vitamin cartel litigation which resulted in the *Empagran* case cited above). Citing the principles of comity and free trade, the Ontario court refused to enjoin the plaintiff from bringing a US motion for the alteration of a protective order of confidentiality with respect to discovery evidence.

Securities Disclosure Liability

Securities class actions have yet to take off in Canada. After the spread of class action legislation the absence of securities class actions was easily attributed to the absence of statutory liability for secondary market disclosure. With respect to initial disclosure the absence of judicial recognition of fraud on the market made class actions unworkable.

After much public discussion Ontario passed legislation in 2007 recognizing liability for secondary market disclosure for the first time in Canada. Similarly the statute adopts a presumption of damage that moderates the difficulties of proof of loss in securities cases. Other jurisdictions may follow suit. Although there has not been a rush of cases the framework is now in place for the more full development of a securities class action practice.

The legislation may also prove to be a strong draw for US plaintiffs' counsel, not only because of the low standard of causation but also because of the broader discovery that will be available under the Ontario legislation than that allowed under the *Private Securities Litigation Reform Act* in the US. By working in concert with Ontario counsel, American counsel may be able to obtain evidence on discovery in the Ontario action, and use the evidence so obtained to amend US pleadings appropriately.

For a variety of reasons, both substantive and procedural, Canada has proven a relatively friendly environment for accused securities offenders. Recent decisions have continued in this tradition. In the criminal prosecution of John Felderhof arising out of the Bre-X scandal involving salted gold samples from Indonesia, the chief geologist was acquitted by a judge in lengthy (and well-developed) reasons of all charges on the basis that he was not involved in the proven wrongdoing.

In the very recent decision of *Danier Leather*, the Supreme Court of Canada upheld a dismissal on the basis that although changes in the sales environment (literally the weather) for clothing sales were material facts they did not constitute a material change requiring disclosure in the offering prospectus.

In general both prosecutors and plaintiffs' counsel lack the coercive prospect of a jury trial or the attractions of large punitive damages. Defendants can and do defend cases that might be compromised in the more uncontrollable legal environment of the United States.

Merits Determination

British Columbia has perhaps the most ambitious summary trial procedure in the Americas. It facilitates early trial resolutions by judges based on affidavit and cross-examination alone. This rule has been used by the courts to determine the merits on class action claims, prior to certification in cases involving credit card checks and trust claims arising from the deposit system for recyclable containers. The ability to secure a judgment on the merits of some or all the issues in a case represents another distinctive challenge and opportunity.

Conclusion: A Third Way

The raw and rambunctious youth that is class action practice in Canada shows little sign of becoming either boring or uniform from sea to sea. Juridical and procedural differences will continue to raise challenges and opportunities for plaintiffs and defendants alike. The quiet competitiveness amongst Canadian jurisdictions and between Canadian firms seeking to serve their clients will doubtless continue some differences and efface others.

Canada will likely remain a jurisdiction that is generous in recognizing class proceedings, vigorous in seeking to make multiple jurisdictional proceedings effective, and a place where the merits of a proceeding may play a far greater role in the practice than has been the experience in the United States. ■

Geoffrey Cowper, QC, *Fasken Martineau DuMoulin LLP*
Tel: (604) 631-3185 • Fax: (604) 632-3185 • E-mail: gcowper@fasken.com

Geoffrey Cowper, is a partner in Fasken Martineau DuMoulin's Class Action Practice Group. Geoff Cowper received his QC in 1997 and is a Fellow of the American College of Trial Lawyers. His class action-related practice has included defending actions brought in relation to product liability, credit card and other financial charge issues and pharmaceuticals.

Paul J. Martin, *Fasken Martineau DuMoulin LLP*
Tel: (416) 865-4439 • Fax: (416) 364-7813 • E-mail: pmartin@fasken.com

Paul Martin, is a partner in Fasken Martineau DuMoulin's Class Action Practice Group

Andrew D. Borrell, *Fasken Martineau DuMoulin LLP*
Tel: (604) 631-3195 • Fax: (604) 632-3195 • E-mail: aborrell@fasken.com

Andrew Borrell, is a partner in Fasken Martineau DuMoulin's Class Action Practice Group