The Americanization of Canadian Class Actions

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While in the United States recently, I was asked if an American judge could certify a sub-class of Canadians as part of a U.S. class certification and settlement. I replied that, while U.S. courts have certified cases involving Canadians, such cross-border matters require great care in drafting and definition to achieve a settlement that is binding on Canadian residents. The very question itself speaks to the fact that the world's longest undefended border is remarkably porous when it comes to class actions. Moreover, as a result of the relative ease with which class actions are now certified in Canada and the generous discovery rules in most common law provinces, class actions are being filed in tandem with U.S. filings, or increasingly, ahead of them.

In April 2009, Andrew Morganti joined Sutts Strosberg, a leading Canadian plaintiff-side class action firm. A former partner at Milberg LLP in New York, Mr. Morganti is described as an "adviser on U.S. complex litigation." Mr. Morganti made these observations in a recent interview with American Lawyer.com:

> It is very exciting to be practicing in a country where the law is evolving so quickly. With respect to securities class actions, Canada is more like the U.S. was prior to the introduction of the *Private Securities Litigation Reform Act*. …On the antitrust [*Competition Act*] side, more and more class actions brought in the United States now involve global cartels. That means cases can potentially be brought in other jurisdictions, including Canada. But unlike other countries like the U.K. or Italy, Canada and the U.S. have more similar legal class action systems and competition laws. And in Canada, unlike in the U.K., many antitrust claims are now being certified as class actions.

While commencement of class action litigation on both sides of the border is not new, the role of U.S. counsel in such cases is gaining profile in Canada. A recent opinion by a senior motions judge in the Ontario Superior Court opens the doors for U.S. plaintiffs' firms participating openly in Canadian class actions.

The issue arose in the context of a carriage motion between two plaintiff class action firms, Kim Orr and Siskinds LLP in the *Sharma v. Timminco Limited* case. Siskinds' lawyers attacked the relationship between Kim Orr and the U.S. Milberg firm as a mark against allocating carriage of the litigation to Kim Orr. Siskinds' objections were understandable. In the 2005 decision of *Poulin v.*

Ford Motors, the Ontario Court ruled against the plaintiffs based on U.S. involvement in the case. The judge hearing the *Poulin* motion for certification found that Motley Rice, a U.S. firm, was essentially underwriting all litigation costs with an agreement to split the contingency fee with its Canadian counterpart. That, held the Court, was going “too far.” To reach this finding, the Court reviewed the earlier decision of *Wilson v. Servier* where U.S. counsel acted as consultants, billing Canadian counsel for time and disbursements spent on behalf of the representative plaintiff and class members. With no evidence that U.S. counsel underwrote litigation costs or took a percentage of fees, the Court held that U.S. counsel in *Wilson v. Servier* were acting as consultants, whereas U.S. counsel in *Poulin* were acting more as underwriters for the litigation. The former was acceptable; the latter was not.

The world’s longest undefended border is remarkably porous when it comes to class actions

In the *Timminco* case, Milberg's role appears to be aimed at helping Kim Orr in its investigation and document review, and in providing "strategic advice.”

> It would be grounds for disqualification of an Ontario law firm seeking carriage of an Ontario class action proceeding if the Ontario firm entered into an arrangement where an American law firm, or any foreign law firm for that matter, assumed *de jure* or *de facto* the role of the lawyer of record for the representative plaintiff, unless the foreign law firm obtained permission to practice law in Ontario. I do not understand Milberg LLP's proposed involvement as usurping the role of Kim Orr.

According to press reports, Milberg is now considering other matters with which it can help Kim Orr.

So What Happens Next?

Based on the Court’s decision in *Timminco*, it is acceptable to obtain services from foreign law firms so long as there is no interference with or usurpation of the lawyer and client relationship. So we can expect that cases will flow back and forth across the border in a manner that favours plaintiffs. Complex litigation will become more complex; the costs attached to defending this litigation, even higher.

In the United States, the pursuit of class actions was unbridled for some 40 years before the courts and legislatures began imposing limitations. It may not be coincidental that, just as a measure of restraint is applied in the United States, Canadian courts have facilitated new opportunities for U.S. counsel to pursue class actions in this country. Given the relative ease of class action certification in Canada and lenient documentary discovery provisions under the Rules of Civil Procedure in most common law provinces, it is small wonder that U.S. class counsel are looking northward. In his interview with *American Lawyer* last August, Mr. Morganti described a class action he had underway:

> Unlike previous parallel class actions brought by our firm in Canada, here we anticipate our certification motion to be served well ahead of our U.S. counterparts. That's because Canadian plaintiffs’ lawyers are not required to do all the discovery that U.S. counsel must (do) prior to a certification motion.

Plus ça change, plus c'est pareil!

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