

# ISSUES IN CROSS BORDER CLASS ACTION LITIGATION

Charles M. Wright and Andrea DeKay

## INTRODUCTION

Increasingly, parallel class actions are being commenced in Canada and the U.S.. In many cases, there are overlapping claims, and in some cases, overlapping classes. Where actions proceed on both sides of the border, it is to the benefit of all parties to look for ways to increase efficiencies and reduce litigation costs. Coordinated proceedings, document sharing, and even the manner in which actions are constituted may become increasingly important as parties look for ways to reduce transaction costs, achieve judicial economies, and ensure consistency in decisions. These issues give rise to a number of questions which must be carefully considered by counsel, including:

1. Will a U.S. or Canadian court certify a class which includes foreign nationals? If yes, is a broad class definition desirable for the defendant(s) in the particular proceeding?
2. Should a class exclude from its membership persons who are presently represented in a class proceeding in a foreign jurisdiction? and
3. To what extent can the parties in a proceeding rely on information or determinations reached in a related proceeding in a foreign jurisdiction? In what circumstances is coordination desirable for plaintiffs and or defendants?

The authors will focus on the current law in order to assist practitioners in addressing the above questions.

## THE INTERNATIONAL CLASS

The creation of an international class of plaintiffs is one method by which class counsel are attempting to deal with the increasingly global nature of class action litigation. However, at this early stage, it is questionable whether a class which includes foreign nationals will be acceptable to the courts or desirable for the plaintiffs and defendants.

### Canadian Proceedings

There is nothing in the Ontario *Class Proceedings Act, 1992*, to prevent the certification of an international class of plaintiffs. As noted by Justice Winkler in *Carom v. Bre-X*, in the absence of any provision limiting the application of the *Class Proceedings Act, 1992*, to residents of Ontario, it is permissible to include "any person with a right of action, regardless of the location of his or her residence, in the class"<sup>1</sup>. Similarly, there is nothing in the legislation in Saskatchewan, British Columbia, Quebec or Newfoundland which prohibits the inclusion of foreign nationals in a class. Indeed, the legislation in each of Saskatchewan, British Columbia and Newfoundland, explicitly allows a non-resident to opt- in to a class proceeding provided the

---

1 *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441.

non-resident would be a class member but for their non-residency status<sup>2</sup>. However, given the precise wording of the legislation in British Columbia, Saskatchewan, and Newfoundland, a class of plaintiffs comprised entirely of foreign nationals would not likely be endorsed. For example, the legislation in British Columbia provides that "one member of a class of person who are resident in British Columbia may commence a proceeding in the court on behalf of the members fo that class"<sup>3</sup>. Language similar to that in the British Columbia Act can also be found in the Saskatchewan and Newfoundland Acts<sup>4</sup>.

In *Robertson v. Thomson Corp.*<sup>5</sup>, the court certified a class comprised of all creators of works published in print media in Canada whose copyright was infringed by distribution in electronic media. Justice Sharpe considered, and rejected the defendants' argument that the proceeding was "tainted with jurisdictional infirmity" because the class included foreign members. Sharpe J observed:

As I have already noted, the proposed class must be defined in objective terms and may well include individuals who, in the end, will have no claim. The question is whether the Australian freelancer, who did not opt out of this action, would be bound by the result elsewhere. That would be an issue for the foreign court in which the Australian freelancer brought proceedings. In my view, the possibility that such question might arise elsewhere with respect to an atypical class member cannot be sufficient to defeat this claim from proceeding in Ontario.<sup>6</sup>

In *Brimmer v. Via Rail Canada*<sup>7</sup>, Justice Brockenshire certified an international class of persons injured as the result of a train derailment. The class was composed of people from Michigan, Ontario, and elsewhere in the U.S.

An international class of securities investors was also certified by Cumming J. in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*<sup>8</sup>. The circumstances surrounding these cases is described further on pages 4 and 5.

### **U.S. Proceedings**

Several U.S. courts have considered the appropriateness of a class which includes foreign nationals. To date, no clear consensus has emerged with respect to the appropriateness of such classes. Instead, differing opinions have emerged in the various federal circuits and on cases brought under different statutes.

In *Phillips Petroleum Co. v. Shutts*<sup>9</sup>, decided by the U.S. Supreme Court in 1985, it was held that a forum state may exercise jurisdiction over an absent class plaintiff even though that plaintiff may not possess the minimum contacts with the forum which would support personal

---

2 *Class Proceedings Act*, R.S.B.C. 1996, c.50; *The Class Action Act*, S.S. 2001, C.12.01; *Code of Civil Procedure*, R.S.Q. 1977, c. C-25 ss. 59-67, 999-1051, 2848, 2897, 2908; *Newfoundland and Labrador Class Actions Act*, SNL2001, c.18.1.

3 *Class Proceedings Act*, R.S.B.C. 1996, c.50, s. 2.

4 *The Class Action Act*, S.S. 2001, C.12.01; *Newfoundland and Labrador Class Actions Act*, SNL2001, c.18.1.

5 *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (S.C.J.).

6 *Ibid.*

7 *Brimmer v. Via Rail Canada Inc.* (2000), 50 O.R. (3d) 114 (S.C.J.).

8 *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2002] O.J. No. 1855.

9 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

jurisdiction over a defendant. The court further held that if a state court wanted to bind an absent plaintiff concerning a claim for damages it must provide minimum due process protection, including the provision of the best practicable notice, an opportunity to be heard and participate, an opportunity to opt out, and adequate representation by the named plaintiff. After finding that it had jurisdiction over non-resident class members, the court examined choice of law issues. The court held that due process would not be met where the law of a state was applied to a class member with no apparent connection with the state and where state law was substantively in conflict with the law of the class member's home jurisdiction.

More recently, the Second Circuit, Court of Appeal permitted an international class of plaintiffs in the context of a federal antitrust case. In *Kruman et al. v. Christie's International PLC et al.*<sup>10</sup>, the plaintiffs filed a class action against two auction houses, Christie's International PLC and Sotheby's Holdings, Inc.. The plaintiffs alleged that the defendants entered into an agreement to fix buyer's and seller's premiums. The plaintiffs all made purchases or sold goods in auctions held outside the U.S. and claim they were injured because they paid inflated commissions. The defendants moved for a dismissal of the case for lack of subject matter jurisdiction, lack of standing, and improper venue. They were successful in the first instance but on appeal the decision was reversed. The Second Circuit examined the application of U.S. antitrust law to conduct directed at foreign markets and held that an antitrust action under U.S. law may be pursued where a plaintiff is able to demonstrate that the agreement to fix prices in a foreign market had an effect on domestic commerce. The requisite effect on domestic commerce will be found where the agreement caused injury to domestic commerce by (1) reducing the competitiveness of a domestic market; or (2) made possible anti-competitive conduct directed at domestic commerce. The Second Circuit held that based on the plaintiffs' allegations, the defendants could not be shielded from scrutiny under U.S. antitrust law. In rendering its decision, the court did not consider whether a judgment of the U.S. court would be enforceable in a foreign jurisdiction as against a foreign class member choosing to commence an action in his/her home jurisdiction.

In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*<sup>11</sup>, the District Court for the District of Columbia considered whether allegations of a global price fixing conspiracy that affects commerce in both the U.S. and other countries gives persons injured abroad a remedy under U.S. antitrust law. Applying *Kruman*, the court held that under federal antitrust law, to establish subject matter jurisdiction, plaintiffs must allege that the conduct causing their injuries resulted in a "direct, substantial, and reasonably foreseeable effect on U.S. commerce". Additionally, plaintiffs must allege that the effect which provides the jurisdictional nexus is the basis for the injury alleged. Ultimately, the court dismissed the claims of the foreign plaintiffs holding that the plaintiffs failed to allege that the precise injury for which they sought redress in the U.S. had the necessary domestic effect to provide subject matter jurisdiction over the case.

The District Court for the Eastern District of Pennsylvania considered the inclusion of foreign nationals in *Parachos v. YBM Magnex International Inc.*<sup>12</sup>, an action commenced on behalf of persons who purchased YBM stock, including persons resident outside the U.S.. The U.S. defendants moved for an order dismissing the action on grounds of international comity and *forum non conveniens*. The U.S. District Court granted the motion to dismiss holding that "the overwhelming evidence of Canada's interest in this action dictates that the Court defer to the

---

10 *Kruman et al v. Christie's International PLC et al.* (13 March 2002) Docket No. 01-7309 (2nd Cir. 2002).

11 *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.* (7 June 2001) Docket No. 00-1686 (Dist. Columbia).

12 *Parachos v. YBM Magnex International Inc.* (5 December 2000) Docket No. 98-6444 (E.D. Pa.).

Canadian legal system and dismiss the action on grounds of international comity<sup>13</sup>. It was determined that the U.S. action pertained to Canadian registered securities, brought by a purported class of investors, most of whom were Canadian, against predominantly Canadian defendants, concerning a Canadian corporation whose stock was sold only on Canadian stock exchanges. The decision was appealed.

Following the dismissal of *Parachos v. YBM Magnex International Inc.* by the District Court, U.S. counsel cooperated with Canadian counsel and a global settlement was reached. In the parallel Canadian actions, *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* and *Royal Trust Corporation of Canada et al. v. Igor Fisherman et al*<sup>14</sup>, Justice Cumming certified an international class of plaintiffs within the context of an agreed upon global settlement. The settlement provided for two groups of class members, both of whom included persons "wherever resident". Justice Cumming recognized the novelty of certifying an international class stating that "[t]hese class actions are also unique for Canada in including class members who are located throughout the world"<sup>15</sup>. The Canadian settlement was contingent upon dismissal of the U.S. appeal.

In *McNamara et al, v. Bre-X Minerals Ltd., et al*<sup>16</sup>, the District Court for the Eastern District of Texas considered whether the claims of foreign nationals could be advanced under U.S. law. In *McNamara*, the plaintiffs alleged that the defendants made misrepresentations which inflated the value of certain stocks. The claim was based on allegations of negligent misrepresentation, common law fraud, and breach of the *Securities Exchange Act*. The court held that although the *Securities Exchange Act* could, in certain circumstances, extend beyond U.S. borders, it did not have application to Canadian plaintiffs who purchased stock on a Canadian exchange. In rendering its decision the court looked at the "conduct" test (whether the fraudulent conduct that formed the alleged violation occurred in the U.S.) and the "effect test" (whether conduct outside the U.S. has had a substantial adverse effect on American investors or securities markets), and determined that only the "conduct" test was relevant to determining whether the Canadian plaintiffs could pursue their action in the U.S. court. The Canadian plaintiffs, who were unable to demonstrate that domestic conduct directly caused the alleged fraud, did not satisfy the "conduct" test, resulting in the dismissal of their claims. Unlike *Parachos*, where only the Canadian action survived, the end result of *McNamara*, was that parallel actions proceeded in both the U.S. and in Canada. The Canadian case was certified in the first instance, and the certification was upheld on appeal to the Court of Appeal. One of the *McNamara* defendants, Bresea, entered into a settlement embodying both the U.S. and Canadian actions. The settlement is conditional on approval in the U.S., Canada, and by the receiver in Alberta.

---

13 *Ibid.*

14 *CC&L Dedicated Enterprise Fund, supra* at note 8.

15 *CC&L Dedicated Enterprise Fund, supra* at note 8.

16 *McNamara et al v. Bre-X Minerals Ltd. et al.* (6 January 1999) Docket No.

### **Is an International Class Desirable?**

Although some Canadian and U.S. courts may be willing to certify a class of plaintiffs which includes foreign nationals, an international class may not be desirable for either plaintiffs or defendants.

For plaintiffs, seeking certification of a broad class may be attractive because of the increased damages which can be sought. This broader class may, however, result in complications in the class proceeding. Notice may be very expensive to provide internationally. Choice of law issues may arise which would affect the certification of the action. If individual hearings are required to establish damages, this may be onerous for foreign plaintiffs. These potential complications could lead to substantial delays in the proceedings which work to the detriment of the Canadian plaintiffs.

Foreign plaintiffs themselves could be adversely affected by inclusion in an international class. For example, U.S. courts may include Canadians with other foreign nationals when defining an international class. While inclusion in an international class might benefit plaintiffs in jurisdictions where there is not a tort system, much less class proceedings legislation, inclusion might not be of benefit to Canadian plaintiffs. In the absence of a U.S. class proceeding, no remedy would be available to many foreign class members. The lack of appropriate legal remedies available to many foreign class members, coupled with choice of law and jurisdiction concerns, could lead to a substantial discount in the plaintiff class claims. Clearly, such a discount would not be appropriate for Canadians who have a viable alternative to participating in U.S. litigation. An example of this can be found in the breast implant litigation which is ongoing in the U.S. and Canada.

In 1994, Ontario and Québec Canadian class counsel opposed a worldwide settlement entered into within the context of U.S. multi-district litigation proceedings. The worldwide settlement ultimately became an opt-in settlement for women in Ontario, Quebec and Australia. Subsequently, Canadian class counsel opposed a Plan of Reorganization within the context of Dow Corning Corporation's Chapter 11 Reorganization. In both instances, U.S. counsel, largely unfamiliar with the Canadian tort system, negotiated sharp discounts for Canadian claimants. The risk of such treatment should cause Canadian courts to be reluctant to allow foreign courts to assume jurisdiction over Canadian residents whose claims may be and have been commenced in Canada. U.S. courts must consider whether the representative plaintiff and class counsel are in a position to adequately and without conflict represent the interests of Canadian residents.

For defendants, the ability to resolve all liabilities in one proceeding is not unattractive. Whether a defendant is successful on the common issues or upon resolution of an action, the defendant will require certainty that the matter cannot be resurrected and re-litigated at a later date. This certainty may be lacking in an action where foreign nationals are included as class members. To date, most of the courts which have dealt with the international class issue have not addressed the issue of foreign enforcement. As a result, it is uncertain at this stage whether a foreign national who does not opt out of a proceeding will be bound by the result of the proceeding elsewhere.

In Canada, settling defendants will frequently seek to either have a settlement approved in each class action jurisdiction where they perceive a substantial exposure (historically Ontario, British

Columbia and Quebec), or they will create a form of opt-in procedure to ensure that each plaintiff actively submits to the jurisdiction of the court. These concerns are of even greater importance with an international class and as a result, defendants may wish to seek the approval of courts in more than one jurisdiction (or ensure that class members are individually bound).

Circumstances may arise in which enforcement against a foreign national is not contentious. Although the issue was not specifically considered by Justice Cumming in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, it was considered to a limited degree in *Parachos v. YBM Magnex International Inc.*. In respect of the possible prejudice which might be visited upon U.S. claimants, the court found that investors were aware of ties to Canada and knew that they might not be under the protections of U.S. securities law. The court appeared to take for granted that all claimants, including the U.S. claimants, would be able to seek relief under Canadian law: "Canadian law clearly provides causes of action for securities fraud, and in light of Canada's interests over the case it would make more sense to have such law adjudicate this matter"<sup>17</sup>. In light of the findings of the U.S. court and its decision to decline jurisdiction, it appears that in this matter any issue of foreign enforcement would be negligible.

## COORDINATED PROCEEDINGS

In light of the growing number of parallel actions proceeding on both sides of the border, a formal method of coordinating parallel proceedings would help to ensure consistency and increase efficiencies. Such a method does not currently exist between Canadian provinces, much less between countries. Perhaps what can reasonably be expected in the near term is to make it possible for judges in Canada and the United States to discuss the proceedings before them. This has happened in Canada on agreement of counsel, and presumably such arrangements could be broadened.

Within the U.S. federal sphere, Multidistrict Litigation ("MDL") has been extensively used to coordinate similar actions commenced in different federal courts. MDL proceedings provide a method for transferring all pending civil cases of a similar type filed throughout the U.S. to one federal judge. Appropriate cases are transferred by a panel of seven judges known as the Judicial Panel on Multidistrict Litigation. The Judicial Panel on MultiDistrict Litigation was created by legislation in 1968 in response to the difficulty courts were encountering in coordinating related cases that were pending in various districts. MDL proceedings are well suited to handle complex class actions and as a result, most complex class actions commenced in the federal sphere will be litigated through the use of MDL proceedings.

Increasingly, there is a less formal effort being made between counsel on both sides of the border to cooperate and coordinate proceedings. Following the dismissal of *Parachos* by the U.S. court, in which the U.S. court noted that the U.S. action was duplicative of the Canadian action, counsel in Canada and the U.S. worked towards a resolution of the matter which ultimately resolved the claims of both Canadian and U.S. plaintiffs. As noted by Justice Cumming in his reasons approving the settlement: "Counsel in the Canadian class actions

---

17 *Parachos, supra* at note 12.

advise that there has been a cooperative approach by all class counsel and that the assistance of American counsel for the plaintiffs in *Paraschos* has been integral to achieving the overall settlement<sup>18</sup>. Resolution of the Canadian proceeding was dependant on the dismissal of the U.S. appeal.

Document sharing may provide a benefit to parties in a number of ways, including informal assistance with evidence gathering or more formal document production. Technology has been developed and is readily available to assist parties on either side of the border with document sharing. In fact, in some U.S. cases, the courts will order parties engaged in litigation to deliver documents and information via electronic methods. In *In Re: Diet Drugs Products Liability Litigation*, a U.S. district court ordered the parties to post documents to an internet website in order to facilitate information delivery. The delivery of information was facilitated through the use of Verilaw, a company that provides customized electronic filing and related web-based systems for courts and lawyers. Similarly, *In re: Vitamins Antitrust Litigation*<sup>19</sup> the delivery of information was also facilitated through Verilaw. All of the documents posted to the Verilaw website in *In re: Vitamins Antitrust Litigation* were posted under a protective order of the court and were not publically available.

Generally, discovery in the U.S. must take place in the public domain, in part because it is believed that public production eases the burden on courts and litigants<sup>20</sup>. In U.S. cases where document production takes place in the public sphere, parties in parallel Canadian proceedings may openly share and access documents. However, the Rules of Civil Procedure, at least in Ontario, prohibit any type of reciprocal document sharing which might be contemplated unless the documents in question are a matter of public record<sup>21</sup>. This point was picked up by Cumming J. in *Wilson v. Servier Canada Inc.* where he noted that "if counsel should ascertain there are relevant documents in another jurisdiction then, subject to meeting any stipulations of the courts in that jurisdiction arising through having gained access to such documents, such documentation can be utilized in the litigation at hand. Again, the deemed undertaking rule would apply to such documents"<sup>22</sup>.

Although public production is the general rule in the U.S., increasingly in class actions the courts will issue a protective order to restrict public access to documents which are produced. Where documents are produced under a protective order, the parties may not be willing or able to assist Canadian counsel engaged in parallel litigation either by discussing strategy which stems from discovery, or by sharing experts where conclusions flow from the documents. The Canadian plaintiffs involved in *Vitapharm v. F. Hoffmann LaRoche Ltd.*<sup>23</sup> moved before a U.S. judge, under U.S. rules, to obtain evidence which had been and was continuing to be produced in the parallel U.S. action, *In re: Vitamins Antitrust Litigation*<sup>24</sup>. Although discovery evidence in the U.S. is generally publically available, in this case a protective order was issued thereby preventing the plaintiffs from obtaining the evidence they sought. The plaintiffs took the position that they were entitled to obtain evidence available in the U.S. through means which were lawful in the U.S.. However, the defendants opposed the U.S. motion and sought an order in

---

18 *Paraschos, supra* at note 12.

19 *In re: Vitamins Antitrust Litigation, Protective Order*, (3 November 1999) Hogan J. (Dist. Columbia).

20 *Wilk v. American Medical Association*, 635 F. 2d 1295 (7th Cir. 1980).

21 Ontario Rules of Civil Procedure, r. 30.1.01

22 *Wilson v. Servier Canada Inc.*, [2001] O.J. No 4947 (S.C.J.).

23 *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (26 January 2001) (S.C.J.).

24 *In re: Vitamins Antitrust Litigation, Memorandum Opinion re: Canadian Plaintiffs' Motion to Intervene*, (19 March 2001) MDL No. 1285 (Dist. Columbia).

Ontario restraining the plaintiffs from proceeding with their U.S. motion. The defendants took the position that the plaintiffs were taking “an end run” around the Rules of Civil Procedure by attempting to obtain discovery at a time when they were not entitled to it. The defendants also expressed privacy concerns. At first instance, Justice Cumming refused to restrain the plaintiffs from proceeding with their U.S. motion, holding that the plaintiffs were seeking access to discovery and not discovery itself. Justice Cumming’s decision was unanimously upheld on appeal to the Divisional Court, although two sets of reasons were given. While the majority decision in Divisional Court noted a distinction between access to discovery evidence and discovery itself, and the minority noted a distinction between access to discovery evidence in the passive sense and the pursuit of discovery in the active sense, both sets of reasons held that the plaintiffs were seeking access to evidence, not discovery. The majority decision held that “the U.S. motions should be governed by the applicable U.S. law in a U.S. court. Whether to entertain the motions or grant any relief are matters entirely for that court to determine”<sup>25</sup>. The decision of the Divisional Court has been appealed to the Court of Appeal.

## CONCLUSION

Although there is no consensus amongst the courts about the permissibility of an international class, and the coordination of proceedings is in its infancy, U.S. and Canadian counsel will continue to find ways to work together in the pursuit of parallel actions. Cooperation amongst counsel is inevitable given the increasingly global nature of class actions. However, as the mood of cooperation heightens, it will be a challenge for counsel and the courts alike to create an environment of certainty, predictability, and fairness. The future development of the law was recognized by Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* where he stated:

As a result of the inexorable forces of globalization and expanding international free trade and open markets, there will be an ever-increasing inter-jurisdictional presence of corporate enterprises. This is seen particularly in respect of American and Canadian business activity, given the extent of cross-border trade. If both societies are to maximize the benefits of expanding freer trade and open markets, the legal systems of both countries must recognize and facilitate an expeditious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries.<sup>26</sup>

Doc. No. 448915

---

25 *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (10 April 2002), (Div. Ct.).

26 *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd* (26 January 2001) Cumming J. 99-GD-46719 (S.C.J.).