Foreign-Based Class Proceedings: Implications for Ontario Counsel

by Greg Monforton and Jennifer DeThomasis

If a class action is commenced in a foreign jurisdiction, what impact, if any, will it have on similar class actions or potential class members in Ontario? The consideration of this question is perhaps an unintended consequence of the innumerable impacts of globalization. While there is no definitive answer to this question, it is clear from the case law that has developed that foreign-based class proceedings can significantly impact domestic proceedings, as well as domestic class members. In some cases, U.S. class action settlements have been extended to include Canadian residents, creating a trend that may ultimately result in a diminished need for Canadian class actions covering cross-border issues, and increasing the incentive for foreign lawyers to certify multi-national classes.[1] Such results have also increased the incentive for Canadian lawyers to join forces with foreign counsel to develop and work up foreign, domestic and multi-national class actions.

Some of the implications and considerations involved when foreign-based class proceedings are pending include the following:

Foreign Proceedings May Bind Ontario Residents

The most significant implication of a foreign-based class proceeding appears to be the potential for it to bind Canadian residents. To date, it appears that our Courts will support the inclusion of Canadian residents in foreign-based class action settlements, provided proper notice is given. In the 2004 decision in *Parsons* v. *McDonald's Restaurants of Canada Ltd.*[2], the Ontario Superior Court held that Canadian class members, who appeared in U.S. class action settlement proceedings to voice their objections to the U.S. class settlement, attorned to the U.S. jurisdiction and were thus bound by the U.S. settlement.

In *Parsons,* the defendant applied to strike two Canadian class actions based on a U.S. class action settlement and release, which specifically included Canadians subject to their exercise of opt-out rights. In addressing the Canadian class members, the U.S. Court ordered that notice to the Canadian class members be published in several publications across Canada. Parsons, the representative plaintiff in one of the two proposed Canadian actions, appeared in the U.S. settlement proceedings and objected to the settlement. Currie, the representative plaintiff in the second Canadian action, did not appear at the U.S. settlement proceedings.

The defendant argued that the proposed Canadian class actions had been finally disposed of by the U.S. class settlement. The Ontario Court held that Parsons and the other Canadian objectors who appeared in the U.S. settlement proceedings attorned to the U.S. jurisdiction and were, as a result, bound by the U.S. settlement and release. The Court permanently stayed Parson's action. However, the Court held that Parsons did not have authority to attorn on behalf of the class he represented since the class had not yet been certified.

In considering the impact of the U.S. settlement on Canadian residents, the Ontario Court held that there existed a real and substantial connection to the United States. However, it also held that the notice provided to Canadian class members was inadequate as it only reached approximately 30% of the class members. As a result of the inadequate notice, Canadian class members were not afforded an effective opportunity to opt out and commence a Canadian action, thereby violating the class members' rights to natural justice and making the U.S. settlement and its broad release unenforceable. As a result, the Currie class action was allowed to proceed.

Although the decision in *Parsons* provides some protection for Canadians in that adequate notice will be required before our Courts will enforce foreign class settlements in Canada, it does open the door for multi-national class actions to be enforced in Canada, thereby allowing foreign counsel to represent Canadians in foreign class actions in the comfort that Canadian courts will respect their efforts.[3]

Ontario Proceedings May Bind Foreign Residents

Similar to foreign proceedings binding Canadians, Canadian proceedings may bind foreign residents. In *Robertson* v. *Thomson Corp.*,[4] the Ontario Court certified a worldwide opt-out class of authors who had submitted

their work to the defendant. Although the Court questioned whether a foreign Court would recognize the binding effect of the Ontario judgment on non-resident class members, the Court left the issue to be decided by the foreign courts in which foreign class members brought proceedings.

As a result of the increase in multi-national classes, class actions may soon become (if they have not already) a race to the finish line or rather, certification, with the first action to be certified taking precedence.

Overlapping Class Actions – Potential for Stay of Proceedings

If overlapping class actions (actions that cover some or all of the same class members) are allowed to proceed, there is a potential for inconsistent results and overlapping classes. As a result, defendants will often seek to stay one or more of the actions. Although Canadian courts do not appear to have stayed a Canadian action as a result of a pending overlapping foreign action or multi-national action, the potential still exists, particularly since provincial class actions have been stayed as a result of pending overlapping national class actions.

National class actions have been certified in several cases across Canada. Unlike Ontario's *Class Proceedings Act*, the British Columbia, Saskatchewan and Newfoundland and Labrador statutes specifically address multi-jurisdictional issues by providing that a representative may seek to certify a class that includes non-resident class members, provided the non-resident class member specifically opts into the action.[5] In assessing whether a class action is appropriate in these provinces, the Courts must consider whether the class action involves claims that are the subject of other proceedings.

Thus far, our courts appear to be reluctant to allow overlapping actions to proceed where one of the actions has been certified. In *Carom* v. *Bre-X Minerals Ltd.*,[6] the Ontario Court held that, since the Ontario *Class Proceedings Act* does not contain a provision limiting its application to Ontario residents, any person with a right of action could be included in the class regardless of the location of his or her residence. In approving a class definition that included non-residents, the Court noted that the courts of other jurisdictions may invoke the principles in *Morguard Investments Ltd.* v. *DeSavoye*[7] to prevent parallel actions from proceeding.

In *Kelman* v. *Goodyear Tire & Rubber Company*,[8] the Ontario Superior Court certified a national class, which included British Columbia and Alberta subclasses. The defendant subsequently brought consent motions in both British Columbia and Alberta to stay pending class proceedings in those provinces. Both motions were granted.

In contrast, however, the defendants in *Pardy* v. *Bayer Inc.*[9] and *Lamb* v. *Bayer Inc.*[10] were not successful in obtaining stays of the extra-provincial proceedings. The Courts of both Newfoundland and Saskatchewan rejected motions by the defendant to stay the proceedings as the other potential class, which might include residents of all provinces, had not yet been certified.

Although our courts are willing to include non-residents in class actions and stay overlapping proceedings, they have demonstrated a desire to defer to foreign or extra-provincial proceedings where non-residents are concerned. In *Nantais* v. *Telectronics Proprietary (Canada) Ltd.*,[11] the Ontario Court certified a national class despite the defendant's objections that it would be improper given that extra-provincial class members would be bound by the result. However, the Court indicated that it would consider removing non-residents from the definition of the class in the Ontario proceeding if a class proceeding were commenced in the non-resident's own jurisdiction.

Similarly, in *Wilson* v. *Servier Canada Inc.*[12] the Ontario Superior Court created a separate B.C. subclass within a national opt-out class action. The court affirmed its jurisdiction to certify a national opt-out class, but did state that "[if] a class action is commenced and certified in another province, that certified class proceeding will take precedence for the residents of that province."[13]

Joining Forces with Foreign Counsel

The existence of pending foreign-based class proceedings is not only an issue to keep in mind when commencing domestic proceedings, but is also potentially advantageous to Canadian counsel. Counsel who choose to join forces with foreign law firms may be able to draw on additional expertise, experience and resources, including expert witnesses, in order to develop their class actions in Canada or, alternatively, to develop a multi-national class action in the foreign jurisdiction.

There are both advantages and disadvantages to working with foreign counsel and bringing national and multi-national classes. National and multi-national classes can provide the resident class with additional litigation leverage as a result of the increased number of class members. It can also provide access to justice for residents of jurisdictions that do not have class proceedings statutes. However, national and multi-national classes can result in additional legal complexities, notice considerations (as multi-jurisdictional notice can be expensive), communications issues, ethical dilemmas, and litigation or settlement complications. It is imperative that counsel carefully and thoroughly consider and weigh the advantages and disadvantages of national and multi-national classes.

When considering joining forces with foreign counsel to share resources or, alternatively, to commence a national or multi-national class action, the following are some of the factors class counsel should consider:

- Whether the potential pecuniary and efficiency gains merit the potential risk to certification caused by manageability and provincial legal variation concerns.[14]

- The statutory and common law rules of the foreign jurisdiction, including admissibility and use of evidence such as business records.

- The applicable rules of procedure. Generally, procedure is governed by the law of the *forum* whereas the substantive law is that of the place where the wrong occurred. One would not be able to resort to Ontario procedural rules to build up a case being tried in a foreign jurisdiction.

- The applicable limitation period for each class member's claim. Since limitation provisions have been held to be substantive rather than procedural,[15] non-resident class members may not be able to take advantage of longer limitation periods in the jurisdiction where the class action is brought. In addition, the ability of a provincial class action statute to toll the period for extra-provincial class members may be in doubt.

- The ability of counsel to formulate and execute a back up plan if the foreign Court refuses to include Canadians in the class.

- Informing clients of the advantages and disadvantages of joining a foreign class proceeding, including the following:

    - quantum of damages;
    - net recovery;
    - limitation periods;
    - tax implications;
    - *res judicata;*
    - pre-judgment interest;
    - costs; and
    - case management rules, if applicable.

- The manageability of the class action as a result of the inclusion of non-resident class members. Is the class less amenable to certification? In *Harrington* v. *Dow Corning*,[16] the Court found that differences in provincial products liability and comparative fault laws did not prevent certification of a non-resident subclass. However, in *Bittner* v. *Louisiana-Pacific Corp.*[17] the complexities created by the need to apply the laws of multiple legal regimes played a role in the court's decision to reject certification.

- Potential conflicts of interest, e.g. if foreign counsel wants to accept a settlement that Ontario counsel does not or if the parties negotiate a settlement that gives foreign class members higher recoveries than Canadian class members.

- Fee arrangements with foreign counsel. Rules 1.02 and 2.08 of the Rules of Professional Conduct appear to prevent an Ontario lawyer from directly or indirectly sharing, splitting or dividing his or her fees with a foreign lawyer (or indeed any lawyer outside Ontario).

Conclusion

Globalization has rendered the existence of multi-national class proceedings increasingly common. Whether the injustice demanding redress has arisen from the widespread sale of a defective product, pharmaceutical agent or cross-border environmental degradation, the pervasiveness of multi-national corporate interests across national borders has rendered the painstaking consideration of class proceeding venues an essential obligation of plaintiffs' counsel. Given the potentially significant implications of pending foreign class actions on Canadian actions and their class members, class counsel cannot ignore the potential impact of a pending foreign class action, nor can class counsel adopt a wait-and-see approach with respect to foreign class actions.

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Notes

[1] W.K. Branch, *Class Actions in Canada* (Aurora: Canada Law Book Inc., 2004).
[2] [2003] N.J. No. 182, leave to appeal dismissed (C.A.)
[3] W. K. Branch & C.A. Rhone, *The Bond Between Class Members – The Wedge Between Counsel: Trans-national Class Actions in the Wake of Parsons* v. *McDonald's Restaurants*,

http://www.branmac.com/go/download/Bond_Between_Class_Members.pdf

[4] (1999), 43 O.R. (3d) 161 (Gen. Div.) (application to strike); (1999), 43 O.R. (3d) 389 (Gen. Div.) (costs).

[5] *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *Class Actions Act*, S.S. 2001, c. 12.01; *Class Actions Act*, S.N.L. 2001, c-18.1

[6] (1999), 43 O.R. (3d) 441 (Gen. Div.) (national class)

[7] [1990] 3 S.C.R. 1077

[8] (17 November 2003) Toronto 42665CP (Ont. S.C.J.)

[9] [2003] N.J. No. 182 (Sup. Ct. – T.D.)

[10] [2003] SKQB 442

[11] (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal dismissed, 25 O.R. (3d) 331 at 347 (Gen Div) (certification application), leave to appeal to C.A. refused 7 C.P.C (4th) 206.

[12] [2001] O.J. No. 1615 (S.C.J.)

[13] [2002] O.J. No. 2032 (QL) (S.C.)

[14] *Supra*, note 1 at para 11.210

[15] *Jensen* v. *Tolofson*, [1994] 3 S.C.R. 1022

[16] (1996), 22 B.C.L.R. (3d) 97 (S.C.) (certification decision), aff'd 193 D.L.R. (4th) 67 (C.A.); (1998), 55 B.C.L.R. (3d) 316 (B.C.S.C.) (extra-provincial class); (1999), 64 B.C.L.R. (3d) 332 (B.C.S.C.) (striking claim against Dow Chemical Co.)

[17] (1997), 43 B.C.L.R. (3d) 324 (S.C.)