



Class Action Settlements

Can U.S. Courts

Bind Canadians?

by David W. Kent

Agrowing number of Canadian anti-trust, products liability, and consumer protection class actions are based on alleged cross-border misconduct. These lawsuits often mirror prior U.S. actions. Canadian class action lawyers are used to litigating in the shadow of parallel U.S. proceedings.

But now U.S. litigants are attempting to supplant Canadian litigation by making U.S. settlements on behalf of unsuspecting Canadian classes. This article focuses on the effect in Canada of U.S. class action settlements that purport to bind Canadian class members.

Mixed Results

There have been two recent attempts to impose U.S. class settlements on Canadians. In one, the settlement was effectively imposed and the parallel Canadian proceedings dismissed. In the other, the U.S. settlement was rebuffed and the Canadian litigation allowed to continue.

What happened? A key practical difference is that the Canadian class lawyers



David W. Kent is the past head of the Litigation Group at the Toronto law firm of McMillan Binch LLP. He has litigated a wide range of international and Canada/US cross-border cartels, conspiracies and class actions, including the auction house case discussed here. Lisa Parliament, a McMillan Binch articling student, assisted with this article.

participated in the U.S. settlement in the first case, but were left out of the second. But there are other differences as well. The decision rejecting a U.S. settlement provides some clues as to how it might be done differently more successfully in the future.

The Auction House Litigation

The case titled *Kruman v. Christie's International PLC*, 284 F.3d 384 (2nd Cir. 2002), was a conspiracy class action brought in New York on behalf of foreign claimants, including Canadians. *Kruman* was settled on terms that included the dismissal of a Canadian class action. U.S. class counsel involved their Canadian counterparts in the U.S. settlement negotiations and arranged for them to receive a payment out of the legal fees payable from the settlement.

Canadian class counsel later led the motion to dismiss the Canadian class action. The Canadian judge was advised that Canadian class members could make claims in the U.S. settlement and that the dismissal of the Canadian class was one of that settlement's terms. The Canadian case was summarily dismissed, on consent.

The McDonalds Litigation

The second case arose from the *Boland, et al v. Simon Mktg, Inc and McDonald's Corp.*, (Case No. 01 CH 13833, Cir. Ct. Cook Cty.) class action in Illinois that alleged fraud relating to contests run by McDonald's across North America. The class was broad enough to include Canadians. Although a parallel Canadian class action was underway, U.S. class counsel settled *Boland* without involving their Canadian counterparts (or providing for any payment Canadian class counsel).

Canadian class counsel appeared at the U.S. fairness hearing to object insofar as the settlement purported to affect Canadians. The U.S. court rejected those objections, approved the settlement and certified the entire class for settlement purposes.

The defendants then asked the Canadian court to stay or dismiss the Canadian litigation on the basis of the U.S. settlement. The Canadian court refused

to do so. But, depending on how you read it (and on the pending appeal), the decision either signals the rejection of cross-border class action settlements or offers a recipe for doing them more successfully.

The Canadian decision turned on the application of the test for recognizing foreign judgments: did the foreign court have a "real and substantial connection" to the action it disposed of. If so, the foreign decision will be enforced in Canada unless certain narrow exceptions apply.

This was the first time a defendant had tried to enforce foreign judgment in Canada against an unwilling plaintiff class. Typically, foreign judgments are enforced against unwilling defendants. Plaintiffs in foreign proceedings have normally chosen the foreign jurisdiction and, accordingly, there is usually no issue about enforcing the decision as against them.

But not in class proceedings. Most class members do not actively choose to be in a class; indeed, most are entirely unaware of either the class or the proceeding. The Canadian court noted that applying the usual test for enforcing foreign judgments is complicated in the context of class proceedings.

However, the court did not really follow through on that analysis. Instead, it assumed that the Illinois decision was *prima facie* enforceable without regard for the nuances of class litigation. It then turned to the exceptions to enforcement, and held that the *Boland* opt-out notice given to Canadian class members was inadequate. The court held that it would be a breach of natural justice to enforce the U.S. settlement against Canadians and, accordingly, that the Canadian action could continue.

What Can We Learn From This?

What is the learning from these two cases? The first, and most practical, is that anyone making a U.S. cross-border class settlement should make sure that Canadian class counsel are involved and will get some benefit from the U.S. settlement. A big difference between the two cross-border settlements was that Canadian class counsel was getting paid

continued on page 62

Points North, from page 58

for his Canadian efforts in the first case but not in the second.

The second practical tip is to pay attention to Canadian notice. Settling parties usually go to great lengths to explain and justify notice plans in U.S. settlements. The same care should also be taken with respect to the Canadian portion of any North American notice program.

It is too early to say whether a properly noticed U.S. settlement on behalf of Canadian claimants will be imposed over the protest of those Canadians. Nevertheless, the courts have left open that possibility. And they have also made it clear that, if Canadian protests can be avoided in the first place, a North American settlement may be very easy to implement indeed.