CANADA

REMEDIES THAT CROSS BORDERS

The Legal System Generally

Canada's legal system consists of both provincial and federal courts. With the exception of Quebec, which is a civil law jurisdiction, all Canadian provinces and territories are common law jurisdictions. Each province and territory within Canada has its own set of rules governing civil procedure and there are variations as to the timing and procedure of an action. Trials in Canada may be heard by a judge alone or by a judge and a jury, although jury trials are becoming rare in civil cases and have been completely abolished in Quebec.

Class/Collective Actions

Generally
Outside of the United States and Australia, Canada is the most frequently used forum for class actions. To date, only a handful of class actions have actually proceeded to trial because virtually all cases that have succeeded past the class certification stage have been settled by defendants. Canadian class actions frequently follow after a similar class action has been filed in the United States and the outcome of a case in the United States will sometimes influence the outcome of the subsequent class action in Canada.

All provinces in Canada, except Prince Edward Island and the territories, allow for representative actions. Additionally, the Federal Court of Canada allows for representative actions permitting an individual to commence a proceeding on behalf of a group of persons with similar claims. There are differences within each province. For example, in Ontario, Quebec, Manitoba, Nova Scotia, Saskatchewan, and the Federal Court, potential class members are required to opt out regardless of their place of residence. However, in Alberta, British Columbia, New Brunswick, and Newfoundland, there is a distinction between resident and nonresident class members. Resident members may opt out of the class proceedings but non-residents are not automatically included and instead must opt-in to the action.

Canadian class action statutes were originally based on Rule 23 of the United States Federal Rules of Civil Procedure but there are some stark differences. Canadian class actions require neither "typicality" nor "predominance" of

common issues over individual issues. There is also no requirement of "numerosity" and in provinces like British Colombia; for example, a class action may consist of merely "two or more" class members. Based on these differences, there is a consensus that the standard for class certification is much lower in Canada than in the United States.

The procedure for appointing a class representative varies by province. In general Canadian courts have identified the following qualities as being ideal for representative plaintiffs:

- Someone who has sufficient knowledge of the litigation and is sophisticated enough to instruct counsel and make informed decisions.
- Someone who has a real interest in the action.
- Someone who does not have idiosyncrasies that would impact their ability to represent the interests of the class.

Securities Class Actions
Securities class actions generally proceed under common law theories of either negligent/fraudulent misrepresentation or of negligence/conspiracy in respect of the issuance or sale of the securities to the public. There is potential for shareholders to pursue actions for securities purchased on both the primary and secondary market. To proceed under a common law theory of negligent misrepresentation, each plaintiff has to establish individual reliance. But recent amendments to the securities laws in some provinces have created statutory causes of action related to securities purchased on the primary market where each class member is deemed to have relied on the misrepresentation and accordingly those causes of action have effectively removed the individual reliance requirement. Shareholders can now pursue actions based on alleged misrepresentations made in publicly disclosed documents or oral statements and the failure by a corporation to make timely corrective disclosures. For cases concerning negligent misrepresentation in relation to shares purchased on the secondary market, there is conflicting case law as to whether claimants must prove actual individual reliance or whether a class can proceed under an "efficient market" theory in order to establish that, by purchasing securities, the plaintiffs had relied upon the alleged misrepresentations. Unfortunately, until the appellate court is given an opportunity to weigh in, there will likely continue to be conflicting opinions as to what is required.

Under the Ontario Securities Act, plaintiffs must seek leave to proceed as a class action. In order to obtain leave, the plaintiffs must show: 1) that the action is brought in good faith (which is satisfied by showing that the plaintiffs brought the action with an honest belief that they have an arguable claim), and 2) that there is a reasonable possibility (that is more than a de minimis possibility or chance) that the action will be resolved in plaintiffs' favor at trial.

Secondary market claims proceeding under a statutory cause of action are subject to strict damage caps and specific formula for calculating damages. Those limitations, however, have not yet been reviewed by Canadian courts.

In Quebec, general principles of civil law allow plaintiffs to pursue securities claims alleging misrepresentation. The plaintiff must show they relied on the

misrepresentation and that the reliance resulted in damages. As in Ontario, the law for secondary market liability is unsettled in regards to whether reliance must be demonstrated on an individual basis and whether that requirement is a bar to proceeding as a class action. The law may never need to be settled, however, because in 2007 Quebec adopted the Quebec Securities Act. Investors may pursue a claim under the Quebec Securities Act without establishing that they relied on the misrepresentation and damages are presumed to flow from the misrepresentation. The Quebec Securities Act has not yet been applied by the courts in a class action context.

In Canada, just as in the United States, institutional investors are considered uniquely qualified to act as the representative plaintiff. In the Smith v. Sino-Forest Corporation carriage motion, to determine which of four rival law firms and four proposed Ontario class actions arising against Sino-Forest would proceed, the court rejected the arguments made by Mr. Smith (an individual investor who was seeking to serve as the class representative after losing approximately half of his investment value) to disqualify the institutional investors from serving as class representatives. The court ultimately decided that the case Labourers v. Sino-Forest would proceed and that institutional investors would serve as the class representative because:

- The expertise of the institutional investor could lead to a greater likelihood of success for the entire class.
- The expertise of the institutional investor makes it better able to manage class counsel.
- One goal of the Class Proceedings Act of 1992 is judicial economy and institutional investors better promote that goal. The court explained that in its view, institutional investors typically have sufficient resources to pursue litigation on their own. This means that the institutional investor is more likely than an individual to opt out of a class action if it is not serving in a representative capacity. However, if an institutional investor serves as a representative party then it is unable to pursue an opt-out action solely on its own behalf and judicial economy is better preserved.
- Institutional investors are already essentially serving in a representative capacity on behalf of their individual members that number in the thousands.

Costs of Litigation

- Canada is a “loser pays” jurisdiction, although the court has discretion.
- The rules governing the recovery of fees and costs vary by province.
- Attorneys are generally permitted to represent clients on the basis of contingency fees, however, the fee must be reasonable, the agreement in writing, and the agreement must be approved by the court.

Kessler Topaz’s Experience in Canada

In an effort to protect investments our clients made on the Toronto exchange, Kessler Topaz, in partnership with a local Canadian firm, is currently litigating two class actions in Canada against Sino-Forest and Agnico Mining Corp. Kessler Topaz has been actively involved in strategizing with the local counsel and assisting its U.S. and European institutional investor clients with the gathering and organization of documents which were required to be produced.