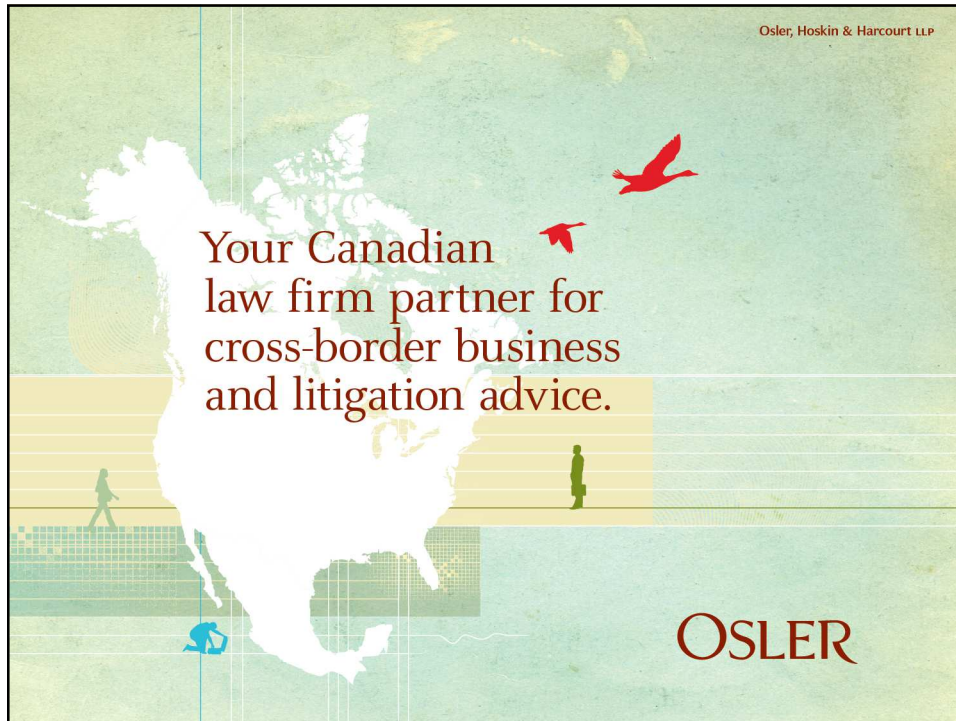


Osler, Hoskin & Harcourt LLP



Your Canadian law firm partner for cross-border business and litigation advice.

OSLER

Osler, Hoskin & Harcourt LLP

Litigating a Cross-Border Class Action in Canada

Rissa Revin, BMO Financial Group
Deborah Glendinning, Osler
Sonia Bjorkquist, Osler

Date: September 12, 2012

OSLER

Agenda

1. Canadian Class Action Landscape
2. Key Strategic Issues in Cross-Border Class Actions
3. Jurisdiction over Out-of-Province Parties
4. Cross-Border Class Action Protocols

Canadian Class Action Landscape

Parallel claims in Canada and U.S. are common

- Canada may become testing ground

Best way to be Prepared:

- Understand the acceptable risk profile
- Litigation readiness
- Early case assessment
- Seamless coordination of international teams
- Coordinate w/ other proceedings (e.g. regulatory)

Canadian Class Action Landscape

Two Court Systems in Canada



- Federal: Statutory (e.g. admiralty, IP, federal tax)
- Provincial: Inherent (e.g. commercial, consumer, personal injury, etc.)

Class Action Legislation in Canada:

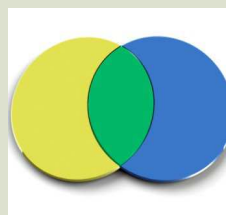
- Every province except PEI has class action legislation.
- The legislation is similar but not identical.

Page 4

Canadian Class Action Landscape

Overlapping Class Actions:

- The provincial courts have overlapping jurisdiction.
- There is no procedure to coordinate overlapping class actions equivalent to the U.S. multi-district litigation (MDL) procedure.



Page 5

Strategic Issue #1 – Jurisdiction *Simpliciter*

Real and Substantial Connection

- A court in a Canadian province must have a real and substantial connection over the subject matter of a dispute
- Issues often arise when a defendant is outside the geographical boundaries of the court
- Issues can also arise with respect to plaintiffs outside the jurisdiction who are included in the definition of the proposed class

Page 6

Strategic Issue #2 – Carriage Battles

Carriage Motions

- Plaintiff class action bar often appears to cooperate
- If not, the court may determine which counsel will control the litigation and may stay all other overlapping actions brought in the province
- Defendants receive a free preview of plaintiff's claims and strategy, as well as the motion judge's view of those strategies



Page 7

Strategic Issue #3 – Class Funding

Funding

- Ontario and Quebec class actions fund
- Contingency fees
- Third-party investors



Strategic Issue #4 - Filing a Defence

Filing a Defence: Pre or Post-Certification?

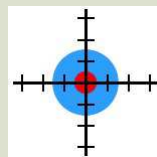
Strategic Considerations:

- Narrows Issues
- Increases Costs
- Availability of Summary Judgment



Strategic Issue #5 - Pre-Certification Motions

Motion to Strike



- The threshold to strike: “Plain and obvious”
- Results in a narrowing of the claim
- Can result in dismissal of action

Page 10

Strategic Issue #5 - Pre-Certification Motions

Motion for Summary Judgment

- May dismiss the entire action
- Availability varies by province
- Strategic timing
 - Save on costs if successful pre-certification
 - Will not bind the class pre-certification
 - Can be more effective after discoveries

Page 11

Strategic Issue #6 – Damages

Damages

- Canada vs. US
 - Jury Trials
 - Punitive damages
- Waiver of Tort Claims



Page 12

Strategic Issue #7 – Costs

Class Action Cost Regimes

- Varies Across Provinces
 - “No-costs” regimes
 - “Loser pays” regimes
 - Ontario’s class action tweaks on “Loser Pays”
- Plaintiffs have been required to pay costs to successful defendants

Page 13

Strategic Issue # 8 - Certification

Five Certification Criteria:

1. Cause of action
2. Identifiable class
3. Common Issues
4. Preferable procedure
5. Representative plaintiff

Strategic Issue # 8 - Certification

Evidence on a Motion for Certification is:

- Extensive
- Expensive



Jurisdiction and Out-of-Province Parties

Strategic Implications:

- Class Actions may be:
 - Larger and fewer OR
 - Smaller and fragmented
- Problems with multiple actions - *Vioxx*



Page 16

Jurisdiction and Out-of-Province Parties

Enforcing Multi-Jurisdictional Class Actions:

- Jurisdiction *Simpliciter* is important!
- If jurisdiction issues are not resolved, settlements or judgment may not be enforced by another jurisdiction



Page 17

Cross-Border Class Action Protocols

The new CBA and ABA Protocols seek to:

1. Improve communications between counsel
(notification lists, databases)
2. Establish notice requirements
(minimum standards, plain language)
3. Allow court-to-court communications
(CBA settlement only; ABA commonality)

Questions?



Osler, Hoskin & Harcourt LLP

Thank you

Rissa Revin (rissa.revin@bmo.com)

Deborah Glendinning (dglendinning@osler.com)

Sonia Bjorkquist (sbjorkquist@osler.com)

Osler.com

OSLER