Cross-Border Class Action Settlements: Unwilling Litigants in the U.S. Courts

By David W. Kent, McMillan Binch Mendelsohn LLP (Toronto)

Introduction

Outsiders often view with interest the private enforcement of competition law in the U.S. courts. Treble damages, *per se* offences, *Illinois Brick*, class actions and juries offer up a potent mix of plaintiff-friendly factors that permit private U.S. claimants to impose shock and awe on alleged cartelists.

It is not surprising that foreign litigants might try to gain entry to this arena. If commodities are arbitraged to take advantage of cross-border differences in price or terms, why not litigation?

In the *Empagran* litigation, foreign plaintiffs actively seeking to use the U.S. courts and U.S. law to resolve their foreign problems were rebuffed. This article deals with the opposite situation – U.S. courts granting judgments affecting foreign plaintiffs who do *not* seek their assistance. This situation arises when U.S. lawyers plead North American or international classes in U.S. class action litigation. When such a case is settled, resolved by judgment or dismissed, to what extent are the foreign class members bound? To put it another way, can U.S. courts pre-empt non-participating Canadians' ability to litigate in Canada?

Cooperating Classes

The disposition of the claims of a Canadian class by a U.S. court has been successfully implemented where the parties (or, more importantly, their counsel) act co-operatively. One example is found in the *Kruman* auction house conspiracy litigation. In this case U.S. counsel advanced class action claims on behalf of foreign art purchasers. The parties ultimately reached a settlement of the U.S. claims of all class members, including Canadians.

However, there was already an uncertified Canadian class action pending that covered the same Canadians and alleged the same harm. U.S. class counsel persuaded Canadian class counsel to cooperate, in part because of the superior benefits that would be available to Canadians under the U.S. settlement. Accordingly, as part of the U.S. arrangement, the Canadian litigation was dismissed on consent at about the time the U.S. settlement was approved. Because class counsel in both jurisdictions co-operated, the questions of whether the U.S. court had jurisdiction over the Canadian claimants and whether any U.S. judgment would be binding on Canadian class members were never put in issue.

Non-Cooperating Classes

While instructive as to how a cross-border settlement might be done on consent, *Kruman* teaches little about whether a cross-border settlement can be imposed on unreceptive Canadian class members. However, in a non-competition law setting, that issue arose and was recently litigated in *Currie v. McDonald's Restaurants of Canada Limited, et al.*[1]

The Litigation

The *Currie* litigation arose from promotional games sponsored by McDonald's in the U.S. and Canada. A number of people were indicted in the United States for embezzling prizes associated with the games. A witness later testified at a criminal trial that McDonald's had instructed him to manipulate the games to ensure that, among other things, no high value prizes would be awarded to contestants in Canada.

A U.S. class action ("*Boland*") was commenced in Illinois in August 2001. A settlement was reached in April 2002. While the *Boland* complaint did not specifically plead the manipulation of Canadian prizes, the release contemplated by the settlement was broad enough to cover all claims in respect of Canada.

The parties in *Boland* applied for preliminary approval of the settlement in May 2002 and Judge Schiller granted relief in June. The judge also required notice to Canadian class members to be published in each of three French language Quebec newspapers on one date in July 2002, in

[1] (2004), 70 O.R. (3d) 53 (S.C.J.); aff'd (2005), 74 O.R. (3d) 321 (C.A.)

MacLean's magazine on two dates in July 2002 and in two U.S. publications that also had circulation in Canada.

An analogous Canadian class action ("*Parsons*") was only commenced, in Ontario, on September 13, 2002, four days before the final fairness hearing in *Boland*. Mr. Parsons sought leave to intervene in *Boland* in order to object to the settlement on the basis that the U.S. court had no jurisdiction to grant relief in respect of Canadian claims and then appeared at the final fairness hearing to object on this basis. A second Canadian class action ("*Currie*") was commenced in Ontario about two weeks after the *Boland* final fairness hearing was completed. The *Currie* case proposed the same class, made the same allegations and was brought by the same class counsel as in the *Parsons* action.

In January 2003 Judge Schiller gave final approval of the *Boland* settlement and dismissed the objections of the Canadian objectors. The formal order contained a release of the defendants together with a declaration that all members of the class who had not opted out were bound thereby.

The Canadian Analysis

The defendants in the *Parsons* and *Currie* actions subsequently moved to dismiss or stay both Canadian cases on the basis of their *Boland* releases, asserting that all claims had been finally disposed of in the *Boland* action. The Ontario motions judge dismissed the *Parsons* action on the basis that Mr. Parsons had attorned to the jurisdiction of the U.S. court by appearing to object to the settlement and that the *Boland* judgment should therefore be recognized and enforced against him. However, the judge refused to restrain the *Currie* action. He found that the U.S. court had jurisdiction over Canadian class members even though they were non-resident, non-attorning parties. But he also found that the notice given to Canadian class members was so inadequate as to violate the rules of natural justice. For that reason, the judge held that the *Boland* judgment should not be enforced against Mr. Currie and his class.

Mr. Parsons did not appeal. The defendants appealed in respect of the *Currie* action.

The Ontario Court of Appeal dismissed the appeal and upheld the motion judge's refusal to restrain the *Currie* action, although not for precisely the reasons of the motions judge. The court considered three discreet but related issues in coming to its conclusion. The third issue, whether or not Canadian courts should recognize and enforce foreign class action judgments against non-attorning Canadian plaintiffs, is the key issue in any consideration of cross-border litigation.

The court began its analysis by reference to general conflicts of law principles relating to the recognition and enforcement of foreign judgments.[2] It reiterated the basic tenets derived from *Morguard* and *Beals*. In particular, it focused not only on "real and substantial connection" but also "order and fairness" as the "twin principles" that underlie the analysis of whether to recognize and enforce a foreign judgment.

The court noted, however, that this case raised for the first time the attempted enforcement of a foreign judgment not by a successful plaintiff against a reluctant defendant but, rather, by a defendant against unwilling plaintiffs, and spent considerable time identifying and weighing different considerations as to whether plaintiffs in this situation ought to be bound by the foreign order. In the result, the court accepted the motion judge's finding that the notice to the Canadian class members was inadequate. The court applied this inadequacy to the jurisdictional requirement of "order and fairness" and held that, absent proper notice of the settlement and the right to opt out, recognition and enforcement of the *Boland* decision would not be fair.[3]

More important, however, were the Court of Appeal's (technically *obiter*) comments as to whether, apart from the notice issue, the *Boland* decision would have been recognized and enforced against Canadian plaintiffs. On this point, the court concluded as follows:

> Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented, and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take

[2] The court cited *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Beals v. Saldanha*, [2003] 3 S.C.R. 416. See para. 9.

[3] para. 31.

appropriate steps to be removed from those proceedings.[4]

Conclusion

Sometimes you don't get what you ask for, and sometimes you get what you don't ask for. These cases illustrate that defendants (in some circumstances) may be able to settle foreign claims in the U.S. and to enforce those settlements abroad.

[4] para. 25.