US Counsel Participation in Canadian Class Actions: Making Sure the "Helping Hand" is Rewarded and Not Slapped

By Ian F. Leach and Kevin L. Ross
Lerners LLP

Cultural similarities and integration of the US and Canadian economies make it likely that questionable conduct, (*e.g.*, marketing and consumption of defective products or pharmaceuticals, or goods whose pricing has been artificially elevated through improper conspiracies), will give rise to similar class action claims north and south of the border.

As class actions inherently focus on facilitating access to justice and economies of scale, and reinvention of the wheel is rarely viewed as a welcome step in either country, the desirability of plaintiff counsel in the United States cooperating and working with their Canadian counterparts also has been a reality of the class action landscape in North America. In particular, American litigators who have accumulated substantial insight and expertise concerning potential claims have looked to increase the return on their investment by coordinating with plaintiff counsel in Canada to advance "copycat" claims north of the border.

Until recently, however, the provision of such assistance by American counsel had not been the subject of much Canadian judicial consideration in the class action context. Nor had extended judicial scrutiny been given to the arrangements between American and Canadian counsel to manage such litigation, define respective work contributions, and secure remuneration for participating American counsel.

At least five relatively recent Canadian decisions suggest a sea change in that regard. In particular, it seems reasonably clear that our courts now will be looking more closely at such relationships, asserting and enforcing parameters of permissible conduct.

Three of those decisions stem from litigation brought against the Ford Motor Company, alleging negligent use of defective springs in the door latch mechanisms of certain vehicles. Numerous individual claims had been advanced against Ford in the United States, prompting cash settlements. Motley Rice, a prominent American firm of litigators, had been involved in a number of the US actions. It then entered into a "co-counsel association agreement" with Canadian counsel, whereby it committed to extend "litigation support" by way of disbursement funding and "guidance" to a class action advancing similar claims in Canada. The agreed *quid pro quo* for this support apparently was to be 30 per cent of any fees awarded to Canadian counsel, after all litigation expenses incurred by Motley Rice in funding the litigation had been paid. The agreement also required Canadian plaintiff counsel to secure advance consent from Motley Rice before incurring and paying any disbursement exceeding C$2,500.

With those arrangements in place, the Canadian litigation moved forward to a certification hearing, in which American counsel played an active role; *e.g.*, providing affidavit evidence in support of the motion.

Poulin v. Ford Motor Co. of Canada, [2006] O.J. No. 4625 (S.C.J.).

Certification of the Canadian class action against Ford was denied at first instance, in part because of concerns prompted by the involvement of American counsel; concerns which manifested themselves in the context of determining whether the

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proposed representative plaintiff was capable of fairly or adequately representing the interests of the proposed class.

In that regard, defense counsel contended that the named representative plaintiff was an "unwitting pawn" in the class action, "contrived and commenced by plaintiff's counsel and his US colleagues". They pointed to numerous revelations, including the representative plaintiff's ignorance as to the arrangements made with Motley Rice and its role in the litigation, to support a conclusion that he had only a limited and negligible role in the litigation. Moreover, those arrangements arguably were quite improper, insofar as they constituted a "fee-splitting" agreement impermissible under Ontario law, and/or US counsel practicing law in Ontario without required qualification or authorization.

These arguments seemed to resonate with the court, which was not satisfied with plaintiff counsel's reply that the American lawyers were not holding themselves out as members of the Ontario Bar or advising class members directly, or reliance on earlier Ontario decisions such as *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, that had awarded costs reflecting the time and disbursements rendered by US counsel to Canadian counsel.

The court emphasized its responsibility in the certification context to confirm the existence of competent class counsel; a responsibility which in turn "entails the court having supervisory jurisdiction over lawyers who seek to represent the interests of litigants". This obviously was not the case in relation to American lawyers based in the United States.

More generally, the cross-border "co-counsel" arrangements in this case had crossed a notional line distinguishing them from earlier situations:

> In *Wilson v. Servier*, the court recognized the contribution of U.S. counsel to Canadian counsel by making an award of costs that reflected the time and disbursements rendered by U.S. counsel to the Canadian counsel. However, U.S. counsel in *Wilson v. Servier* acted as consultants, billing Canadian counsel for the time and disbursements spent on behalf of the representative plaintiff and the class members. There is no indication that the U.S. counsel in *Wilson v. Servier* essentially underwrote the entire litigation costs and was sharing in the fees on a percentage basis, as in the present case. In sum, U.S. counsel in *Wilson v. Servier* were acting as consultants where as U.S. counsel in this case were acting more as underwriters for the litigation.

In the result, the court had "serious concerns" as to whether the proposed representative plaintiff, ignorant of such arrangements and their apparent impropriety, had capacity to properly instruct counsel on behalf of the putative class.

Poulin v. Ford Motor Co. of Canada, [2007] O.J. No. 4988 (S.C.J.).

The first instance court in *Poulin* revisited and expanded its condemnation of the above "co-counsel" arrangements when awarding costs of the unsuccessful motion for certification.

In particular, the court took the unusual step of awarding costs personally against plaintiff counsel, both Canadian and American, notwithstanding protests that the latter award was beyond the court's jurisdiction.

Accepting defense submissions that "the entities which created the litigation" should not "walk away unscathed", the court emphasized that:

- American counsel's denial of the Ontario court's jurisdiction to award adverse costs against them was "inconsistent and self-contradictory" with the position that would have been taken had the motion for certification been successful, (in which case US counsel would have sought their costs as "co-counsel" pursuant to the agreement);
- the role of American counsel in the case at bar, (*e.g.*, swearing the only affidavit filed in support of certification), differed "significantly" from the role of American counsel in earlier Ontario cases wherein fees payable to US counsel had been approved by the court;
- any command and control functions exercised by Canadian counsel were ancillary to the role of American counsel who "effectively underwrote" the action, (*e.g.*, via the funding arrangements, and by engaging plaintiff counsel in Canada "to actively find and recruit a Canadian plaintiff" for the purpose of launching a copycat proceeding north of the border); and
- the co-counsel agreement "definitively" established that Canadian and American counsel had agreed on an arrangement "splitting any fees derived from the successful outcome of the action".

Poulin v. Ford Motor Co. of Canada, [2008] O.J. No. 4153 (Div. Ct.).

In *Poulin*, a unanimous panel of the Divisional Court then dismissed the appeal from the denial of certification, and the ancillary cost awards made against Canadian and American plaintiff counsel.

In doing so, the appellate court expressly found no error in the motion judge's findings, "or in his analysis of the role of the US law firm and its relationship with plaintiff's counsel of record and his concern about the court having supervisory jurisdiction over

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lawyers who seek to represent the interests of the litigants". The panel endorsed the lower court's pejorative view of the US counsel having acted "more as underwriters for the litigation as opposed to acting as consultants". (The fact that Canadian counsel was required to obtain approval from American counsel for any disbursements over C$2,500 was viewed as particularly troubling.)

On the whole, the panel felt there was good reason to characterize the named plaintiff as an "unwitting pawn" in an action "contrived and commenced by plaintiff's counsel and his US colleagues".

Chartrand v. General Motors Corp., [2008] B.C.J. No. 2520 (B.C.S.C.).

Similar concerns about the nature of US counsel involvement were expressed in subsequent class action litigation in British Columbia against General Motors, which was alleged to have negligently employed dangerously defective high-force spring clips causing premature wear and failure of parking brakes.

No specifics of the relationship between plaintiff counsel in Canada and counsel in the US were disclosed to the court, which in itself was a cause for concern. However, the available information indicated that, following certification of a similar class action in Arkansas, plaintiff counsel in British Columbia had "partnered" with American lawyers in Texas, proactively contacted the named plaintiff (a former client) to secure her agreement to act as a representative, and brought the litigation in British Columbia as a prelude to similar class action litigation in other Canadian jurisdictions. The written retainer agreement with Canadian counsel had been disclosed and made reference to the possible use of "partners", but did not indicate who they would be. When cross-examined on her affidavit filed in support of a motion for certification, the representative plaintiff acknowledged that she was neither informed nor involved as far as the relationship between Canadian and American counsel was concerned, and had not had any interaction with the American counsel.

The court dismissed the application for certification, in part because the unsatisfactory evidence of US counsel involvement made it impossible to accept the named plaintiff as an adequate representative:

> Concerns also arise when American counsel are involved in proposed Canadian class proceedings. The nature of the involvement is relevant. Lawyers from other jurisdictions may be able to act as consultants. It is a different matter if they are in some way underwriting the litigation and obtaining a potential benefit from it. A representative plaintiff must have competent counsel in order to fairly and adequately represent the interests of the class. The court, as part of its role in a class proceeding, supervises class counsel to ensure that counsel is acting in the interests of the class. The court is not in a position to supervise the actions of or participation of counsel from another jurisdiction.
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> American lawyers are playing a significant role behind the scenes in this case. That is apparent from comments made throughout the proceedings by proposed class counsel. [The representative plaintiff] does not know the nature of that relationship; she played no role in putting into place the arrangement with her counsel's American partners. The Court does not know the nature of that relationship.
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> The retainer agreement makes specific reference to partners. . . . No application has been made to date to approve this retainer agreement. At such an application this Court may well have concerns about the undefined role of the American partners. Are they consultants or are they underwriting the litigation?
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> It is incumbent on [an intended representative plaintiff], in seeking certification, to satisfy the Court that she has a lawyer who will independently discharge his duties to her, the class, and the Court. Without knowing the nature of the relationship with her counsel's American "partner", the Court cannot be satisfied that her counsel is making choices based solely on [her] best interests and the interests of the proposed class.
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> In all of these circumstances, I am unable to say that she is a genuine plaintiff, and not a placeholder plaintiff for the entrepreneurial interests of her lawyer and his American partners.

In reaching its decision, the British Columbia court expressly cited and relied upon the comments and approach of the Ontario court in the *Poulin* litigation.

Sharma v. Timminco Limited, 2009 CanLII 58974 (ON S.C.).

Views about the permissible nature of US counsel involvement in Canadian class actions surfaced again in the context of this 2009 "carriage motion" in Ontario; *i.e.*, a motion to determine which of two plaintiff firms should be permitted to act as counsel in

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securities class proceeding litigation brought against Timminco Limited, (a company whose shares were publicly traded on the Toronto Stock Exchange).

One of the competing Canadian firms had a relationship with prominent American counsel, (Milberg LLP), who were recognized as one of the leading class action law firms in the United States, particularly when it came to securities litigation. At the time of the carriage motion, the manner of payment to American counsel for their services was a matter for court approval at some future date. In the meantime, American counsel were keeping track of their work in progress.

In the course of argument, the Ontario court effectively was asked to determine whether the involvement of American counsel should be viewed as a positive or negative factor in awarding carriage of the class action litigation.

In the case at Bar, the Ontario court found the involvement of US counsel to be a "neutral" or "sterile" factor that neither qualified nor disqualified the relevant Canadian law firm as a preferred choice to represent the proposed class. In doing so, the court nevertheless outlined and emphasized its view on the limits of permissible relationships with US counsel:

> What is significant is not that an American law firm would be involved in an Ontario class action but how that American law firm would be involved. While one can posit examples where the involvement of an American law firm would be grounds for disqualifying an Ontario firm seeking carriage of a proposed class proceeding, in my opinion, the case at bar is not one of those cases.
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> In my opinion, it would be grounds for disqualification of an Ontario law firm seeking carriage of an Ontario class proceeding if the Ontario firm entered into an arrangement where an American law firm, or any foreign law firm for that matter, assumed *de jure* or *de facto* the role of the lawyer of record for the representative plaintiff, unless the foreign law firm obtained permission to practice law in Ontario with a right of audience before the court. Further, it would be grounds for disqualification of the Ontario firm, if a foreign law firm in any other way usurped the role of the Ontario lawyer of record as the lawyer for the representative plaintiff and the class or if the foreign firm had a proprietary interest in the claims of the representative plaintiff and the class.
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> However, in the case at bar, I do not understand Milberg LLP's proposed involvement as usurping the role of [Canadian counsel], as negating the court's ability to manage and adjudicate the proceedings, or as asserting a propriety interest in the client's litigation.
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> I understand [the representative plaintiff's] evidence about the role of Milberg LLP as going no further than that Milberg LLP would provide [Canadian counsel] with investigative services, document management service, and strategic advice based on Milberg LLP's experience in comparable American class actions. As I see it, the fact that [Canadian counsel] will have these services available from an American law firm is not a reason to disqualify [Canadian counsel].
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> In my opinion, it would be grounds to disqualify an Ontario firm seeking carriage if it purported to partner with an American law firm so that the American firm had a proprietary interest in the Ontario law suit, because this would take the foreign firm's involvement into the territory of champerty and maintenance and impermissible fee splitting, but I do not understand this to be the case at bar.

The court opined in passing that some of the services provided by American counsel might be chargeable as disbursements to be paid by the representative plaintiff, whereas others might be chargeable exclusively to Canadian counsel; *i.e.*, because class members could not be expected to pay for such "education" services any more than they could be expected to pay for lawyer attendance at continuing legal education conferences.

However, there generally was "nothing inherently wrong" with Ontario class counsel obtaining services from foreign law firms, "so long as there is no interference with or usurpation of the lawyer and client relationship between the Ontario lawyer of record and his or her clients"; *e.g.*, nothing in the arrangement raising problems of unauthorized practice of law in Ontario, champerty, maintenance or fee-splitting.

(Similar concerns were emphasized again by the same judge in *Smith v. National Money Mart*, 2010 ONSC 1334, where the court declined to award any measure of "counsel fees" to non-lawyers and lawyers other than properly appointed class counsel, regardless of the underlying contingency fee agreement negotiated by the representative plaintiff and a consortium of plaintiff law firms. In the court's view, such arrangements were not envisioned by the class proceeding legislation, arguably contravened rules of professional conduct relating to contingency fees and fee splitting, and raised concerns about champerty and maintenance.)

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Summary and Recommendations

Taken together, the above decisions suggest the following conclusions and precautions to ensure that proposed US counsel involvement in Canadian class actions remains a benefit and not a liability:

- Such involvement is not inherently frowned upon, so long as the particular involvement does not trigger specified policy concerns.
- Full details concerning the nature of any proposed relationship between Canadian and American counsel nevertheless should be disclosed to the representative plaintiff and to the Canadian court, failing which the court necessarily will draw adverse inferences.
- All "command and control" decisions and functions regarding conduct of the Canadian class action must remain with properly appointed Canadian class counsel, over whom the Canadian court exercises full supervisory jurisdiction.
- American counsel participation in the litigation must not extend to the point where it effectively constitutes unauthorized practice of law within the Canadian jurisdiction.
- American counsel must not act as "underwriters" in relation to a Canadian class action; *e.g.*, providing funding and control over disbursements in a manner that may give rise to *de facto* control of the litigation.
- American counsel may properly act as "consultants" to Canadian class counsel, (*e.g.*, providing investigative and document management services, and/or strategic advice), and may properly be compensated for their associated time and disbursements by appropriate invoices charged to Canadian counsel. However, compensation of American counsel by way of direct sharing in counsel fees, (*e.g.*, by an agreed percentage), would constitute impermissible champerty and "fee-splitting", as well as grounds for disqualifying any Canadian counsel party to such arrangements.

The policy concerns and corresponding restrictions underscored by the Canadian courts are understandable and, from a Canadian perspective, laudable. However, whether arrangements structured within such parameters provide sufficient incentive for continued US counsel support of Canadian class actions remains to be seen.

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Ian F. Leach, *Lerners LLP*
Tel: (519) 640-6377 • Fax: (519) 932-3377 • E-mail: ileach@lerners.ca

Ian is a litigation partner at Lerners LLP, specializing in class proceeding, commercial and insurance litigation at all levels of courts in Ontario and the Federal Court. He was called to the Ontario bar in 1991, after receiving law degrees from Queens University (LLB, 1986), Cambridge University (LLM, 1987), and Oxford University (BCL, 1989). He completed a pupillage with the Honourable Society of the Middle Temple, has served for many years as an Adjunct Professor with the Faculty of Law at the University of Western Ontario, and as the coordinator of continuing legal education at Lerners' London office. Since 1993, his practice has involved class proceeding litigation from both the plaintiff and defense perspectives, including breast implant and TMJ implant claims, claims relating to late payment penalties charged by utility companies, claims concerning licence fees levied by municipalities, and claims against insurers relating to salvage appropriation, the use of after-market parts, and the denial of claims related to power blackouts.

Kevin L. Ross, *Lerners LLP*
Tel: (519) 640-6315 • Fax: (519) 932-3315 • E-mail: kross@lerners.ca

Kevin received his LLB from the University of Windsor and was called to the Bar in 1984. He practices civil litigation with an emphasis on personal injury, insurance, health law, and class proceedings. He is a certified Specialist in Civil Litigation by The Law Society of Upper Canada and is a past Adjunct Professor and lecturer in civil procedure and civil trial advocacy at the University of Western Ontario's Faculty of Law, guest lecturer at the University of Windsor Faculty of Law, past lecturer on employment law, civil procedure, and advocacy at the Bar Admission Court, London, and lecturer in occupational health and safety legislation at Fanshawe College, London. His class experience includes work done in relation to toxic mould claims, urea formaldehyde based insulation claims, claims relating to late payment penalties charged by utility companies, claims concerning licence fees levied by municipalities, and claims against insurers relating to salvage appropriation, the use of after-market parts, and the denial of claims related to power blackouts. He is currently the Chair of the Lerners LLP Class Proceedings Practice Group. He is a past Director of The Advocates' Society and a contributing editor of the *Insurance Law Journal*, Federated Press.

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