

US Discovery For Canadian Class Actions

Law360, New York (March 05, 2010) -- In Canadian class action proceedings, class discovery generally does not begin until after there has been a ruling on class certification. This, however, has not stopped Canadian plaintiffs from heading south in an effort to gain early access to discovery evidence produced in parallel class proceedings taking place in the United States.

Their goal is simple: to gain access to documents that Canadian plaintiffs could not obtain through the Canadian legal system at the current stage of their own litigation (i.e., preclass certification).

This new tactic is especially prevalent in cross-border antitrust class actions. In this increasingly global economy, competition is no longer localized to one region, state or country. Antitrust and unfair competition lawsuits are now reaching across national borders. Today, “copycat” class actions, based on U.S. proceedings, are common in Canada.

While plaintiffs champion cross-border discovery sharing as promoting efficiency, this recent trend has many implications for defendants engaged in cross-border litigation.

If successful, the effect is to permit plaintiffs to circumvent the Canadian rules of civil procedure that permit discovery only after class certification. Documents obtained from parallel U.S. proceedings could therefore be used to bolster the Canadian plaintiffs’ class certification motion.

Giving Canadian plaintiffs U.S. documents before Canadian procedure would otherwise permit could give plaintiffs an unfair advantage at a decisive moment in the Canadian litigation. In addition, early access to U.S. discovery may be viewed as a potential settlement tool in the hands of a plaintiff who may not have a certifiable class action.

Adding uncertainty to this situation, U.S. courts have had very mixed reactions to this new tactic. This article discusses the different approaches Canada and the United States have taken to precertification discovery, the evidence gathering procedures available in the U.S., as well as a few of the important decisions addressing this new trend.

Two Countries, Two Approaches

In the United States, parties can engage in extensive discovery practices before the class certification hearing, including substantive document productions and depositions, both on issues pertaining to class certification as well as the merits of the claims asserted.

In Canada, by contrast, discovery is generally not permitted until after there has been a ruling on class certification, defendants have filed a statement of defense, and plaintiffs have filed a reply.

In addition, while Canadian discovery practice has analogs to U.S. depositions and interrogatories, the availability and scope of these discovery procedures vary significantly between the two jurisdictions.

In Ontario, for example, an examining party is not entitled to subject a person to both depositions and interrogatories without leave of the court. Ont. R. Civ. P. 31.02. A plaintiff is only entitled to examine one representative of a corporate defendant unless leave of court is obtained. Ont. R. Civ. P. 31.03(1). And a nonparty may not be deposed without a prior court order. Ont. R. Civ. P. 31.10.

These restrictions make it very attractive to Canadian plaintiffs to look to parallel proceedings in the United States to obtain access to the broad discovery taking place south of the border.

Evidence Gathering Procedures

The procedure traditionally relied on by foreign litigants seeking access to discovery of persons and documents in the United States is set forth in 28 U.S.C. § 1782, which enables U.S. courts to provide assistance to foreign and international tribunals and to foreign litigants before such tribunals.

Section 1782, however, is not the only option. Where a protective order is in place, and the desired documents were produced under that protective order, nonparty Canadian plaintiffs have increasingly invoked Rule 24(b) of the Federal Rules of Civil Procedure, coupled with a motion to modify the protective order, in requesting access to U.S. discovery evidence.

Under Rule 24(b), a district court may grant intervention to certain interested parties:

“On timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact. ... In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of original parties’ rights.” Fed. R. Civ. P. 24(b).

Rule 24(b) has been interpreted to require: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action.

The grant of permissive intervention is a matter of discretion. Assuming a right to intervene is granted, a nonparty must still show cause to modify the protective order. Generally, the nonparty must show that their collateral litigation is bona fide and that the discovery sought will obviate the need for that party to engage in duplicative discovery.

The court must also weigh the “policy considerations of efficient resolution of litigation through the avoidance of duplicative discovery against any prejudice that may result to the substantive rights of the party opposing amendment.” *In re Baycol Products Litig.*, MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2002) at 10.

Several courts have held that permissive intervention is the appropriate procedure for a nonparty to seek modification of a protective order. Until recently, Rule 24(b) was invoked by U.S. nonparties seeking access of discovery in other U.S. proceedings, and not by foreign litigants.

However, in a number of recent cases, Canadian plaintiffs have sought to obtain assistance from the U.S. courts by using Rule 24(b) to modify the respective protective orders issued in parallel U.S. litigation. The results have been mixed.

Early Decisions Favor Plaintiffs

Vitapharm v. F. Hoffman-La Roche et al.

The Ontario action *Vitapharm v. F. Hoffman-La Roche Ltd.* related to a global price-fixing conspiracy, where manufacturers of certain vitamins were alleged to have conspired to fix prices and allocate markets, including Canada. Litigation was ongoing in the United States at the time *Vitapharm* was filed, and discovery in the U.S. was well underway.

Canadian plaintiffs moved, precertification, to intervene in the U.S. proceeding under Rule 24(b) and for modification of the operative protective order to permit Canadian plaintiffs access to documents and depositions in the U.S. litigation.

The Canadian defendants brought what became known as an “anti-motion motion” before the Ontario court, seeking an Ontario order requiring the plaintiffs to discontinue their U.S. motion. The Canadian defendants took the position that because the plaintiff class had not yet been certified, plaintiffs were not yet entitled to discovery under the Ontario Rules of Civil Procedure.

The Ontario Superior Court denied defendants’ motion, emphasizing that “plaintiffs are not seeking discovery in the U.S. through their U.S. motion. Rather, they are only seeking access to the discovery of the litigant in the U.S. litigation.

From a legal standpoint, the U.S. motion is only necessary because of the protective order.” *Vitapharm Can. Ltd. v. Hoffman-La Roche Ltd.*, No. 99-GD-46719, [2001] O.J. No. 237 (Ont. S.C.J. Jan. 26, 2001) (Cummings, J., Reasons for Decision) at ¶ 31. The decision was upheld by both the Ontario Divisional Court and the Court of Appeal.

The Ontario Court of Appeal, however, made clear that while the Ontario courts would respect the jurisdiction of the U.S. courts to hear a motion properly commenced under U.S. procedure, it was expected that any ruling on such a motion would respect “the governing rules of practice and procedure in Ontario.” *Ford v. F. Hoffman-La Roche Ltd.*, 223 D.L.R. (4th) 445, ¶ 5 (Ont. C.A. March 13, 2003).

The Court of Appeal was further of the view that “this can and should be done through expert evidence adduced by the parties.” *Id.* Presumably, any expert testimony offered on Canadian procedure would include discussion of the Canadian rules of civil procedure, which do not permit class action discovery until after a class is certified.

The Ontario Court of Appeal’s decision did not mean that Canadian plaintiffs’ would automatically be afforded access to the requested documents in the United States. It only meant that the Canadian courts declined to block the U.S. motion in the Ontario proceeding.

Before the conclusion of the defendants’ Ontario motion, the trial judge in the United States rendered a decision on the plaintiffs’ motion for intervention and modification of the protective order. Judge Thomas Hogan granted plaintiffs intervenor status, but deferred ruling on the portion of the motion seeking modification of the protective order until the appeals in Ontario had been exhausted.

In the end, the Canadian class action settled before Judge Hogan was required to make a decision. Nonetheless, other Canadian plaintiffs, no doubt spurred by the Ontario Court of Appeals decision, have sought similar access from the American courts.

Coleman v. Baycol Inc. (In re Baycol Products Litigation)

Driven by the U.S. Vitapharm motion, plaintiffs in the Canadian action *Coleman v. Baycol Inc.* sought to obtain both discovery under Section 1782 and to intervene in parallel U.S. litigation (*In re: Baycol Products Litigation*) pursuant to Rule 24(b), for the purpose of modifying the protective order.

In considering the Canadian plaintiffs' motion to intervene, the U.S. court held that "allowing the Canadian Plaintiffs access to discovery materials already produced will not offend the Canadian tribunal, nor will it prejudice Defendants by further intruding into their privacy or subjecting them to further questioning or document production." *In re Baycol Products Litigation*, MDL No. 1431, Pretrial Order No. 77 (U.S. District Court, District of Minnesota, 2003) at 9.

The court permitted Canadian plaintiffs to intervene to the extent they sought access to documents already produced, but Canadian plaintiffs' request to conduct discovery in the U.S. proceeding pursuant to Section 1782 was denied because it would contravene Ontario's discovery rules.

After granting Canadian plaintiffs' motion to intervene, the court considered the motion to modify the protective order for the limited purpose of gaining access to documents already produced in the U.S. proceeding. The court granted Canadian plaintiffs' motion, but agreed to allow plaintiffs access only to nonconfidential materials that had already been produced.

The court emphasized the similarities between the two matters: "Where the party seeking modification is a 'bona fide' litigant, and shows that the two actions are virtually identical, it follows that the discovery produced in the first action is relevant to the second action." *Id.* at p. 10.

In limiting Canadian plaintiffs' access to nonconfidential materials, the court noted that "difficult issues arise," with respect to confidential discovery materials and requested further briefing on the issue. It is unclear from the court's docket, however, whether this issue was resolved.

La Cie McCormick Canada Co. v. Stone Container Corp. et al. (Linerboard)

In the Canadian action *La Cie McCormick Canada Co. v. Stone Container Corp.*, the Canadian plaintiff sought access to discovery materials produced in U.S. litigation titled *In re Linerboard Antitrust Litigation*.

Like its predecessors, the Canadian plaintiff moved to intervene pursuant to Rule 24(b). 333 F. Supp. 2d 333 (E.D. Pa. 2004). But the procedural posture here was different. Unlike *Vitapharm* and *Baycol*, *In re Linerboard* had been resolved in its entirety shortly before the Canadian plaintiff brought its motion, a fact that the court relied on in finding that "defendants will suffer no prejudice" by the disclosure of documents. *Id.* at 342.

After extensively reviewing both the U.S. and Canadian court's decisions in *Vitapharm*, the U.S. District Court for the Eastern District of Pennsylvania granted Canadian plaintiff's motion.

The Tides are Turning — Recent Decisions Trend in Favor of Defendants

In re Hydrogen Peroxide Antitrust Litigation

Thus far, Canadian plaintiffs enjoyed some success in accessing U.S. discovery documents before they would otherwise be entitled to such material in the Canadian proceedings.

Hoping to follow this trend, Canadian plaintiffs in *Hydrogen Peroxide* moved, precertification, under Rule 24(b), to intervene in parallel U.S. class action proceedings for the limited purpose of modifying the protective order in an effort to gain access to discovery materials produced in the U.S. matter.

The U.S. court noted that the Canadian action duplicated the allegations in the case before it, involving the same defendants and similar evidence. Nevertheless, after granting the motion to intervene for the limited purpose of considering the request for access to discovery, the court denied the motion to modify the protective order to allow the Canadian plaintiffs access to materials produced in the U.S. action.

The court emphasized the concerns articulated by defendants generally, namely that under the Ontario Rules of Civil Procedure, plaintiffs may not obtain discovery until after the court rules on class certification, the defendants have filed a statement of defense, and plaintiffs have filed a reply — none of which had yet occurred in the Canadian hydrogen peroxide litigation. In *re Hydrogen Peroxide Antitrust Litigation*, MDL No. 1682, Order (E.D. Pa. July 31, 2006) ¶ g.

Thus, the court held, “it would appear that movants ... seek to bypass the rules of the Canadian court system.” *Id.* at ¶ j. The court ruled that considerations of comity with courts of a neighboring country required that the motion be denied because those courts “we are sure, care as much about their laws as we do about ours.” *Id.* at ¶ l.

The Hydrogen Peroxide decision marks the first time Canadian plaintiffs were denied precertification access to discovery materials produced in parallel U.S. proceedings. It is also the first time a U.S. court recognized that allowing Canadian plaintiffs access to U.S. discovery before a decision on class certification had been made in the Canadian action would run counter to Canadian procedural rules.

In re High Fructose Corn Syrup

The most recent decision addressing this trend in cross border evidence gathering is *In re High Fructose Corn Syrup Antitrust Litigation*, MDL No. 1087, Order (C.D. Ill. July 7, 2009).

Marking a possible shift in courts’ approach to foreign-litigant Rule 24(b) motions, the court in *High Fructose Corn Syrup* followed *Hydrogen Peroxide*’s lead and relied on comity principles in denying Canadian plaintiffs’ motion to intervene and request for access to U.S. discovery materials:

“[T]his Court is not familiar with the Canadian litigation and could not rule on the Defendants’ evidentiary objections without impermissibly and unnecessarily intruding into the province of the Canadian court system. In addition, the Court finds that because the Canadian litigation is in an early stage, it would be difficult to determine what should be produced now, as opposed to if/when the Canadian court grants certification.

“Accordingly, the Court finds that the Defendants’ substantial rights would be substantially prejudiced by the proposed modification of the Protective Order and the Canadian litigants would not be unduly burdened by having to conduct its own discovery.” *Id.* at 6.

What It All Means

So far, American courts have had mixed reactions to requests from Canadian plaintiffs seeking access to discovery in the United States. The early decisions of *Vitapharm*, *Linerboard* and *Baycol* suggest that allowing access to Canadian plaintiffs is practical and efficient for plaintiffs.

This, however, may overlook the substantive implications of allowing equal access to Canadian plaintiffs. In effect, granting access to discovery in U.S. proceedings allows Canadian plaintiffs to circumvent the Canadian rules of civil procedure that permit discovery only after class certification.

This could give Canadian plaintiffs an unfair advantage at the class certification stage or could provide unwarranted settlement ammunition to Canadian plaintiffs who do not otherwise have a viable class action. The courts in Hydrogen Peroxide and High Fructose Corn Syrup recognize this potential misuse.

Nonetheless, with mixed results in the United States, Canadian plaintiffs will likely continue to move to intervene in U.S. proceedings in an effort to gain access to information that is not available to them under the relevant Canadian procedural rules. It thus becomes important for defense counsel on both sides of the border to work together to address any such issues that arise.

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