

Blakes Bulletin

Class Actions

Court Rules Direct Involvement of U.S. Firm in Canadian Class Action Acceptable

MARY JANE STITT, NIGEL CAMPBELL, SEAN BOYLE AND CHARLES DOBSON

INTRODUCTION

On October 29, 2009, the Ontario Superior Court (the Court) granted Kim Orr Barristers P.C. (Kim Orr) carriage of a class action against Timminco Ltd. (Timminco), a Canadian metals producer listed on the Toronto Stock Exchange, and several co-defendants. Milberg LLP (Milberg), an experienced U.S. class action firm, will provide Kim Orr with various forms of support. In selecting Kim Orr, the Court has thus also approved the direct involvement of a heavy-weight U.S. firm in a Canadian class proceeding. This is a first. It is a development that could have significant consequences for defendants in Canadian class actions and their insurers.

BACKGROUND

In recent years, many of the leading U.S. plaintiffs' securities class action law firms have attempted to expand their practices internationally. This has not always been successful. In the 2006 decision *Poulin v. Ford Motor Co. of Canada* (affirmed on appeal in 2008), the Court denied a representative plaintiff's application for certification of a class action. In part, this was due to the Court rejecting the proposed role of an American class action firm, Motley Rice. Some primary characteristics of this role which the Court found problematic were that Motley Rice was to fund the litigation and share in the fees. (For further information on the 2006 decision, see our December 2006 [Blakes Bulletin on Class Actions: U.S. Plaintiffs' Firm's Involvement Helps Sink Class Action.](#))

By contrast, Milberg's involvement with Kim Orr does not involve financial support with a direct claim on any award. Rather, it involves the provision of resources and expertise.

THE DECISION

Responding to the significant rise and subsequent crash of Timminco's share price, two Canadian firms, Kim Orr and Siskinds LLP (Siskinds), launched separate and independent investigations to determine whether an action in common law and under Part XXIII.1 of the Ontario *Securities Act* could be brought against Timminco and others. Following these investigations, each firm commenced a class action based on negligence and negligent misrepresentation against Timminco and several co-defendants. In October 2009, a hearing was held to determine which of these two law firms would be allowed to proceed with their class action, while that of the other would be halted.

The Court chose Kim Orr. In doing so, it considered and approved Kim Orr's partnering with Milberg. As the Court noted, Milberg is "one of the leading class action law firms in the United States" and it has been involved in several "humongous cases" in the area of securities law. The two firms have agreed to co-operate on the prosecution of the action. Specifically, the Court understood Milberg's role to be limited to providing Kim Orr with investigative services, document management service, and strategic advice. Importantly, the Court also understood Milberg's fees to be chargeable either as disbursements to be paid by the representative plaintiff or to be paid by Kim Orr exclusively. This means, then, that Milberg would not have a direct claim on any court or settlement award.

Under Ontario law, when a court must choose between firms vying for carriage of a class action, numerous factors may be considered. On these facts, the Court regarded the proposed role for Milberg to be a neutral factor with no bearing on which firm would be chosen. Thus it did not regard the direct involvement of an American firm to be outright unacceptable. According to the Court, "[w]hat is significant is not that an American law firm would be involved in an Ontario class action but how the American firm would be involved." Elaborating on this statement, the Court briefly discussed several grounds for disqualifying an Ontario law firm seeking carriage of a class action where that firm proposed to partner with an American firm (or any other foreign firm).

CONT'D ON PAGE 2

Class Actions

CONT'D FROM PAGE 1

Broadly speaking, any arrangement where the role of the American firm would "usurp" the role of the Ontario firm as the lawyer of record for the representative plaintiff and the class would be unacceptable. The Court repeatedly emphasized there must be no interference with this relationship. It would also be unacceptable if the American firm had a proprietary interest in the Ontario lawsuit. This is due to rules regarding champerty and maintenance, and impermissible fee splitting. Further, a court's ability to manage and adjudicate the proceedings must not be undermined.

Notably, the Court did not discuss any grounds that might make an arrangement between an Ontario firm and an American firm a positive factor in the calculus to decide which of the competing firms should be granted carriage of a class action. Nor did the Court discuss whether there could or should be any such grounds.

The Court ultimately chose Kim Orr over Siskinds for a number of reasons, which included its preference for the nature and scope of the causes of action advanced by Kim Orr and the theories proposed to support them. In particular, the Court favoured Kim Orr's simpler, more focused claim with a shorter class period and potentially smaller class. Siskinds argued its approach was superior in part because its larger class definition would result in more purchasers of Timminco shares having access to justice.

The Court's response is telling, and suggests that a careful analysis of the way claims are framed is required in resolving carriage disputes. That is, the Court emphasized that arguments about potential class size may not be helpful in resolving carriage disputes. Indeed, "[i]f class actions are the mass transit to access justice, sometimes it is not doing justice to push more passengers onboard the subway train."

THE CONSEQUENCES

This decision sets a precedent for the direct involvement of American firms in Canadian class actions. While such involvement might be a neutral factor in a court's decision to grant carriage, it is questionable whether it will be a neutral factor to Canadian class action litigation in general. There can be no mistaking Kim Orr's aim in pushing for this development. In an affidavit submitted to the Court as part of the motion record, a lawyer for Kim Orr claims many Canadian class actions that are resolved frequently "settle for a fraction of their potential value." Thus, the firm hopes Milberg's "expertise and resources" will "greatly enhance" its ability to pursue the case.

The impact this precedent will have both on the *Timminco* litigation specifically, and Canadian class actions generally, remains to be seen. Will the peripheral involvement of U.S. counsel result in an increase in the amounts plaintiffs' counsel claim from defendants or affect the value of eventual settlements? In the interim, it is a development that defendants in class actions and their insurers should monitor closely and one that we expect will be met with vigorous scrutiny and opposition from defendants' counsel.

For further information, please contact a member of our national Class Actions Group listed below:

<u>Toronto</u>	<u>Nigel Campbell</u>	416-863-2429
	<u>Jeff Galway</u>	416-863-3859
	<u>Gordon McKee</u>	416-863-3884
	<u>Mary Jane Stitt</u>	416-863-2940
<u>Montréal</u>	<u>Robert Torralbo</u>	514-982-4014
<u>Calgary</u>	<u>Dalton McGrath</u>	403-260-9654
	<u>Web Macdonald</u>	403-260-9604
<u>Vancouver</u>	<u>David Neave</u>	604-631-3338
	<u>James Sullivan</u>	604-631-3358

Go to blakes.com/english/subscribe.asp to subscribe to other Blakes Bulletins.

Blakes periodically provides materials on our services and developments in the law to interested persons. If you do not wish to receive further bulletins or other materials from Blakes, please contact Blakes Marketing Department at 416-863-3036 or dorothy.byers@blakes.com. For additional information on our privacy practices, please contact us at privacyofficer@blakes.com. *Blakes Bulletin* is intended for informational purposes only and does not create a lawyer-client relationship. The transmission of this information does not suggest Blakes or any of its lawyers are practising law of any jurisdiction other than Canada. The information provided in this bulletin is summary in nature and does not constitute legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For permission to reprint articles, please contact Blakes Marketing Department at 416-863-2403 or lynn.spencer@blakes.com. ©2009 Blake, Cassels & Graydon LLP.