Cross-Border Class Actions: The Ontario Court of Appeal Affirms the Ability of U.S. Class Plaintiffs to Compel Evidence from a Canadian Executive on Canadian Soil

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On November 28, 2012, the Ontario Court of Appeal released its decision in *Treat America Limited v. Leonidos* 2012 ONCA 748 which broadly affirmed the ability of U.S. class action plaintiffs to obtain the assistance of the Canadian courts in compelling testimony from Canadian witnesses in support of a U.S. class proceeding. In short, in a cross-border class action for price-fixing, the Ontario Court of Appeal upheld an order that required a former CEO of a Canadian company to attend at a U.S. deposition on Canadian soil, in spite of the fact that the former CEO remained subject to criminal investigation in Canada. In so doing, the Court rejected the former CEO’s constitutional challenge, and concluded that the deposition would not infringe his right against self-incrimination under the *Canadian Charter of Rights and Freedoms*. The Court’s ruling reflects an increasing willingness by U.S. class plaintiffs to gather evidence in Canada in cross-border cases, even in cases where the targets remain subject to criminal or regulatory investigation in Canada.

The proceedings in *Treat America* arise from an ongoing criminal and regulatory investigation into potential price-fixing activity in Canada by the Commissioner of Competition and the Public Prosecution Service of Canada. Shortly following the execution of certain search warrants in 2007, class plaintiffs in Canada and the U.S. launched dozens of parallel class actions against a number of defendant manufacturers as well as a number of individuals. In order to collect evidence from a key witness in Canada, the U.S. class plaintiffs sought and obtained a letter of request from the supervising judge in the consolidated U.S. class proceeding that was pending before a U.S. federal court in Pennsylvania.

By way of background, where a U.S. litigant wishes to obtain evidence from a non-party Canadian resident for use in a U.S. proceeding, he or she is generally required to bring a motion for a letter of request (or letter rogatory) from a U.S. judge, and then move to have that request enforced as against the Canadian resident by bringing an application before a court in Canada. Under existing law, a Canadian court is not obliged to grant the request. Rather, Canadian courts have the discretion to grant or deny such requests, provided that: (i) the evidence is relevant, necessary for trial and cannot otherwise be obtained, (ii) the order enforcing the request would not be contrary to public policy and is
not unduly burdensome, and (iii) if documents are being sought, they are identified with reasonable specificity. In a number of recent decisions, the Canadian courts have underscored the importance of the public interest in international comity in exercising their discretion, and given that interest, they have granted a number of prior requests by U.S. litigants.

In reliance on this jurisprudence, there have been a number of reported cases where U.S. class plaintiffs have successfully invoked this process in Canada in support of a U.S. class proceeding that is premised on alleged securities, antitrust or other regulatory violations, particularly where the proceedings have been brought against Canadian defendants and where there are individuals in Canada that are in possession of relevant evidence. However, these requests for compelled testimony can raise difficult constitutional issues where the individual remains subject to criminal or regulatory investigation in Canada, and where the individual would otherwise enjoy the right to remain silent under the Charter.

In Treat America, the U.S. class plaintiffs sought to compel a Canadian resident, namely the former CEO of Nestlé Canada, to attend at a deposition in Canada to give evidence relating to the alleged price-fixing conspiracy. The individual, however, remained subject to investigation in Canada in connection with the same events. At first instance, Justice Campbell granted an order with a number of terms and conditions which sought to balance the individual’s constitutional concerns while also demonstrating respect for the court’s comity obligations. In particular, Justice Campbell attached conditions to the approval of the letter of request which required that the individual be notified and be given the opportunity to respond to any action taken by the Commissioner to gain access to the transcripts of depositions in the U.S. litigation or any action taken by other parties to make the evidence public prior to trial. The individual appealed Justice Campbell’s order, principally on the basis that it was contrary to Canadian public policy in that it infringed on his Charter rights to remain silent and not to incriminate himself in the pending criminal investigation. The individual argued that the Commissioner (who had initiated the criminal investigation in Canada and was also an intervener in the U.S. proceeding) could obtain access to his testimony in the U.S. proceeding, thereby gaining strategic advance knowledge of the individual’s potential defence to the criminal proceeding and thereby undermining his constitutional rights.

The Ontario Court of Appeal dismissed the appeal and upheld the order. In her reasons, Justice Feldman held that Justice Campbell applied the correct test for the enforcement of a letter of request and Justice Campbell did not err in considering matters of Canadian public policy or sovereignty. She noted that the Court was greatly concerned that “the appellant’s Charter rights and protections, especially as an anticipated accused person in Canada, be scrupulously protected and preserved.” However, she further noted that Canadian and Ontario evidentiary legislation, along with section 13 of the Charter, prohibited the use of any potentially incriminating evidence given by the appellant in the U.S. proceeding from being used against him in a criminal case. The individual had argued that the Commissioner might nevertheless seek to obtain his U.S. evidence and use it strategically in developing its investigation. Justice Feldman held that while the question of whether such an action by the Commissioner would itself be an infringement of the appellant’s Charter rights was an open one, it was unnecessary to decide it as the Commissioner had agreed not to seek to obtain the U.S. evidence. Justice Feldman was also satisfied that there was no risk the evidence would be disclosed to the Commissioner by other parties, as protective orders that had been issued in the U.S. proceeding prohibited such disclosure, and the Commissioner consented to additional provisions seeking to enhance the appellant’s protections.

Treat America is consistent with the prevailing jurisprudence in Canada that suggests that Canadian courts will try to enforce letters of request wherever possible, provided there is a true need for the evidence in question and that the request does not offend Canadian public policy. What is particularly
interesting is the practical demonstration of the extent courts will go to in fashioning remedies to guard against offending such policies while still granting the request. This case reflects the increasing willingness of U.S. plaintiffs in U.S. proceedings to seek the assistance of Canadian courts in obtaining evidence from Canadian residents for use in U.S. litigation, and the Court’s ruling may remove a further obstacle to obtain evidence from Canadian residents in Canada.

For a more comprehensive summary of the process by which U.S. litigants can obtain evidence in Canada for use in the U.S., please see the paper “Obtaining Evidence in Canada for U.S. Litigation”, co-written by the authors of this update.

1 While the evidence was subject to protective order in the U.S. and therefore not publicly available, the Commissioner was an intervenor in the U.S. proceeding. Further, parties in the U.S. proceeding were cooperating with the Commissioner in its investigation in Canada.
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