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Best Practices For US-Canada Virtual Mass Tort Teams

By **Peter Pliszka, Munjot Sahu, Adrienne Busby and Lexi Fuson**
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Peter Pliszka

Munjot Sahu

Adrienne Busby

Lexi Fuson

A virtual law team is a collaborative and technology-based team of lawyers selected for specific tasks in defending a single client's litigation. In this ninth article in the series examining key roles on virtual law teams in mass tort litigation, we examine strategic collaboration among U.S. and Canadian defense counsel in cross-border litigation.

In mass tort litigation, it is not unusual for defendants to find themselves litigating similar claims in the United States and in Canada. It is perhaps little wonder why. The Canadian government describes the relationship as a bilateral one, "forged by shared geography, similar values, common interests, deep connections and powerful, multi-layered economic ties."[1] For its part, the U.S. government calls this bilateral relationship one of the world's closest and most extensive relationships.[2]

With hundreds of thousands of people crossing the border every day and at least one shared language, it stands to reason that the neighbors might also share mass tort experiences. After all, both countries boast state or provincial laws that address personal injury, defect and damages in remarkably similar terms.

But mass tort litigants need to remember that similar does not mean the same, and even the subtlest distinctions in substantive or procedural issues can pose significant challenges to the coordination of cross-border mass tort litigation.

In this article, we extend the notion of a virtual law team across the border to address the challenges and best practices for cross-border collaboration between American and Canadian counsel who find themselves on the same side, but very different playing fields.

Begin at the Beginning

Mass tort litigation often starts in the U.S. Usually, but of course not always, the litigation advances to some degree in the state or federal courts before Canadian litigation is contemplated. Why is that?

Historically, the U.S. plaintiffs bar has been more inclined to initiate mass tort litigation in response to events such as a press release that somehow relates to a potential legal

issue. The pattern that has evolved over the past 25 years is the phenomenon of copycat claims — i.e., after an American plaintiffs counsel files litigation in the U.S. against a defendant that conducts the same business in Canada, a Canadian plaintiffs counsel then files similar litigation in Canada.

However, it is now not always the case that the litigation is initiated in the U.S. In the past few years, we have seen lawsuits filed almost concurrently in both countries, and occasionally, in Canada first.

In these cases of parallel litigation on either side of the border, the question of which case can or should lead the way is not always based on which claim came out of the gate first. From a defense perspective, considerations may include differences between Canadian and U.S. law and process respecting the timing of documentary production, the particular threshold to be met to obtain certification of a class action, and the potential effect that an adverse judicial precedent in one country could have on the lawsuits in the other country, among other things.

For example, Canada does not have broad-based documentary production prior to certification of a class action. However, Canada has a lower threshold for certification of a class action, which is closer to the threshold for consolidating a multidistrict litigation in the U.S., and documentary production in the post-certification common issues adjudication stage of the proceeding is proactive and extensive.

Of course, it is not within the sole discretion of the defendant to decide how a lawsuit will proceed in a given jurisdiction. The plaintiffs counsel and the judge have a role in making the determination as well. Plaintiffs counsel may file a case and sit tight to see how other, similar cases progress in the U.S. or other provinces.

On the other hand, a Canadian plaintiffs counsel in one province may try to accelerate the conduct of her case in order to gain advantage over any duplicative proposed class actions filed in other provinces, or to try to put pressure on the defendant to come to the bargaining table. As in the U.S., the judge's preferences and priorities for managing her docket can also factor into the pace of the litigation.

You're Not From Around Here, Eh?

American and Canadian lawyers are licensed in their home jurisdictions. A Canadian lawyer who is called to the bar of any of the 10 provinces is permitted to practice law, and appear in the courts of, any of the other provinces. However, U.S. law prohibits a Canadian lawyer from practicing U.S. law or appearing as counsel in a court in the U.S.

In the U.S., a lawyer wishing to represent her client in another state needs to affiliate with local counsel and petition for temporary admission to the court in which the case is pending. That process stops at the Canada-U.S. border.

American lawyers cannot practice law in Canada. American lawyers cannot petition a Canadian court for pro hac vice status. This comes as a surprise to many American lawyers who are used to the relative fluidity of practicing in the U.S.

Practical pointer: An American lawyer crossing the border should even be thoughtful about how she explains the purpose of her visit to the border control. A casual statement like, "I'm a lawyer, here for a hearing," can be met with a raised eyebrow and lots of leading questions from the Canadian border control officer, who then investigatively seeks to determine whether that lawyer is planning to practice law in Canada. Or so we have been told.

The traditional national counsel-local counsel team model, as applied in purely domestic U.S. litigation, requires some modification to work effectively in the relationship between an American lawyer who serves as national counsel in the U.S. and a Canadian lawyer who serves as national counsel in Canada.

Specifically, to work effectively for the client, it is necessary for the Canadian lawyer to be more directly involved in some aspects of the case than would typically apply to a domestic local counsel. For example, since the Canadian counsel will necessarily be the lawyer who deposes witnesses in the Canadian proceeding, examines witnesses in the Canadian courts, and makes the oral submissions in Canadian court hearings, the Canadian lawyers need to have far greater knowledge of the documents, expert evidence, etc. in order to be able to perform that role effectively for the common client.

For this dynamic to work smoothly and cost-efficiently, U.S. and Canadian counsel must work well together, meaning that their relationship is marked by a high degree of mutual trust and confidence. Communication between U.S. and Canadian counsel should also be frequent and candid.

Counsel should be willing to learn from each other's factual knowledge and about each other's litigation experiences and respective legal customs to bring about optimal results for the client. In-house counsel should consider how they can facilitate a good relationship and open communication between U.S. and Canadian counsel. For example, arranging for periodic updates in the form of defense team calls or emails can help ensure that all relevant parties are kept apprised of relevant facts and events.

Understanding the Risk Profiles

One of the biggest challenges of cross-border collaboration is understanding the different risk profiles for litigation in the U.S. and Canada. This understanding is important not only for the lawyers involved, but also for the clients, as expectations may need to be adjusted at the outset of litigation.

The universe of damages in Canadian litigation is strikingly different (read: lower) from that in U.S. litigation. The primary differences are found in the law respecting general nonpecuniary damages (i.e., pain and suffering, loss of enjoyment of life, etc.) and punitive damages.

With respect to general nonpecuniary damages, in 1978, the Supreme Court of Canada imposed a cap for nonpecuniary damages in personal injury lawsuits. The court ruled that general nonpecuniary damages in the most catastrophic personal injury cases (e.g., spinal cord injury, child brain injury, etc.) should never exceed the sum of CA$100,000.

That cap has been indexed for inflation since 1978; it now stands at approximately CA$375,000. For clarification, note that there is no cap in respect of pecuniary damages — e.g., cost of future care, loss of future income, etc. Pecuniary damages are whatever the evidence establishes them to be.

Theoretically, punitive damages awards are available under Canadian law, but they are rare. Further, while the Supreme Court of Canada has not set a cap, per se, on the quantum of punitive damages, the court ruled in a case involving extremely egregious bad faith insurance adjusting of a homeowner's insurance claim following a fire which destroyed their house, that it would have difficulty conceiving of any case that could justify a punitive damages award in excess of CA$1 million.

In contrast, whether and to what extent compensatory and punitive damages are capped in the U.S. depends on which state's law applies to the case. Jury verdicts can vary widely, but it is not uncommon to

see verdicts in the range of millions in mass tort litigation. Less commonly, U.S. jury verdicts can be rendered in the billions.

Therein lies another significant difference between the two countries: American mass tort claims generally are tried to juries, while Canadian trials are almost always bench trials.

The law of costs represents a third major difference between Canada and the U.S. All of the provinces of Canada are loser pays jurisdictions. While the treatment of costs (which in the legalese of Canada's common law provinces means not just disbursements, but also attorney fees) is within the discretion of the judge hearing the motion or trial, the near-universal practice is that the losing party is ordered to pay some portion of the costs of the successful party.

The portion of the actual costs incurred by the successful party that it can recover varies among provinces and is dependent upon various factors. Generally, however, in the absence of any formal offers to settle, following the completion of the trial, the successful party would typically receive an award of costs representing around 1/3 to 1/2 of the actual legal fees and disbursements that it incurred.

That portion can rise substantially, and approach full indemnification, if the successful party, at an early point in the proceeding, made an offer to settle that remained open for acceptance until the start of trial, and the successful party beat her/his offer — i.e., received a judgment that was better for her/him than the terms of the offer.

In the U.S., however, each party bears its own costs. Of course, settlement agreements and sanctions may change that landscape, but cost-shifting circumstances in the U.S. are the exception rather than the rule.

Thus, the risk profile for a given case may be drastically different in the U.S. and Canada. On the one hand, Canadian damages caps may limit the potential verdicts (and potential settlement amounts), while in some American jurisdictions verdict amounts seem virtually limitless. On the other hand, the loser pays rules can lead to a significant hit on attorney fees and costs, which is typically not a monetary risk that American companies or lawyers anticipate.

Effective cross-border collaboration requires frequent and effective communication among all counsel and the client to enable the client to gain information needed to make or advise on business decisions, and also allow counsel and the client to ascertain the full risk profile of a given case and explore the nuances of any particular litigation strategy.

Conclusion

Clients and lawyers who find themselves litigating a mass tort on both sides of the U.S.-Canada border should take their lead from the long-standing friendship between the countries. Cross-border collaboration is a bilateral relationship built on mutual trust and confidence and frequent, effective communication.

Understanding and respecting the similarities and differences between the jurisdictions is critical, as is a willingness to work together to find efficiencies and candidly evaluate the effect a litigation strategy in one location may have on the other. With these guideposts in mind, cross-border collaboration can result in an effective litigation strategy and, importantly, a happy client. That is, as long as no one starts talking about hockey.

This article is part of a series spearheaded by Faegre Baker Daniels on the virtual law team.

Peter J. Pliszka is a partner at Fasken Martineau DuMoulin LLP.

Munjot Sahu is litigation and legal compliance counsel at Eli Lilly and Company.

Adrienne Franco Busby is a partner and Lexi C. Fuson is an associate at Faegre Baker Daniels.

[1] https://www.international.gc.ca/world-monde/country-pays/united_states-etats_unis/relations.aspx?lang=eng.

[2] https://www.state.gov/u-s-relations-with-canada/tucker.