

Defending Competition Class Actions in Canada: New Challenges and Next Steps

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Introduction

The competition class action landscape in Canada has changed significantly in the last 18 months. In the past, proposed competition class actions often failed to survive contested certification motions because plaintiffs were unable to establish a workable methodology to establish the fact of loss on a class-wide basis, a constituent element of civil liability under the *Competition Act*.¹ Recent appellate-level decisions in Ontario² and British Columbia³ have revisited the issue of whether, at the certification stage, a plaintiff should be required to demonstrate that the fact of loss can be proved on a class-wide basis. The courts in these provinces have signalled their willingness to certify proposed competition class actions where the plaintiff has established that the defendant's breach of the *Competition Act*, or unlawful gain, is a suitable common issue that would advance the action, even though class members would still be required to establish loss on an individual basis. The courts in these provinces have also significantly lowered the evidentiary standard that must be met by plaintiffs at the certification stage, thus confirming a more plaintiff-friendly approach. In addition, at least in British Columbia, the courts have opened the door to the use of the aggregate damages provisions of class proceedings legislation to assist plaintiffs in overcoming the inherent difficulties in proving loss on a class-wide basis.

This paper examines these recent developments in Canadian competition class action law, focusing on the current certification and evidentiary standards and the practical implications that these standards may have on the course of proceedings *post*-certification. On the premise that, in light of the current standards, defendants will now be much less unlikely to be able to fend off

¹ R.S.C. 1985, c. C-34

² 2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation, 2010 ONCA 466, aff'g (2009), 250 O.A.C. 87 (Div. Ct.), rev'g (2008), 89 O.R. (3d) 252 (S.C.J.) ("Quizno's")

³ Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2009 BCCA 503, rev'g 2008 BCSC 575, leave to appeal refused, [2010] S.C.C.A. No. 32 ("Infineon")

certification, the paper also explores other procedural mechanisms that defendants might now consider employing in their defence of competition class actions, short of defending them on their merits at the common issues trial.

Background: Damages as a Prerequisite to Liability

Section 36 of the *Competition Act* provides a statutory cause of action to any person who has suffered loss or damage arising from the breach of any of the criminal provisions in Part VI of the Act. These criminal provisions include conspiracy (s. 45), bid-rigging (s. 47), misleading advertising (s. 52) and deceptive telemarketing (s. 52.1). (Section 61(1), which established the criminal offence of price maintenance, and had been invoked as the basis for a number of civil actions, was repealed in July 2009.) However, the commission of one of these offences will not in itself give rise to civil liability: under s. 36, the plaintiff must have suffered actual loss or damage from the criminal conduct.

In a class proceeding under s. 36 of the *Competition Act*, therefore, a class member is not entitled to recover unless he or she has personally suffered harm. As the court stated in *Price v. Panasonic Canada Inc.*,⁴ “[e]ach member of the proposed class must prove actual loss or damage before the defendant will be found liable.”

At the certification stage, the ability of a prospective representative plaintiff to prove damage on a class-wide basis is engaged by three of the five certification requirements: whether there is an identifiable class; whether there is a common issue; and whether a class proceeding is the preferable procedure.⁵ Historically, Canadian courts were reluctant to certify proposed competition class actions where the plaintiff was unable to demonstrate that loss or damage could be proved on a class-wide basis. The informal rule appeared to be that if the plaintiff could not show that the fact of harm could be proved on a class-wide basis, the action was not appropriate for certification.

Recent Developments

A More Flexible Approach to Certification

⁴ [2002] O.T.C. 426 (S.C.J.) (“*Price*”) at para. 36

⁵ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2010 BCSC 285 (“*Microsoft*”) at para. 8

In its June 2010 decision in *Quizno's*,⁶ the Ontario Court of Appeal for the first time upheld the certification of a class action involving claims under the *Competition Act*. The decision confirms that Ontario courts have adopted a liberal and flexible approach to the certification of competition-related class actions.

Quizno's is an action by a class of franchisees in Ontario against the franchisor (*Quizno's*) and food distributor (GFS) involved in the *Quizno's* restaurant chain. Under the *Quizno's* franchise system, franchisees are required to purchase all food and other supplies from sources designated by *Quizno's*. *Quizno's* had designated GFS to sell and distribute supplies in Ontario. The franchisees allege that they have been charged exorbitant prices for these supplies as a result of a price maintenance scheme engineered by *Quizno's*. They allege that the distributor, GFS, has engaged in a civil conspiracy with *Quizno's* in which it aided and abetted the price maintenance scheme. The franchisees assert three causes of action: a statutory cause of action under s. 36 of the *Competition Act* for breach of the price maintenance provision (s. 61(1)) of the *Competition Act* (which has since been repealed), civil conspiracy and breach of contract.

At first instance, the motions judge denied certification, principally on the basis that loss or damage was not a suitable common issue. He focused on loss as a key issue both as a constituent element of liability under the *Competition Act* and conspiracy, and as proof of damages for all claims. He rejected the plaintiff's expert's opinion that a valid methodology existed to determine and assess loss on a class-wide basis. He found that loss could only be determined on an individual basis, so that whether franchisees had suffered loss was unsuitable as a common issue. He concluded that because the franchisees had not shown that damages could be established on a class-wide basis, they had failed to identify any common issues.⁷

The Divisional Court, in a split decision, reversed the decision of the motions judge and conditionally certified the action. The majority of the Court held that the motions judge had erred in failing to consider whether, quite apart from the plaintiff's expert opinion, there was some other basis in fact in the record that might render the fact of loss a common issue with respect to liability under the *Competition Act*.⁸ The majority relied on the 2007 decision in *Axiom Plastics Inc.*

⁶ *Quizno's* (C.A. decision), note 2 above

⁷ *Quizno's* (S.C.J. decision), note 2 above at para. 115

⁸ *Quizno's* (Div. Ct. decision), note 2 above at paras. 47, 95

v. E.I. Dupont Canada Company,⁹ where the certification judge was satisfied on basic economic principles that in the case of persons required to buy products there would be some basis in fact that each person suffered some loss as a result of an alleged vertical price-fixing conspiracy. Similarly, in *Quizno's*, the majority of the Divisional Court found that the requirement imposed on a uniform class of purchasers for the purchase of the same products at the same prices provided some basis in fact for concluding that loss could be proved on a class-wide basis, thus making the issue of loss a suitable common issue and a class proceeding the preferable procedure for advancing the action. The majority stated, "Although there will be a differential impact on the class members depending on the specific products each ordered, if the plaintiffs ultimately prove overcharging, the fact of loss must be common to all."¹⁰

The majority of the Divisional Court further held that, even if loss could *not* be proved on a class-wide basis, this would not be fatal to certification. It observed that "[f]ailure to establish all elements of liability, including proof of loss as a constituent element of liability under s. 36 of the *Competition Act* or for civil conspiracy, is not the end of the inquiry." The majority pointed out that orders certifying class actions outside the competition context in which loss was a constituent element of liability had frequently been upheld, even though loss or damage was not a common issue.¹¹ The majority noted that, even if loss could not be proved on a class-wide basis, the breach of s. 61(1) of the *Competition Act* as well as questions relating to the civil conspiracy and breach of contract claims were "substantial ingredients" of liability that could be proved on a class-wide basis. They were themselves suitable common issues that would advance the action and make a class proceeding the preferable procedure.

The Ontario Court of Appeal agreed with the Divisional Court majority's conclusion that the action was appropriate for certification, even though the

⁹ (2007), 87 O.R. (3d) 352, leave to appeal refused, [2008] O.J. No. 1973 (Div. Ct.)

¹⁰ An important element of *Quizno's* is that the direct relationship between the purchaser and seller in that case provided the evidentiary basis to satisfy the requirement of loss on a class-wide basis. As the Divisional Court majority itself acknowledged, *Quizno's* is an action by direct purchasers, as opposed to indirect purchasers, and therefore does not involve the complicated issue of "pass through," which had, at least historically, prevented class actions from being certified. The Divisional Court majority specifically distinguished the case before it from such indirect purchaser actions as *Chadha*, *Price*, *Harmegnies* and *Infineon* (which was then under appeal), all of which denied certification on the basis that there was insufficient reliable evidence that an overcharge had been passed through to indirect purchaser end users. See *Quizno's* (Div. Ct. decision), note 2 above at paras. 107-115.

¹¹ *Ibid.* at para. 46

issue of damages might not be capable of being addressed on a class-wide basis. It adopted the Divisional Court majority's analysis that the breach of s. 61(1) of the *Competition Act* as well as questions relating to the civil conspiracy and breach of contract claims were "substantial ingredients" of liability that could be proved on a class-wide basis. These issues were therefore appropriate common issues that would advance the litigation and avoid the duplication of legal analysis.

Quizno's thus marks a new, liberal approach to the certification of competition class actions. As a result of *Quizno's*, it may be sufficient for plaintiffs to establish that the question whether there was a breach of a section of the *Competition Act* is a suitable common issue that would significantly advance the action and achieve the objectives of judicial economy and access to justice, despite the fact that class members would still be required to prove loss on an individual basis in order to establish liability.¹²

While this approach may be consistent with the courts' renewed focus on access to justice, judicial economy and behaviour modification, one potential consequence – barring the adoption of some other procedural mechanism – is to postpone problems of proof to the trial of the common issues and a multitude of individual damages assessments, at the expense of the same principle of judicial economy, and also, possibly, of fairness to defendants.

Lowering of the Evidentiary Standard

Recent decisions in Ontario and British Columbia further confirm that a prospective representative plaintiff need only establish "some basis in fact" that damage can be proved on a class-wide basis. The plaintiff will discharge this onus on demonstrating that he or she has a "credible and plausible methodology" for proving the fact of harm on a class-wide basis.¹³ This burden is not a heavy one.¹⁴ A plaintiff need not come to the certification motion with

¹² In contrast to the Ontario approach represented by *Quizno's*, the Quebec Court of Appeal has steadfastly maintained a requirement that a plaintiff on a certification motion provide some evidence of his or her ability to establish proof of harm on a class-wide basis: *Harmegnies v. Toyota Canada*, 2008 QCCA 380 (C.A.) at para. 54, leave to appeal refused, 2008 CarswellQue 9015 (S.C.C.).

¹³ *Infineon* (C.A. decision), note 3 above at para. 68

¹⁴ *Quizno's* (Div. Ct. decision), note 2 above at para. 74: "The requirement that there be an evidentiary foundation – or some basis in fact – to support the certification criteria does not include a preliminary merits test and should not involve an assessment of the merits. It is not an onerous requirement. The plaintiffs are not required to indicate the evidence upon which they

a completed harm or damage analysis.¹⁵ As the Divisional Court majority held in *Quizno's*, “the plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent that they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader.”¹⁶

Moreover, in assessing on a certification motion whether the plaintiffs have demonstrated a “credible and plausible methodology,” the courts will not engage in a weighing of conflicting evidence. As the Court of Appeal held in *Quizno's*, “it is unnecessary at [the certification] stage to engage in the debate about the relative strengths and weaknesses of the expert evidence.”¹⁷ The practical implication of this lowering of the evidentiary bar is that it will rarely be worthwhile for defendants to put in expert evidence of their own on the certification motion.

Aggregate Assessment of Damages

In June 2010, leave to appeal from the certification order in the *Irving Paper* case was refused.¹⁸ The leave decision is an important one because, although leave was refused and the certification order upheld, the leave judge, Leitch J., provided an important clarification of the law regarding the requirement of proving loss on a class-wide basis and the related question of the use of the aggregate damages provisions of the *Class Proceedings Act*.¹⁹

will prove these issues. The certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action” [citing *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16, 25].

¹⁵ *Microsoft*, note 5 above at para. 9

¹⁶ *Quizno's* (Div. Ct. decision), note 2 above at para. 102

¹⁷ *Quizno's* (C.A. decision), note 2 above at para. 45

¹⁸ *Irving Paper Ltd. v. Atofina Chemicals Inc.*, 2010 ONSC 2705 (S.C.J.), denying leave to appeal from (2009), 99 O.R. (3d) 358 (S.C.J.)

¹⁹ *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“CPA”). Section 24(1) states:

The court may determine the aggregate or a part of a defendant’s liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability; and
- (c) the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.

In *Irving Paper*, at first instance, Rady J. had suggested that the Ontario Court of Appeal's decisions in *Markson v. MBNA Canada Bank*²⁰ and *Cassano v. The Toronto Dominion Bank*,²¹ although not price-fixing class actions, had signalled a different approach to certification. She took the view that *Markson* had established both that certification did not require proof of loss on a class-wide basis, and that the aggregate damages provision of the CPA would be triggered upon showing "potential liability – in other words that the defendants acted unlawfully."²²

This decision could have had far-reaching and serious implications for competition class actions. It suggested that *Markson* and *Cassano* had effectively overtaken the rule in *Chadha v. Bayer Inc.*,²³ which states that the aggregate damages regime of the CPA is only applicable to establish the quantum of damage, but not the fact of damage. However, on the leave application, Leitch J. clarified that in competition class actions liability to each member of the class, and therefore resort to the aggregate assessment provision, depends on proving that each of them suffered some loss. Justice Leitch correctly pointed out that the plaintiffs in both *Markson* and *Cassano* were not required to establish actual loss because their claims were for breach of contract, in which proof of individual loss is not a constituent element of liability. *Markson* and *Cassano* therefore did not change the requirements, set out in *Chadha*, that a plaintiff in a proposed competition class action must establish that actual loss can be proved on a class-wide basis, and that liability must be established before the plaintiff may resort to the aggregate damages provisions of the CPA. As Leitch J. stated:

the statistical evidence provisions in s. 23 and the aggregate damages provisions in s. 24 cannot be utilized to demonstrate that

²⁰ [2007] ONCA 334 ("*Markson*")

²¹ [2007] ONCA 781 ("*Cassano*")

²² *Irving Paper* (certification decision), note 18 above at para. 118. In *Markson*, the Ontario Court of Appeal held that if the court determined that liability to some class members could be established through a common issues trial, then that would be sufficient to trigger ss. 23 and 24 of the CPA. The Ontario Court of Appeal held that s. 24(1)(b) becomes available where the court is satisfied that "potential liability" can be established on a class-wide basis, even if entitlement to monetary relief may depend on individual assessments (at para. 48).

²³ (2001), 54 O.R. (3d) 520 (Div. Ct.), aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal refused, [2003] S.C.C.A. No. 106 ("*Chadha*")

class-wide injury can be proven as a common issue, nor can those provisions allow a plaintiff to avoid proof of class-wide injury.²⁴

Justice Leitch also observed that the Court of Appeal in *Markson* specifically confirmed its consistency with *Chadha* and followed the rule from *Chadha* that s. 24 “is applicable only once liability has been established and provides a method to assess a quantum of damages on a global basis but not the fact of damage.”²⁵

In *Quizno's*, the Divisional Court and the Ontario Court of Appeal took an approach to aggregate assessments of damages that was consistent with *Chadha*, recognizing that s. 24 of the CPA is procedural in nature and cannot aid in proving liability. However, both courts went on to note that the case before them involved claims of breach of contract and breach of s. 61(1) of the *Competition Act* (price maintenance), neither of which required proof of loss as an element of liability. Relying on *Markson*, the Divisional Court held (and the Court of Appeal agreed) that ss. 23 and 24 of the CPA should be available at the common issues trial to determine damages on an aggregate basis. The Ontario Court of Appeal further noted that the ultimate decision on whether ss. 23 and 24 would be available rested with the trial judge.²⁶

The British Columbia Court of Appeal appears to have gone one step further than the Ontario courts. In *Infineon*, the B.C. Court of Appeal proceeded from the premise that the loss suffered by the class members would necessarily be reflected in the total gain obtained by the defendants. Based on that premise, the Court stated that

any legal objection to the use of the aggregation provisions of the [Class Proceedings Act, R.S.B.C. 1996, c. 50] to assess damages in the conspiracy actions at common law and under the *Competition Act* would be of no practical importance. The common issues trial will have determined the [defendants'] wrongful conduct as common issues and, as a practical matter, will have determined the aggregate amount of the loss suffered by the class.”²⁷

²⁴ *Irving Paper* (leave decision), note 18 above at para. 45

²⁵ *Ibid.* at para. 43

²⁶ *Quizno's* (C.A. decision), note 2 above at para. 58

²⁷ *Infineon* (C.A. decision), note 3 above at para. 70

The B.C. Court of Appeal has thus opened the door to the use of the aggregate damages regime of class proceedings legislation to assist plaintiffs in establishing the essential liability question of harm on a class-wide basis. At least in British Columbia, so long as a plaintiff can demonstrate a methodology for showing damages in the aggregate, the plaintiff will satisfy the court that actual loss can be proved on a class-wide basis.

This “top-down” approach set out by the B.C. Court of Appeal in *Infineon* has been followed by lower B.C. courts in *Sun-Rype*²⁸ and *Microsoft*.²⁹ The court stated in *Microsoft* that “the Court of Appeal [in *Infineon*] must be taken to have accepted that for certification of the damage claims, a method of showing harm to all class members need not be demonstrated and, further, that the aggregate damages sections can be used to establish liability.”³⁰ As the discussion above indicates, the B.C. position is inconsistent with that, at least to date, in Ontario.

Next Steps

The developments discussed above appear to have rendered it largely futile for defendants in competition class actions to seek to resist certification on the ground that the loss that is a prerequisite to liability cannot be established on a class-wide basis. Proceeding from this premise, the remainder of this paper explores two procedural mechanisms that defendants might now consider employing in the defence of competition class actions, short of simply defending the cases on their merits at trial – summary judgment and decertification. In light of the increased accessibility of competition class actions in Canada, there is a potential for these mechanisms to feature more prominently in the defence of these actions.

Summary Judgment³¹

Availability

²⁸ *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922 at para. 114

²⁹ *Microsoft*, note 5 above at paras. 125-127

³⁰ *Ibid.*

³¹ The discussion in the paper focuses on the summary judgment mechanism in Ontario, though reference is made in the text to the analogous “summary trial” provisions in British Columbia. (British Columbia also has a summary judgment rule which is similar to Ontario’s former summary judgment rule.) Provinces with summary judgment or summary trial rules similar to the recently amended Ontario rules include Alberta, Manitoba and Newfoundland. The *Federal Courts Rules* also provide for summary judgment (rule 215) and summary trial (rule 216).

Summary judgment is a procedural mechanism that is intended to remove from the trial system proceedings in which there is no genuine issue requiring a trial.³² Summary judgment will be granted where one party is able to demonstrate the absence of a dispute between the parties regarding the facts or the application of the law to the facts of the case. On a summary judgment motion, the motions judge may consult the pleadings, any affidavits filed in the proceeding, as well as any cross-examination of the deponents, the transcript of any examinations for discovery, admissions and other evidence to determine whether there is a genuine factual dispute requiring a trial.

Until recently, the role of a court determining a summary judgment motion was limited to determining the threshold issue of whether there was a genuine issue as to material facts requiring resolution by a trier of fact. The court hearing the motion could not weigh the evidence, evaluate credibility or draw any factual inferences.³³ No matter how weak the claim or defence might appear to be, if there was a genuine issue for trial with respect to material facts, the case would be allowed to proceed.

Recent amendments to the *Ontario Rules of Civil Procedure*, in force effective January 1, 2010, have significantly broadened the powers of the court on a motion for summary judgment, with a view to expanding the availability of summary judgment relief. While the statement of the ultimate test on a motion for summary judgment under rule 20.04(2) has changed only slightly – from “no genuine issue for trial” to “no genuine issue requiring a trial” – the judge hearing a motion for summary judgment is now empowered to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence.³⁴ These sweeping new powers essentially overrule the Ontario jurisprudence which had expressly held that the motions judge could do none of these things.

Added to these powers is a new power to order the hearing of oral evidence where the interests of justice require a brief trial to dispose of the motion for summary judgment. The availability of this “mini-trial” power brings the Ontario

³² *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 at 557 (C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 10

³³ *Kilpatrick v. Peterborough Civic Hospital* (1999), 44 O.R. (3d) 321 at 324-325 (C.A.)

³⁴ Rule 20.04(2.1)

Rules closer to the B.C. *Rules of Court*, which provide for a similar “summary trial” procedure.³⁵

The following points can be gleaned from the cases decided to date under the amended Ontario rule.

- The court has the power to conduct at least some limited inquiry into the merits of the case, in order to decide whether a claim enjoys “no chance of success.”
- The court must take a “hard look” at the evidence in order to determine the suitability for summary judgment.
- The new powers in Rule 20 are appropriately exercised where it is in the “interests of justice” to do so.
- The quality of the record, and the stage of the proceeding, are relevant factors in ascertaining whether it is in the interests of justice to grant summary judgment. In particular, the courts have expressed a reluctance to grant summary judgment where discovery is in its early stages and there is a reasonable likelihood that further evidence will arise through the discovery process.³⁶

There appears to date to be only one decision under the new summary judgment rule in a certified class proceeding: *Healey v. Lakeridge Health Corp.*³⁷ In that case, which related to the alleged failure of the defendant doctors and hospital to properly diagnose and take precautions to prevent the spread of an infectious disease, both the plaintiffs and the defendants brought motions for partial summary judgment on whether a duty of care was owed and whether there were compensable damages. In concluding that he was in as good a position as the trial judge to decide the issues before him, Perell J. observed that an “enormous record,” consisting of voluminous affidavits, including expert affidavits, and cross-examinations on affidavits, had been put

³⁵ *Supreme Court Civil Rules*, B.C. Reg. 168/2009, rule 9-7. There is, however, a key difference between the summary trial rules in Ontario and B.C. While the B.C. rule effectively gives any party the right to force a summary trial, the Ontario rule maintains judicial control over the process.

³⁶ See, for example, *Lawless v. Anderson*, 2010 ONSC 2723; *Healey v. Lakeridge Health Corp.*, 2010 ONSC 725 (“*Healey*”); *Blue Giant Equipment Corp. v. Misco Holdings Inc.*, 2010 ONSC 4404; *Cuthbert v. TD Canada Trust*, 2010 CarswellOnt 867 (S.C.J.).

³⁷ *Healey*, note 36 above

before him and that the issues would be determined “in the context of evidence and a real factual foundation, not just allegations.” In the result, Perell J. dismissed the plaintiffs’ motion on the basis that there were genuine issues requiring a trial about the causation-in-fact of the claimed (psychological) injuries and about the assessment of damages. Justice Perell granted the defendants’ motion for judgment, noting that the issues raised on the defendants’ motion were predominated by legal issues (e.g., the compensability of psychological injury) that are often decided without needing a trial.³⁸

For competition class actions, the potential implications of the new summary judgment rule are significant. The availability of a summary procedure in which the court is empowered to weigh evidence and conduct at least a limited inquiry into the merits of the case may be an effective answer to the low evidentiary standard at the certification stage. Defendants may, for instance, move for summary judgment on the issue of their liability under the *Competition Act*, either on the issue of their breach of the applicable criminal provision or on the issue of damages, or both. The issue of damages as an element of liability was regularly the subject of successful summary judgment motions by defendants under the old rule (outside of the competition context).³⁹ While the onus will always be on the defendant to prove that there is no genuine issue requiring a trial, the plaintiff will nonetheless be required to “put its best foot forward” – an evidentiary burden that is arguably much heavier than the evidentiary standard that plaintiffs are required to meet at the certification stage. Indeed, when hearing a motion for summary judgment, the court assumes that the record before it contains all of the evidence that the parties would present if the case were to proceed to trial.⁴⁰ Given the historical difficulties that plaintiffs have had in establishing loss on a class-wide basis (particularly in “pass through” cases), summary judgment may therefore prove to be an effective weapon in the defence of competition class actions.

³⁸ *Ibid.* at paras. 32, 35

³⁹ See *Ciano v. York University*, [2000] O.J. No. 183 (S.C.J.), where Winkler J. (as he then was) granted the defendant summary judgment and dismissed a proposed class action involving a claim of breach of contract. Winkler J. stated: “Where a plaintiff cannot establish, in response to a motion for summary judgment, an essential element of the cause of action asserted, the action must fail and the motion for summary judgment must succeed.” See also *KRP Enterprises Inc. v. Haldimand (County)*, [2007] O.J. No. 2967 (S.C.J.).

⁴⁰ *HSBC Securities (Canada) Inc. v. Davies, Ward & Beck*, [2004] O.J. No. 3086 (S.C.J.)

Timing

Timing should be an important preliminary consideration for any party contemplating a summary judgment motion in the context of a class action.

The timing of a summary judgment motion is governed first, as are all elements of class proceedings, by the generally applicable rules of civil procedure.⁴¹ Under the Ontario rules, the delivery of a statement of defence is the only step that a defendant must complete prior to bringing a summary judgment motion. Thus, as a general rule, a defendant may move for summary judgment after delivering a statement of defence, whether before or after certification.

There is also significant judicial support for the view that it can be desirable to hear and dispose of preliminary motions, including motions for summary judgment, prior to the certification motion. Justice Cumming, an experienced class action judge, made the following observations in *Holmes v. London Life Insurance Co.*:⁴²

In my view, there is not any provision in the CPA which requires that the certification motion be heard first when the representative applicant (or plaintiff) so requests. Rather, discretion is conferred by s. 12 upon the court respecting the conduct of the proceeding, with the objective of ensuring “its fair and expeditious determination.”

Where the class proceeding is by way of a civil action with a statement of claim, significant issues are routinely dealt with prior to certification. This can include a determination of the merits through summary judgment by way of a Rule 20 motion to the effect that there is no genuine issue for trial. Indeed, the Ontario Court of Appeal has approved the procedure of pre-certification summary judgment motions: *Stone v. Wellington (County) Board of Education* (1999), 29 C.P.C. (4th) 320 (Ont. C.A.) at p. 322.

...

Rules 20 and 21 apply to civil actions and not to a proceeding commenced by application. An application is summary by nature

⁴¹ CPA, s. 35

⁴² (2000), 50 O.R. (3d) 388 (S.C.J.)

and is generally a less expensive and more expeditious procedure for determining a dispute In this sense, an application by its inherent nature involves a streamlined procedure that is similar to that seen in respect of motions under Rules 20 and 21. The applicant in the case at hand chose to proceed by way of application.

There is no a priori reason why an application can not be determined on its merits prior to certification.⁴³

Justice Cumming went on to say that “[t]he proper and legitimate interests of all parties must be kept in mind in scheduling the conduct of a class proceeding to ensure its fair and expeditious determination. A balancing of interests taking into account a costs and benefits analysis with respect to the respective parties may be necessary.”⁴⁴

Similar motions, called summary trial applications, have been successfully brought prior to certification in British Columbia. In *Royster v. 3584747 Canada Inc.*,⁴⁵ the B.C. Supreme Court allowed a summary trial application, challenging the proposed representative plaintiff's entitlement to wrongful dismissal damages, to proceed even though a certification motion was already scheduled. A summary trial application was also allowed to proceed prior to certification in *Consumers' Assn. of Canada v. Coca-Cola Bottling Co.*⁴⁶ In that case, the Court held that it is appropriate to hear summary trial applications before certification where it will potentially reduce what remains for certification.⁴⁷ The Court also noted, however, that the summary trial procedure is “not well suited to cases where the facts are complex and conflicting.”⁴⁸ In that case, there was no evidence before the Court that the case was factually complex enough to make a summary trial unsuitable. The Court also rejected the plaintiff's concerns about the limited availability of pre-trial evidence or cross-examination on conflicting material, noting that the B.C. *Rules of Court* permit the court to order the examination of a party or witness, including cross-

⁴³ *Ibid.* at paras. 6-10

⁴⁴ *Ibid.* at para. 16

⁴⁵ 2001 BCSC 153

⁴⁶ 2005 BCSC 1042

⁴⁷ *Ibid.* at para. 52

⁴⁸ *Ibid.* at para. 62

examination, and give directions required for the discovery, inspection or production of documents.⁴⁹

For a number of reasons, however, defendants may find it impractical to bring a summary judgment motion prior to certification, particularly where the motion is for summary judgment on an ultimate issue such as the defendant's liability. The following considerations arise from a defendant's perspective:

- The pre-requisite of filing a statement of defence.⁵⁰
- The practical pre-requisite of delivering a complete affidavit of documents, and the delays associated with challenges to the affidavit of documents.⁵¹
- The sufficiency of the evidence available and the prospect that the majority of evidence will arise through the documentary discovery process.
- The extent to which summary judgment will bind the class: if summary judgment is obtained prior to certification, the judgment will not bind the class.

⁴⁹ *Ibid.* at paras. 56-60

⁵⁰ Rule 20.01(3)

⁵¹ *Laurentian Bank of Canada v. Herzog*, [1999] O.J. No. 3272 (S.C.J.); *Cole v. Corporation of the City of Hamilton* (1999), 45 O.R. (3d) 235 (Gen. Div.); *Segnitz v. Royal and SunAlliance Insurance Co. of Canada*, [2001] O.J. 6016 (S.C.J.). The courts in these cases have noted that the Ontario *Rules of Civil Procedure* require the delivery of an affidavit of documents ten days after the close of pleadings, and that the bringing of a summary judgment motion does not exempt a party from this requirement. Further, as Justice Cumming stated in *Cole*,

[t]his normative approach is purposeful because a party will often require production of documents by the opposition to prove the party's case. There is no suspension of this obligation because of an intended or pending motion for summary judgment. A party against whom there is a motion for summary judgment must be able to put forward all relevant evidence in defending the motion. A party in such a position may ascertain relevant evidence through the affidavit of documents.

See also *Bank of Montreal v. Negin* (1996), 31 O.R. (3d) 321 at 323, where the Ontario Court of Appeal made the following observation:

Important evidence is often only in the possession of the party moving for summary judgment. If the responding party were denied the opportunity of reviewing relevant documents in the possession of an opposing party before examination on affidavits to be used on a motion for summary judgment, he would be deprived of information to which he is entitled under the *Rules of Civil Procedure*. In addition, it would mean that on a motion for summary judgment the responding party is not entitled to know the full evidence on which the opposing party bases its case.

- The risk that the motion will only serve to educate the plaintiff about the defendant's case.

The courts, too, have identified a number of reasons why certification should be "the first order of business" in a proposed class proceeding.

- First, the brief 90 day time period for bringing a certification motion, provided for in s. 2(3) of the CPA, strongly suggests that the certification motion is intended to be the first procedural matter that is to be heard and determined.
- Second, the "binding effect" of a summary judgment motion determined after certification favours postponing the determination of the summary judgment motion until after the certification motion.
- Third, postponing the summary judgment motion would occasion no actual prejudice on the defendant.⁵²

In the context of competition class actions, which typically involve complicated issues of proof of the impact of anti-competitive conduct, defendants may find it more feasible to bring a summary judgment motion after certification, and particularly after the exchange of full affidavits of documents and the completion of documentary and oral discoveries. While this will inevitably prolong the action and increase costs to defendants, it is likely the most realistic and cost-effective scenario, since the courts have shown a reluctance to refuse summary judgment on the issue of liability as long as documentary discovery remains incomplete.

Decertification

Under s. 10 of the CPA, a defendant in a certified class action may move to decertify the action where it appears that the conditions for certification no longer exist. Other jurisdictions' class action legislation contains similar provisions.⁵³ The Supreme Court of Canada has expressly recognized that the

⁵² *Moyes v. Fortune Financial Corp.* (2001), 13 C.P.C. (5th) 147 (Ont. S.C.J.) at paras. 8-11, per Nordheimer J.

⁵³ See, for example, *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 10 and the *Federal Courts Rules*, SOR/98-106, s. 334.19.

decertification provision imparts “flexibility” to class proceedings, and is one of the provisions that enable the court to deal with issues as they arise.⁵⁴

As noted earlier, the ability of a prospective representative plaintiff to prove the loss prerequisite for liability a class-wide basis is engaged by three of the five certification requirements: whether there is an identifiable class; whether there is a common issue; and whether a class proceeding is the preferable procedure.⁵⁵ It follows that additional evidence arising from the discovery process or developments that occur as the proceeding moves toward trial that suggest that damage cannot be proved on a class-wide basis may provide a basis for a court to decertify the proceeding on a number of grounds. At a minimum, new evidence on the issue of loss may justify the redefinition of the class or the modification of the certified common issues.⁵⁶

On a recent mid-trial motion for directions in *Smith v. Inco Ltd.*,⁵⁷ the common issues trial judge indicated that he would not rule on any motion for decertification until he had heard all of the evidence. This was the defendant's second attempt to decertify the proceeding. The defendant initially brought an unsuccessful motion to decertify after completion of documentary productions and examinations for discovery.⁵⁸ In refusing the defendant's initial motion to decertify, Cullity J. commented on the appropriate use and timing of a decertification motion, holding that it cannot be used to effectively appeal from the certification decision, but must be based on new evidence that has come to light in the course of the continuing proceeding:

Section 10 (1) does not contemplate that the motion judge is to hear what would be, in effect, an appeal from an earlier decision to certify a proceeding. The moving party has, in my opinion, the burden of showing that the earlier decision would not have been made in the light of new evidence – including evidence of facts that have subsequently occurred. Subsequent facts – consisting, for example, of developments that occur as the proceeding moves

⁵⁴ *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 32. See also *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 70, and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 90.

⁵⁵ *Microsoft*, note 5 above at para. 8

⁵⁶ *Peppiatt v. Royal Bank of Canada*, [2002] B.C.J. No. 691 (S.C.J.)

⁵⁷ 2009 CarswellOnt 8019 (S.C.J.) (formerly *Pearson v. Inco Ltd.*)

⁵⁸ *Pearson v. Inco Ltd.* (2009), 42 C.E.L.R. (3d) 319 (Ont. S.C.J.)

towards trial – may demonstrate that, contrary to the original finding, it is not manageable as a class action. Motions for decertification on this ground were made in *Webb v. 35847747 Canada Inc.*, [2005] O.J. No. 449 (S.C.J.) and *L.R. v. British Columbia*, [2003] B.C.J. No. 313 (S.C.), although neither was successful on the facts relied upon.

As Justice Cullity observed, decertification has regularly been denied by Canadian courts.⁵⁹ However, in light of the recently lowered evidentiary standards for the certification of competition class actions, it is worth questioning whether the courts should balance that low standard with a more rigorous examination of the evidence on a decertification motion, where a significant evidentiary record will typically be available. There is some support for this in *Smith v. Inco Ltd.* where Henderson J., although declining to hear a decertification motion, observed that it is a principle on a motion to decertify, either before or at trial, that the presiding judge should “carefully scrutinize the evidence as it has evolved to that stage of the proceeding and determine if the evidence continues to support the criteria set out in s. 5 of the CPA”.⁶⁰ This appears to be a significantly higher evidentiary standard than the “some basis in fact” standard applicable at the certification stage. If that is indeed the standard applied, defendants in competition class actions may have a much better chance to obtain decertification than to defeat certification in the first place.

Conclusion

The lowering of the certification and evidentiary standards in recent decisions in Ontario and British Columbia has significant implications. Although these decisions appear to satisfy the objectives of behaviour modification, access to justice and judicial economy, they appear to have done so at the potential expense of the considerations of fairness, efficiency and manageability. As a result, although the decisions appear to remove the difficulties traditionally faced by plaintiffs in contested certification motions and have eased the burden faced by plaintiffs on certification motions, they may have simply opened the door to new difficulties and new battlegrounds. Courts will likely be

⁵⁹ See, for example, *Webb v. 35847747 Canada Inc.*, [2005] O.J. No. 449 (S.C.J.), leave to appeal refused [2005] O.J. No. 3306 (Div. Ct.); *Rumley v. British Columbia* (2003), 12 B.C.L.R. (4th) 121 (S.C.).

⁶⁰ *Smith v. Inco Ltd.*, note 57 above at para. 34

faced with inefficient and unmanageable common issues trials that are followed by complex, costly and time consuming individual loss inquiries. At the same time, in the face of mounting costs associated with defending an increased number of class actions, defendants are likely to shift their focus to using other procedural weapons in defending these actions. Summary judgment and decertification motions are two procedural mechanisms that may hold promise for defendants.