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CLASS ACTION DEFENCE QUARTERLY

EDITOR-IN-CHIEF: ELIOT N. KOLERS
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Volume 8 Number 4 June 2014

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THE CAUSE OF ACTION OF THE REPRESENTATIVE PLAINTIFF IN CLASS PROCEEDINGS

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The Supreme Court of Canada's late-2013 set of decisions in the direct/in-direct purchaser trilogy[1] and in *AIC Limited v. Fischer*[2] continues to emphasize that the bar to certifying a class proceeding in Canada, including in Quebec, is a low one. However, it remains the case that for an action to be certified as a class proceeding, a suitable representative plaintiff is required. A representative plaintiff with a triable claim that legitimately raises common issues is important as a matter of natural justice and due process. Certifying class actions without having a "real" representative plaintiff seriously prejudices the defendant's right to fully defend the case against it. Yet, at least in Ontario, very little attention has been devoted to this certification criterion.

Class Action Defence Quarterly

Class Action Defence Quarterly is published four times per year by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Markham, Ont., L3T 7W8, and is available by subscription only.

Web site: www.lexisnexis.ca
Subscribe to: orders@lexisnexis.ca

ISBN 0-433-45401-6 ISSN 1911-2270

ISBN 0-433-45403-2 ISSN 1911-2289

ISBN 0-433-45406-7 (print & PDF)

Subscription rates: $320.00 (print or PDF)
$435.00 (print & PDF)

However, after many years of giving little consideration to the issue, Quebec judges are now beginning to scrutinize the appropriateness of a proposed representative plaintiff and, in some cases, are denying authorization to proceed as a class action where they consider the case to be purely lawyer driven or are not satisfied that the proposed representative has a valid cause of action. Article 1003(d) of the *Code of Civil Procedure* ("CCP")[3] requires the representative plaintiff to show that he or she has a personal interest in the litigation. A class action will not be authorized (the equivalent of "certified") if the representative plaintiff does not play an active role in the litigation and/or if he or she does not have a valid cause of action. The courts have also been clear that pursuant to art. 1003(b) CCP, it is indeed the representative plaintiff's case that must be examined to determine, even on a *prima facie* basis, if the case should move forward as a class action.

This approach is the correct one, and the authors suggest that it should be adopted in the common law provinces as well.

An Increased Focus on the Proposed Representative in Quebec

In recent years, several proposed pharmaceutical class actions in Quebec have been denied authorization because the representative plaintiff failed to meet the low threshold of showing that the facts alleged seem to justify the conclusions sought or because the representative plaintiff could not adequately represent the group. These requirements are found at arts. 1003(b) and (d) CCP.

Overview of Recent Interpretations of art. 1003(b) CCP

Quebec courts have recently denied the authorization of a number of class actions where the representative plaintiff failed to establish that he or she had a cause of action on a *prima facie* basis.

In *Lebrasseur v. Hoffmann-Laroche ltée* [*Hoffmann-Laroche*],[4] the court confirmed that the authorization stage is meant to be a filter to eliminate claims that are frivolous or clearly ill founded, without

undertaking an exhaustive analysis of the evidence (which should be left to the trial Judge). The representative plaintiff in this case alleged that he developed Crohn's disease three years after taking Accutane for an acne problem that was 90 per cent resolved four months after taking the medication. The court found that even with a very low burden of proof, there was insufficient evidence to support the allegations made and to find that the facts alleged seemed to justify the conclusions sought. Specifically, the court in *Hoffmann-Laroche* found that the representative plaintiff's medical records contained no fact or medical opinion that, even if taken to be true, would establish a causal link between the plaintiff taking Accutane and the diagnosis of Crohn's disease three years later.[5] In other words, the representative plaintiff's case did not legitimately raise the common issue alleged.

Similarly, in *MacMillan v. Abbott Laboratories*,[6] the court found that contrary to what was alleged, the representative plaintiff did not show, *prima facie*, that the weight loss medication Meridia caused a single heart attack or cerebrovascular accident.[7] The court concluded that many of the plaintiff's allegations were contradicted by the evidence he himself filed in support of his claim and that the other allegations were insufficient to conclude that there was a serious appearance of right such that the requirements of art. 1003(b) CCP were met.[8] The court found a number of deficiencies in the evidence filed and in the representative's testimony, including the fact that the study filed in support of the motion did not conclude that the medication caused heart attacks or cerebrovascular accidents. Notably, the plaintiff's medical record did not show that he himself suffered from a heart attack or cerebrovascular accident. The court also re-iterated a well-established principle in Quebec law whereby, even though the burden is particularly low at the authorization stage, the representative plaintiff must at least meet the minimum requirement and not "arrive empty handed".[9] The Court of Appeal dismissed the appeal on the basis of the motions judge's findings pursuant to art. 1003(b) CCP to the effect that several of the appellant's allegations were insufficient to establish a *prima facie* right.[10]

The court in *Option Consommateurs v. Merck Canada Inc.* [*Merck*][11] reiterated that the art. 1003(b) CCP burden is not a burden of proof but rather one of demonstration and that a motion for authorization cannot simply be predicated on hypotheses and speculations.[12] In this case, the court found it revealing that the proposed representative plaintiff continued taking the osteoporosis prevention medication Fosamax for one-and-a-half years after alleging that she never would have done so if she had known of the inherent risks and dangers associated with the medication. The court found that the representative plaintiff "failed to meet the minimal threshold requirement of raising facts that support a serious appearance of right, notably that she suffered or suffers from osteonecrosis of the jaw and that she would not have taken the medication Fosamax if she had known of the risks [authors' translation]".[13] There were also no factual allegations that the plaintiff suffered from embrittlement of the femur or hip bones. The Court of Appeal confirmed that there was a serious deficiency with the proposed action in that the representative plaintiff did not have a cause of action, since nothing in her medical file indicated that she suffered from osteonecrosis of the jaw or bone embrittlement.

The motions judge in *Merck* also clearly stated that at the authorization stage, it is the representative plaintiff's case that must be examined, since the action at this stage does not exist on a collective basis; the condition set out at art. 1003(b) CCP must be analyzed in light of the representative plaintiff's case.[14] The court in *Lévesque v. Vidéotron, s.e.n.c.* reiterated this principle, stating that "the class action does not exist on a collective basis. The evaluation of the criteria found at article 1003 CCP must therefore be undertaken in light of the sole case for which the Tribunal has knowledge, that of [the representative plaintiff] [authors' translation]".[15]

As such, the trends in recent case law shows that courts in Quebec will refuse to authorize a class action where the representative plaintiff does not suffer from the injury resulting from the alleged fault.

Overview of Recent Interpretations of art. 1003(D) CCP

Recent interpretations of art. 1003(d) CCP reveal that courts in Quebec are no longer reluctant to dismiss a class action when it is found that on its face, the proposed class representative does not meet the required criteria.

The question of whether the representative plaintiff is in a position to adequately represent the class is based on fulfilling the following three criteria:

- personal interest in the matter
- competence to represent the class if the case had been brought under art. 59 of the CPC
- no conflict of interest with the class members[16]

In *Hoffmann-Laroche*, the court dismissed the class action, based in part on art. 1003(d) CCP. The court found many deficiencies with regard to the role taken by the representative plaintiff in the case, including the fact that the representative did not take any steps to adequately get acquainted with the seriousness of the allegations or the existence of a causal connection between the medication he took and the disease he allegedly developed. The court also found that the representative plaintiff failed to provide sufficient information to his lawyers to establish his personal claim, including providing his own medical and pharmaceutical records. He did not take any steps to communicate with potential group members or even to verify whether a group existed. The representative plaintiff also testified that he let his lawyers take the necessary steps because they are better equipped to do so than he.[17]

Courts have found that the representative plaintiff is the one, rather than the lawyer, who must show interest in the proposed action and take the necessary inquisitive steps. Relying on recent case law, the court in *Hoffmann-Laroche* stated:

> it is up to the plaintiff to assume the responsibility of representative and to be able to direct the required steps for the action. He cannot leave its entire control to his lawyer. The class action, if authorized, belongs to the members and not to the lawyers who initiated the action [authors' translation, citations omitted].[18]

Other judges have also clearly stated that a lawyer cannot replace or act as class representative on behalf of the client.[19] It is also crucial for a representative to show that he or she conducted a reasonable investigation of the action and is able to provide an estimate of the number of class members so that he or she can be in a position to demonstrate an ability to undertake the required steps as class representative; a failure to do this could result in the authorization of the class action being dismissed.[20]

In *Abbott Laboratories*, the court found that the representative plaintiff and his lawyer had not taken even the minimum steps necessary to institute the proposed class action.[21] The court also found that general allegations concerning the representative plaintiff's appropriate character were insufficient and that certain concrete steps must be taken by proposed representative plaintiffs to show that they meet the requirements.[22]

In *Bélair v. Bayer Inc*., the court dismissed the motion for authorization of a class action on the basis that class counsel could not find a representative plaintiff to replace the original one who could no longer act because of alleged health-related reasons. Class counsel had filed a motion for discontinuance, but the defendant opposed this form of relief and argued instead that the case should be dismissed. The court agreed, stating that it was unfair for the defendant to have to wait for class counsel to find a client. It held that the criterion set out at art. 1003(d) CCP must be met, dismissed the motion for discontinuance, and dismissed the motion for authorization.[23]

In *Merck*, the court found that since the representative plaintiff did not meet the requirements of art. 1003(b) CCP because she did not establish that she had a valid claim, it would be difficult for her to be an adequate class representative. The court also

found important deficiencies with the representative in her failing to disclose that she suffered from a previous condition for 25 years prior to her taking the medication Fosamax and in her not revealing that she kept taking the medication after the action was filed, contrary to what was alleged in the motion.[24]

In light of the recent case law in Quebec, it is clear that the courts will not authorize a class action if representative plaintiffs cannot show that they have a personal triable claim or if the case is purely lawyer driven.

Ontario: The Land of Second Chances (So Far)

Ontario courts do not seem to be as troubled as their Quebec counterparts by the prospect that a case is "lawyer driven", and in any event, have not yet seen fit to follow their Quebec colleagues' stricter stance on the suitability of the representative plaintiff. Instead, the reported Ontario decisions show that in these circumstances, judges tend to conditionally certify cases and provide plaintiffs' counsel with an opportunity to find another representative.

Ontario law does accord with the Quebec approach in theory, if not in practice. In *Hughes v. Sunbeam Corp. (Canada) Ltd.* [*Hughes*],[25] the Ontario Court of Appeal confirmed the approach that had been set out by the Ontario Superior Court in *Ragoonanan v. Imperial Tobacco Canada Ltd.*,[26] noting that "if the representative plaintiff does not have a cause of action against a named defendant, the claim against that defendant will be struck out".[27]

However, subsequent decisions have backed away from the approach taken by the Court of Appeal in *Hughes*. For example, in *Matoni v. C.B.S. Interactive Multimedia Inc.* [*Matoni*],[28] the court held that the proposed representative plaintiffs did not personally have a claim against the defendants. Rather than dismissing the action outright, though, the court provided the representative plaintiffs with an opportunity to find a suitable substitute.[29] In this case, there was a small class, and the court accepted evidence that the plaintiffs had limited their contact with other class members because the defendants had indicated they intended to bring an action against the plaintiffs for intentional interference with economic relations.[30]

A similar result was obtained in *Graham v. Imperial Parking Canada Corp.*[31] As in *Matoni*, the court concluded that neither of the two proposed representatives were qualified to be representative plaintiffs. Rather than dismiss the action, the court held that there were "undoubtedly Class Members with claims" and therefore certified the class action on the condition that a new representative plaintiff be added.[32]

A proposed class action brought on behalf of franchisees of Panzerotto Pizza provides a final example. In *6323588 Canada Ltd. v. 709528 Ontario Ltd.*,[33] the court agreed with the defendant that the proposed plaintiff was not a suitable representative of the class but nonetheless refused to dismiss the certification motion. Instead, the motion was adjourned with leave to bring a motion to substitute a new representative plaintiff within 90 days. The court held it would be "a waste of time, money and judicial resources to require that the class start afresh if indeed there is a will amongst franchisees to pursue the matter".[34]

Discussion

The basis for the common law provinces' courts' relatively lax attitude towards the substitution of representative plaintiffs is arguably reflected in *Martin v. Astrazeneca*, where Justice Cullity observed that if the courts denied certification "there would be nothing to prevent the commencement of a new and otherwise identical action" by a new representative plaintiff.[35] Whether this statement is true as a matter of law is beyond the scope of this article. However, class proceedings are intended to be not private prosecutions (even if they are led by competent class counsel) but rather a procedural method to assist those with triable claims in having those claims determined. Where it is clear that the proposed representative does not have a personal

claim, courts should not simply suspend the proceeding indefinitely while class counsel searches for a new representative; nor should the case be simply discontinued. The defendant is entitled to finality. If courts are not willing to dismiss a proceeding outright, then they should provide a short window to allow class counsel to find a new plaintiff and should compensate the defendant for the costs thrown away in defending the certification motion on the basis of the original representative put forward.

After many years of placing little emphasis on the suitability of proposed representative plaintiffs, judges in the common law provinces should now follow their Quebec colleagues' lead and scrutinize the choice of plaintiff more closely. After all, it is a certification criterion. The goal of behaviour modification should not trump the need for a real plaintiff with a triable claim.

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1 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] S.C.J. No. 58, 2013 SCC 58; and *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, 2013 SCC 59.

2 [2013] S.C.J. No. 69, 2013 SCC 69.

3 CQLR c. C-25.

4 [2013] J.Q. no 7126, 2013 QCCS 3024 (in French) [*Hoffmann-Laroche*].

5 *Ibid.*, para. 29.

6 [2012] J.Q. no 3632, 2012 QCCS 1684 (in French); appeal dismissed, [2013] Q.J. No. 5177, 2013 QCCA 906 (in French) [*Abbott Laboratories*].

7 *Ibid.*, para. 8.

8 *Ibid.*, para. 37.

9 *Ibid*., *Abbott Laboratories*, QCCS, para. 86; *Harmegnies v. Toyota Canada Inc.*, [2008] J.Q. no 1446, 2008 QCCA 380 (in French) (leave to appeal ref'd, [2008] S.C.C.A No. 173 (in French)).

10 *MacMillan v. Abbott Laboratories*, [2013] Q.J. No. 5177, 2013 QCCA 906, para. 2 (in French).

11 [2011] J.Q. no 9047, 2011 QCCS 3447 (in French) [*Merck*]; appeal dismissed, [2013] J.Q. no 165, 2013 QCCA 57 (in French).

12 *Merck*, *ibid*., para. 46; *Pharmascience inc. v. Option Consommateurs*, [2005] Q.J. No. 4770, 2005 QCCA 437, EYB 2005-89683, para. 25.

13 *Merck*, paras. 75–76.

14 *Ibid.*, para. 70.

15 [2013] J.Q. no 9469, 2013 QCCS 3868, para. 38 (in French) [*Vidéotron*].

16 See *Jasmin v. Société des alcools du Québec*, [2013] J.Q. no 10707, 2013 QCCS 4162, para. 78 (in French) [*Jasmin*]; *Patenaude v. Montréal (Ville de)*, [2012] J.Q. no 5081, 2012 QCCS 2402, para. 53; *Vidéotron*, *ibid*., para. 89 and following.

17 *Hoffmann-Laroche*, *supra* note 4, para. 51 and following.

18 *Ibid.*, para. 61. References included in the quote: *Del guidice v. Honda Canada Inc.*, [2007] J.Q. no 6808, 2007 QCCA 922, para. 38 (in French); *Patenaude v. Montréal (Ville de)*, [2012] J.Q. no 5081, 2012 QCCS 2402, para. 57 (in French); *Toure v. Brault & Martineau inc.*, [2012] J.Q. no 210, 2012 QCCS 99, para. 83 (appeal filed, 2012-02-15, [2014] J.Q. no 661, 2014 QCCA 195, no. 500-09-022413-124 (in French).

19 *Jasmin*, *supra* note 16, para. 84; *Lambert v. Whirlpool Canada*, l.p., [2013] J.Q. no 15906, 2013 QCCS 5688, para. 68 (in French) [*Whirlpool*].

20 *Vidéotron*, *supra* note 15, para. 94; *Whirlpool*, *ibid.*, para. 69; *Benoit v. Amira Enterprises Inc*., [2013] J.Q. no 12756, 2013 QCCS 4653, para. 52 (in French); *Perrault v. McNeil PDI inc*., [2012] J.Q. no 3532, 2012 QCCA 713 (application for leave to appeal to the S.C.C. dismissed; in French).

21 *Abbott Laboratories*, *supra* note 6, para. 9.

22 *Ibid.*, paras. 122–125.

23 Montreal S.C., No. 500-06-000591-129 (September 5, 2013), unreported.

24 *Merck*, *supra* note 11, paras. 88–89.

25 [2002] O.J. No. 3457, 61 O.R. (3d) 433 (Ont. C.A.).

26 [2000] O.J. No. 4597, 51 O.R. (3d) 603 (Ont. S.C.J.).

27 *Supra* note 25, para. 15.

28 [2008] O.J. No. 197 (Ont. S.C.J.).

29 *Ibid.*, para. 180.

30 *Ibid.*, para. 77.

31 [2010] O.J. No. 3898, 2010 ONSC 4982.

32 *Ibid.*, para. 201.

33 [2012] O.J. No. 2324, 2012 ONSC 2985 [*Panzerotto Pizza*].

34 *Ibid.*, paras. 101 and 107.

35 [2009] O.J. No. 3847, 83 C.P.C. (6th) 79, para. 20, cited in *Panzerotto Pizza*, *supra* note 33, para. 102.

IS EIGHT ENOUGH? THE LAW OF CERTIFICATION AFTER THE SUPREME COURT OF CANADA'S RECENT FLURRY OF CASES

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It has been more than a decade since the Supreme Court of Canada's (the "S.C.C.") first and only consideration of class certification in its seminal trilogy of *Western Canadian Shopping Centres Inc. v. Dutton* [*Dutton*],[1] *Hollick v. Toronto (City)* [*Hollick*],[2] and *Rumley v. British Columbia* [*Rumley*].[3] Despite over 60 applications for leave to appeal with respect to certification in common law jurisdictions in the interim, the S.C.C.'s next analysis of class certification came in a relative flurry of five decisions in the past eight months: *Pro-Sys Consultants Ltd. v. Microsoft Corporation* [*Microsoft*],[4] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company* [*Sun-Rype*],[5] and *Infineon Technologies AG v. Option consommateurs* [*Infineon*][6] (all competition class actions released together as a new trilogy), *AIC Limited v. Fischer* [*Fischer*],[7] and *Vivendi Canada Inc. v. Dell'Aniello* [*Vivendi*].[8] Taken all together, these five decisions shed new light on the S.C.C.'s thinking about the status and approach to class actions in general and to class certification in particular, while holding relatively true to the S.C.C.'s original 2001 trilogy. In this article, we briefly summarize the S.C.C.'s eight decisions on class certification, and then we examine the development of the S.C.C.'s treatment of the key certification principles from the first trilogy as expanded or clarified in the five recent decisions. In short, the S.C.C. has reiterated that a class action is merely a procedural method of approaching group claims and certification is not a merits-based assessment, access to justice is a key goal of class proceedings, and the threshold for class certification is lower than the one in the United States where class actions have not fared as well as in Canada.

The First Trilogy

In 2001, the S.C.C. released its unanimous judgments in *Dutton*, *Hollick*, and *Rumley*. These decisions, rendered in the relative early days of class actions in Canada, have served as the foundation for the certification analysis by courts across the country. Although this original trilogy set out an apparently consistent set of rules regarding certification of proposed class actions, the cases themselves left some question as to the application of those rules. In particular, *Hollick* and *Rumley* appeared to reach opposite conclusions based on their facts, suggesting a somewhat result-driven analysis.

In *Dutton*, two investors commenced a representative action pursuant to Rule 42 of the *Alberta Rules of Court*[9] on behalf of themselves and 229 other investors who had purchased debentures in a failed company. The defendants applied to strike the portion of the claim in which the plaintiffs purported to represent a class of investors. The S.C.C. held that in the absence of comprehensive legislation respecting class actions in Alberta, the plaintiffs had met the common law conditions for class actions. In *Hollick*, the S.C.C. considered whether a claim involving noise and physical pollution from a landfill owned and operated by the City of Toronto (the "City") could proceed as a class action under Ontario's *Class Proceedings Act*, *1992*.[10] The plaintiff sought to represent 30,000 people who lived in the vicinity of the landfill for claims spanning seven years. The S.C.C. was not satisfied that a class action was the preferable procedure and denied certification. *Rumley* involved allegations of widespread sexual and physical abuse over several

decades at a residential school for deaf children in British Columbia. The government had acknowledged the abuse and established a compensation program providing up to $60,000 for each claim accepted. The issues on appeal were whether the requirements of commonality and preferability were met. The S.C.C. held that both criteria were satisfied because all class members shared an interest in the question of whether the defendant breached a duty of care as part of the negligence and breach of fiduciary duty claims.

In these decisions, the S.C.C. set out the parameters for class certification in common law Canada. In *Dutton*, the S.C.C. held that the diversity of the proposed class was not a bar to the class action proceeding: "If material differences emerge, the court can deal with them when the time comes".[11] Thus the fact that the investors had invested at different times and pursuant to different offering memoranda was not a bar to certification.

In *Hollick,* the S.C.C. enunciated the evidentiary requirement of "some basis in fact" for each of the certification criteria other than the requirement the pleadings disclose a cause of action. The S.C.C. found that the evidence of complaints about the landfill, despite the many different areas within the proposed geographical boundaries, of the proposed class satisfied the commonality requirement.[12] However, the S.C.C. found that the issue of whether the landfill emitted physical and noise pollution was negligible in relation to the individual issues that arose as a result of the fact that the pollution was not distributed evenly across the geographic area or the class period.[13] With respect to access to justice, the S.C.C. held that if the claims of the class members were so small as to engage access to justice concerns, they could be addressed by a small claims fund of $100,000 that the City was required to have established as part of the approval to operate the landfill. On the other hand, if the small claims fund was not sufficiently large to handle the class members' claims, the S.C.C. questioned whether access to justice was engaged at all.[14] The denial of certification on the basis of this preferability analysis is somewhat hard to reconcile with the conclusion in *Rumley*.

In *Rumley*, the S.C.C. found that the allegation of "systemic" negligence could be addressed without reference to the circumstances of any individual class member and that the standard of care may have varied over the 40 or so years in issue "means that the court may find it necessary to provide a nuanced answer to the common question".[15] As to preferability, the S.C.C. incorporated its reasons in *Hollick*, finding that while the issues of injury and causation would have to be litigated on an individual basis, the common issues relating to the nature of the duty owed to the class and whether that duty was breached, in the context of a systemic negligence claim, predominated over the individual issues. Moreover, the government's compensation program capped recovery at $60,000 and included other limitations such as not permitting complainants to be represented by counsel so it did not provide an adequate alternative to a class proceeding. Although each of *Hollick* and *Rumley* involved a large class, alleging one type of wrong (emission of pollution in *Hollick* and systemic negligence in *Rumley*), over a lengthy class period, with the defendant in each case providing a recovery mechanism for the class members, one met the preferability test and one did not. The nature of the allegations and the particular vulnerability of the class in *Rumley* almost certainly played a role in the analysis.

The New Decisions

On October 31, 2013, the S.C.C. delivered its rulings in *Microsoft*, *Sun-Rype* and *Infineon,* all involving proposed class actions for damages by "indirect purchasers" of products for alleged competition law violations. The substantive question in the cases was whether indirect purchasers had a claim at law for recovery of overcharges that were alleged to have been "passed on" to them through the chain of distribution for an initial price-fixed product.

In *Microsoft*, the plaintiffs brought a class action on behalf of indirect purchasers who alleged that

Microsoft had engaged in unlawful conduct by overcharging for its operating systems and applications software. In *Sun-Rype,* the plaintiffs alleged a conspiracy to fix the price of a food sweetener, high fructose corn syrup ("HFCS"). The proposed class of direct and indirect purchasers of HFCS, or products containing HFCS, alleged that manufacturers passed on the unlawful overcharges to the class members. Both of the actions were initially certified in British Columbia, but those certifications were reversed by the Court of Appeal on the basis that indirect purchasers had no cause of action recognized in law.[16] The S.C.C. held that indirect purchasers do have a claim. With respect to certification, the S.C.C. found that the test for certification was met in *Microsoft* but not in *Sun-Rype*, based on the evidence presented.

In *Infineon*, manufacturers of a silicon memory chip commonly used in electronic devices (dynamic random-access memory or DRAM) had pleaded guilty in the United States to participating in a limited conspiracy to fix DRAM prices. The proposed class, which consisted of direct and indirect purchasers of DRAM, alleged breaches of the *Competition Act*,[17] which conduct amounted to a fault giving rise to civil liability under the *Civil Code of Quebec*.[18] The Québec Superior Court initially dismissed the plaintiff's motion for authorization to proceed as a class action, but that decision was overturned by the Court of Appeal. The S.C.C. upheld the Court of Appeal's decision to authorize the case.

This new S.C.C. trilogy was quickly followed by the decision in *Fischer* at the end of 2013. In *Fischer*, the S.C.C. considered whether the preferability requirement of the certification test was met, given that the defendant mutual fund managers had entered into settlement agreements with the Ontario Securities Commission ("OSC") and had collectively paid over $100 million to their investors as a result of those settlements. The settlements did not preclude the possibility of civil proceedings. The motions judge declined to certify the action on the basis that a class action was not a preferable procedure, given the OSC proceeding and the resulting restitution.[19] The Ontario Divisional Court and Court of Appeal each ruled that the action should be certified, but for differing reasons as to preferability.[20] The S.C.C. affirmed the certification of the action and provided an extensive analysis of the preferability requirement and, in particular, the goal of access to justice.

Finally, in its first decision of 2014, the S.C.C. considered the test for authorization under the Quebec *Code of Civil Procedure*,[21] including the requirement under art. 1003(a) that there be one or more questions of law or fact that are "identical, similar or related" for all the members of the group. The action arose out of a unilateral amendment by an employer to the health insurance plan it sponsored for its retirees. The Québec Superior Court dismissed the motion for authorization on the basis that the claims of the class members did not raise questions that were identical, similar or related.[22] The Court of Appeal reversed this decision and authorized the class action, and its decision was upheld by the S.C.C..[23]

Through these five recent decisions, the S.C.C. commented on all of the key aspects of the certification test. An analysis of the main issues is set out below.

The Evidentiary Requirement: What Does "Some Basis in Fact" Really Mean?

The late Justice Lax summed up the general frustration with the application of the "some basis in fact" requirement pronounced in *Hollick*,[24] when she commented:

> "Some basis in fact" is an elastic concept and its application can be vexing. It is sometimes easier to articulate what it isn't, rather than what it is.[25]

In *Microsoft*, the S.C.C. was invited to consider whether "some basis in fact" should be established on a balance of probabilities and whether, similar to the U.S. approach, certification judges should be permitted to weigh evidence to resolve all factual or legal disputes related to certification. The S.C.C. held that

the *Hollick* standard does not require evidence on a balance of probabilities nor does it require the S.C.C. to resolve conflicting facts and evidence at certification, reiterating that the certification stage does not involve an assessment of the merits of the claim.[26] The S.C.C. went on to say the following about the "some basis in fact" test (note that even the S.C.C. defines it in terms of what it is not!):

> Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (CPA, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.[27]

The S.C.C. provided a bit more guidance by stating:

> In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.[28]

However, the S.C.C.'s simultaneous decision in *Sun-Rype* highlights that the application of the "some basis in fact" requirement will continue to prove to be vexing.

In *Sun-Rype,* the majority declined to certify the class on the basis that the representative plaintiff had not established some basis in fact that class members would be able to determine whether they were members of the class. The defendants' evidence was that HFCS was used interchangeably with liquid sugar by food producers and that a generic ingredients label was used on food packaging such that a consumer would not know whether a product actually contained HFCS. Indeed, even the representative plaintiff's evidence was that she was unable to state whether the food products she purchased during the class period contained HFCS as opposed to sugar. The majority of the S.C.C. concluded that the plaintiff had adduced no evidence to overcome the self-identification problem and that on the evidence presented, it appeared to be impossible to determine class membership.

Justices Cromwell and Karakatsanis, in dissent, held that this was setting the evidentiary standard too high. In their opinion, there was sufficient evidentiary basis to establish the existence of a class. The fact that this standard was too low for the majority demonstrates that the "some basis in fact" test was intended by the majority of the S.C.C. to provide a meaningful evidentiary standard albeit one that the limits of which are still being determined.

Common Issues: Can Differences Among Class Members Preclude Commonality?

Consistent with *Dutton*, the new rulings by the S.C.C. have affirmed that individual differences will not necessarily preclude a finding of commonality.

In *Microsoft*, the S.C.C. considered the commonality requirement in circumstances where the plaintiffs alleged they were injured by multiple instances of wrongdoing over a 24-year period involving 19 different products. The S.C.C. noted that while the multitude of variables involved in indirect purchaser actions may present a significant challenge at the merits stage, the common issues as to the existence of causes of action and whether loss can be determined on a class-wide basis were common, and their resolution would advance the claims of the entire class. Relying on *Dutton*, the S.C.C. held that even a "significant level of difference" amongst class members does not preclude a finding of liability and that if material differences emerge, the court can deal with them when the time comes.[29]

The S.C.C. took a similar approach to the commonality requirement in *Vivendi* in the context of a motion for authorization. There, the motions judge held that the members of the proposed group did not raise questions that were "identical, similar or related", as required by art. 1003(a) of the *Code of Civil Procedure*, because there were many questions requiring individual analysis arising from each retiree's province of residence, time of retirement, and communications received from the employer. The S.C.C. held that the motions judge erred in considering the merits of the case and in asking whether there were common answers to the

questions raised by the motion for authorization rather than by determining whether the claims raised common issues.

The S.C.C. reviewed the principles on commonality set out in *Dutton* and confirmed in *Rumley*, noting that the Quebec approach to authorization is more flexible than the one in the common law provinces. The S.C.C. concluded that "common questions do not have to lead to common answers".[30] The S.C.C. stated that the main question raised by the motion for authorization was whether the amendments to the plan were valid or lawful, which was a common question. Although the answer to this question may be nuanced on the basis of specific circumstances of each individual, the requirement of art. 1003(a) was met.[31]

It bears noting that this general approach of allowing cases to proceed as class actions does not appear to be consistent with the S.C.C.'s admonition in these same decisions that cases should not be permitted to proceed on a class basis if they will simply founder at the merits stage by reason of certification requirements not having been met (*e.g.*, issues ultimately requiring determination on an individual basis).

Preferable Procedure: What Is Access to Justice?

In *Hollick*, the S.C.C. established that the preferability inquiry had to be conducted through the lens of the three goals of class actions, including access to justice. In the original trilogy of cases, however, the S.C.C.'s approach to access to justice was relatively narrow, focusing mainly on class actions as providing access to the courts for claims that may otherwise not be brought at all. In *Fischer*, the S.C.C. revisited access to justice, holding that it is not only concerned with whether claimants have a fair *process* for resolving their claims but also with whether the claimants will receive *substantive* fairness (*i.e.*, a just and effective remedy for their claims if established).[32]

In *Fischer*, the main issue was whether the preferability requirement was met in circumstances where the defendants had already compensated investors through settlements with the Ontario Securities Commission ("OSC"). The Divisional Court had focused its access to justice analysis on substance, finding that (1) there was some basis in fact the investors were entitled to significantly more compensation than they had received through the OSC proceedings by contrast, (2) the Court of Appeal had focused on process, relying on its finding that the OSC proceeding was regulatory, rather than compensatory, and (3) the OSC proceeding did not provide participation rights to the investors. The S.C.C. held that both procedural and substantive considerations must be applied; a class action will serve the goals of access to justice if (1) access to justice concerns that a class action could address are present, and (2) these concerns remain even when alternative avenues of redress are considered.[33] In conducting this overall comparative analysis, the S.C.C. outlined a series of questions that must be considered as part of the analysis:

(1) What Are the Barriers to Access to Justice?
(2) What Is the Potential of the Class Proceedings to Address Those Barriers?
(3) What Are the Alternatives to the Class Proceeding?
(4) To What Extent Do the Alternatives Address the Relevant Barriers?
(5) How Do the Two Proceedings Compare?[34]

In answering these questions in *Fischer*, the S.C.C. observed that the limited scope of the factual inquiry on a certification motion means that the motions court will often not be able to compare the potential recoveries in the class action and in the alternative(s) to it. The S.C.C. noted, however, that where the results or the limits on recovery in the alternative process are uncontested, as was the case in *Fischer* and in *Rumley*, those facts cannot be ignored. In other cases, the S.C.C. stated, the comparative exercise with regard to the substantive access to justice barriers will be very limited.[35]

Class Proceedings: Can They Provide Substantive Rights?

In *Microsoft* and *Sun-Rype*, the S.C.C. confirmed that class action legislation is merely procedural

and that attempts to use the mechanism to create substantive rights are not proper.

In *Microsoft*, the motions judge's reasoning for certifying aggregate damages as a common issue was based on a line of cases which had held that the aggregate damages provisions of the *Class Proceedings Act*[36] can be used to establish the proof of loss requirement for liability under the *Competition Act*. The S.C.C. rejected this and confirmed that the aggregate damages provisions relate to remedy and are procedural: "They cannot be used to establish liability".[37]

In a similar vein, the majority in *Sun-Rype* disagreed with the minority's opinion that where liability to the class has been proven, there is no requirement to prove that any person is a member of a class or that any person has suffered individual damage. The majority noted that the necessary implication is that class proceedings legislation alters existing causes of action; however, "the CPA neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants with causes of action to unite and pursue their claims as a class".[38]

Conclusion

After a decade of legal developments regarding the certification test, there is now additional guidance from the S.C.C. on some of the key issues considered by courts on every certification motion. While the five new cases are generally consistent in approach with the original trilogy, they expand and clarify certain aspects of the certification test, as discussed. Our expectation is that the S.C.C. will not wait another decade before weighing into the certification test again particularly in the area of securities class actions,[39] which is an active and growing area.

1 *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] S.C.J. No. 63, 2001 SCC 46, [2001] 2 SCR 534 [*Dutton*].
2 *Hollick v. Toronto (City),* [2001] S.C.J. No. 67, 2001 SCC 68, [2001] 3 SCR 158 [*Hollick*].
3 *Rumley v. British Columbia*, [2001] S.C.J. No. 39, 2001 SCC 69, [2001] 3 SCR 184 [*Rumley*].
4 *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* [2013] S.C.J. No. 57, 2013 SCC 57, [2013] 3 SCR 477 [*Microsoft*].
5 *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] S.C.J. No. 58, 2013 SCC 58, [2013] 3 SCR 545 [*Sun-Rype*].
6 *Infineon Technologies AG v. Option consommateurs,* [2013] S.C.J. No. 59, 2013 SCC 59, [2013] 3 SCR 600 [*Infineon*].
7 *AIC Limited v. Fischer*, [2013] S.C.J. No. 69, 2013 SCC 69, [2013] 3 SCR 949 [*Fischer*].
8 *Vivendi Canada Inc. v. Dell'Aniello,* [2014] S.C.J. No. 1, 2014 SCC 1 [*Vivendi*].
9 *Alberta Rules of Court*, Alta Reg 390/68 as amended by Alta Reg 124/2010.
10 *Class Proceedings Act*, 1992, S.O. 1992, c. 6.
11 *Dutton*, *supra* note 1, para. 54.
12 *Hollick*, *supra* note 2, paras. 22, 24–26.
13 *Ibid*., para. 32.
14 *Ibid*., para. 33.
15 *Rumley*, *supra* note 3, paras. 30–32.
16 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2011] B.C.J. No. 688, 2011 BCCA 186, rev'g [2010] B.C.J. No. 380, 2010 BCSC 285.
17 *Competition Act*, R.S.C. 1985, c. C-34.
18 *Civil Code of Quebec*, LRQ, c C-1991.
19 *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 112, 2010 ONSC 296, paras. 31, 34, 201, 254, and 273.
20 *Fischer v. IG Investment Management Ltd.*, [2012] O.J. No. 343, 2012 ONCA 47.
21 *Code of Civil Procedure*, CQLR c. C-25.
22 *Dell'Aniello c. Vivendi Canada inc.*, [2010] J.Q. no 7459, 2010 QCCS 3416.
23 *Vivendi*, *supra* note 8, para. 36.
24 For instance, see Maurice Cullity, "Certification in Class Proceedings—The Curious Requirement of 'Some Basis in Fact'" (2011) 51 Can. Bus. L.J. 407.
25 *Glover v. Toronto (City)*, [2009] O.J. No. 1523, 70 C.P.C. (6th) 303, para. 15.
26 *Microsoft*, *supra* note 4, paras. 100–102.
27 *Ibid*., para. 103.
28 *Ibid*., para. 104.
29 *Ibid*., paras. 110–112.
30 *Vivendi*, *supra* note 8, para. 59.
31 *Ibid*., paras. 57–59, 75, 79, and 80.
32 *Fischer*, *supra* note 7, para. 24.
33 *Ibid*., para. 26.
34 *Ibid*., paras. 27, 28, 35, 37, and 38.
35 *Ibid*., paras. 44 and 47.
36 *Class Proceedings Act*, R.S.B.C. 1996, c. 50.
37 *Microsoft, supra* note 4, para. 131.
38 *Sun-Rype*, *supra* note 5, para. 75.
39 There are currently three high-profile securities class action decisions in which defendants have sought leave to appeal to the S.C.C. ([2014] O.J. No. 419, 2014 ONCA 90): *Green v. Canadian Imperial Bank of Commerce*; *Silver v. Imax Corp.*; and *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*