BCF Class Action NetLetter

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BCF LLP is a full-service business law firm that represents a wide range of corporate and institutional clients. In order to better serve these clients, BCF has a Class Action Defence Group composed of seasoned practitioners who specialize in complex commercial matters, media relations, and crisis management.

Monthly issues are published on the first day of each month.

HIGHLIGHTS

* In the November 2020 edition of the BCF Class Action NetLetter, you will find the following three articles.
* The first article looks at an important Québec Court of Appeal decision which provides direction on issuing stays in the context of overlapping, multi-jurisdictional class actions.
* The second article provides an overview of the criteria Ontario courts evaluate when deciding whether to certify a class action.
* The third article is a summary of the second contested class action arising in Prince Edward Island wherein the court includes proposed class action legislation for the province.
* Finally, we briefly update our readers on a newly published book written by a past contributor, Sarah Rose.
* Please note that the views expressed in the BCF Class Action NetLetter are those of the authors only and do not constitute advice of any kind.
* If you have any comments, wish to advise us of a recent class action case or issue, or would like to submit an article for publication, please feel free to contact the BCF Class Action NetLetter at one of the e-mail addresses below.
* Wishing you and yours safety, good health, and happy reading., Shaun E. Finn, Co-Leader of the Class Action Defence Group, Partner, BCF, Business Law, shaun.finn@bcf.ca, Carle Jane Evans, Lawyer, BCF, Business Law, carlejane.evans@bcf.ca, Audrée Anne Barry, Lawyer, BCF, Business Law audreeanne.barry@bcf.ca

COMMENTARY

Stay Here or There? Recent Direction from the Québec Court of Appeal on Stays in Proposed Parallel Class Proceedings, by Ranjan Agarwal, Emily Kettel, and Pavan Virdee, Bennett Jones

The Québec Court of Appeal recently released a decision in *Micron Technology Inc. v. Hazan*[1] that could have important implications for defendants seeking to have proposed class proceedings in Québec courts stayed in favour of proceedings in other Canadian jurisdictions.

History of the Case: Overlapping Class Actions in Québec and Federal Court

In 2018, class actions were commenced in Québec, British Columbia, Ontario and the Federal Court to certify (or authorize) a class action against seven defendants who were manufacturers and sellers of dynamic

random-access memory ("**DRAM**"). In each of the proceedings, the proposed representative plaintiff made claims under the federal *Competition Act* that he and other class members had paid artificially inflated prices for DRAM, and products containing DRAM, because of a price-fixing conspiracy among the defendants.

On April 30, 2018, an application for authorization of a class action against the defendants (the Québec equivalent of a motion for certification) was filed in the Superior Court of Québec. On May 2, 2018, a statement of claim was filed in Federal Court against the same defendants, which included a motion for certification. The next day, a second application was filed in Québec, which was suspended under Québec's "first to file" rule. This rule requires that the first applicant to file an application for authorization in the Superior Court of Québec may seek the authorization to proceed with the class action, and later applications are stayed.

In November 2018, a Joint Application for a Stay of the Class Action was filed in Québec seeking a stay of the Québec action, alleging *lis pendens* - an exception under the Québec *Civil Code* to have a pending suit stayed if a proceeding is already the subject of pending proceedings in a foreign jurisdiction, involving the same cause of action between the parties - between the Québec proceeding and the Federal Court proceeding.

In February 2019, the Superior Court of Québec dismissed the stay application, finding that the "first to file" rule applies with equal force to applications in the Superior Court of Québec and in Federal Court, not just concurrent applications for authorization of class actions in Superior Court. The court also found that, although there was a risk of contradictory decisions arising from parallel proceedings, the appellants failed to show how staying the Québec proceedings would serve the best interests of the class members.

Summary of the Québec Court of Appeal's Decision

The Québec Court of Appeal revisited the "first to file" rule to determine whether it applies in the scenario where plaintiffs start applications for authorization, or certification, in both the Superior Court of Québec and the Federal Court. The existing jurisprudence in Québec holds that the rule applies when multiple plaintiffs start overlapping proceedings in the Superior Court of Québec but it does not apply when one proceeding is in the Superior Court of Québec and another is "pending before a foreign authority".

The Court of Appeal held that because the "first to file" rule was adopted as a matter of judicial policy for intra-Québec class action matters, the court could not justify extending it to situations involving the Federal Court or another province. In that case, the Superior Court of Québec can only decide whether to suspend its proceedings.

The Court of Appeal acknowledged that, owing to the risk of conflicting judgments, undue costs to the parties, and the potential for waste of scarce judicial resources, it generally will not be in the interests of justice or of the parties to have two class actions proceed on the merits in parallel in front of different courts. When considering a suspension, the appeal court suggested that a court should assess and weigh general considerations, such as whether the proposed class actions raise similar issues, and any difference in the scope of the proceedings.

In reaching a decision, both the motion judge and the Court of Appeal expressed dissatisfaction with the defendants' conduct. The defendants had failed to advise the motion judge that they had also asked the Federal Court to suspend its proceeding pending the Supreme Court of Canada's decision in *Godfrey*,[2] a leading competition law class action. The lower court found this was sufficient, on its own, to dismiss the stay application. The appeal court agreed that it was inappropriate of the defendants to seek a stay of the proceedings in the Québec court to proceed in Federal Court without disclosing to the judge that they also had sought a suspension of the Federal Court proceeding.

That said, the Québec Court of Appeal found that the defendants' conduct was insufficient to dismiss the stay application, affirming the lower court judge's conclusion: "In itself, the behaviour of the defendants in court must not have an impact on the interests of the class members." Rather, the Court of Appeal emphasized the holistic approach for assessing the interests of the class members. The possible suspension of the Federal Court proceeding was just one relevant factor to consider.

Ultimately, the Québec Court of Appeal found that the lower court judge correctly dismissed the stay application under the principle of *lis pendens* because the Québec proceeding was filed before the Federal Court proceeding. It held that it would be premature to suspend the Québec proceeding before authorization of the class action, and that it may be appropriate to reassess the issue if both the Federal Court and the Québec Superior Court certify or authorize the class actions.

Key Takeaways

Interestingly, the Québec Court of Appeal acknowledged that the question of whether a proceeding should be suspended usually occurs before either class action is authorized or certified. That said, it also said that in this case, the court lacked key information to make a decision (for example, there is no judgment which defines the class, issues or remedies, and there is no certainty about whether the other proposed class action will be authorized or certified).
This is an important decision on overlapping, multi-jurisdictional class actions, as defendants may have to fight certification/authorization for the same, or similar, claims, more than once, potentially raising costs. The recent amendments to Ontario's *Class Proceedings Act, 2002* that came into force on October 1, 2020 include provisions for the management of multi- jurisdictional class actions. This decision is also an important reminder for parties to disclose any plans they may have when considering a stay in multiple jurisdictions.

Certification of Class Actions in Ontario by David Milosevic and Cameron Fiske, Milosevic Fiske LLP[3]

The purpose of this article is to provide a general overview of the criteria courts in Ontario will evaluate in order to determine whether or not to certify a class action proceeding. Simply put, the certification stage is markedly different from that of a trial. The question before the court at a certification hearing is not whether the plaintiff's claims are likely to succeed on the merits, but rather whether the action can be appropriately adjudicated as a class proceeding.[4] Courts are bound to certify a class action where the requirements in section 5(1) of the Ontario *Class Proceedings Act*[5] are satisfied.[6] The requirements to certify a class proceeding in section 5 (1) are set out directly as follows:

(a) the pleadings or the notice of action disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class;

(ii) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and

(iii) does not, on the common issues, have an interest in conflict with the interests of other class members.

I. The evidentiary standard at the certification hearing:

All that is required is "some basis in fact" for each of the certification requirements and the pleadings must disclose a cause of action in which no evidence at all is required.[7] In other words, a Plaintiff is under no obligation in a certification motion to tender evidence in support of the material facts underpinning its claim.

Because the *Class Proceedings Act* ("**CPA**") is remedial in nature, it is given a large and liberal interpretation to widen access to our courts in appropriate circumstances. In *Hollick*, the Supreme Court of Canada made it clear that, in light of its legislative history, the *CPA* should be construed generously and that an overly restrictive approach must be avoided in order to realize the full benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice, and encouraging behaviour modification in those who cause harm.[8] It is particularly important to be mindful of this approach at the certification stage. As held in *Bendell v. McGhan Medical Corp.*, the "court should err on the side of protecting people who have a right of access to the courts".[9]

As the Supreme Court has made clear, certification focuses on the "form of the action" and does not require the class to demonstrate that it will succeed on the merits.[10] The court should not engage in resolving conflicts in evidence or in an evaluation of the strengths or weaknesses of a party's evidence.[11]

II. Section 5(1)(a): The Pleadings Disclose a Cause of Action

The threshold for satisfying the cause of action element is "very low."[12] The test is the same as that under Rule 21 of the Ontario *Rules of Civil Procedure*-the criterion is met unless it is "plain and obvious" that the statement of claim does not disclose a cause of action.[13] All allegations of fact pleaded must be accepted as proved and thus assumed to be true and the Statement of Claim must be read generously to allow for inadequacies due to drafting frailties and the Plaintiff's lack of access to key documents and discovery information.[14]

III. Section 5(l)(b): There is an Identifiable Class

This class definition satisfies the three purposes of a class, as outlined in *Hollick*:

(a) to identify persons who have a potential claim for relief against the defendants;

(b) to define the parameters of the lawsuit so as to identify those persons who are bound by the result; and

(c) to describe who is entitled to notice of certification.[15]

The proposed class definition is set out in objective terms, such that membership in the class proceeding is readily ascertainable. Moreover, inclusion in the class does not depend on the merits of the claim or the outcome of the litigation.[16]

IV. Section 5(l)(c): The Plaintiffs' Claims Raise Common Issues

The term "common issue" is defined in section 1 of the *CPA* to mean: "a) common but not necessarily identical issues of fact, or b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts." The commonality question is approached purposively. The underlying question is whether certifying a class would avoid duplication of fact-finding or legal analysis. An issue is common where it constitutes a substantial ingredient of each class member's claims and "where its resolution is necessary to the resolution of each class member's claim."[17]

V. Section 5(1)(d): A Class Proceeding is the Preferable Procedure

The preferable procedure inquiry is governed by three main principles:

"(a) the preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;

(b) "preferable" should be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases and consolidation [...]; and

(c) the preferability determination must be made by looking at the common issues [...] in relation to the claims as a whole".[18]

VI. Section 5(l)(e): There is a Representative Plaintiff who Would Fairly and Adequately Represent the Class

The representative plaintiff's role is to capably prosecute the interests of the class.[19] A representative plaintiff is not expected to have a detailed knowledge of the civil litigation process or the issues involved in the action. A demonstrated ability to retain and instruct counsel who is competent to act in the field will provide for adequate representation of the class.[20]

VII. A Workable Litigation Plan

A litigation plan should provide a reasonable framework within which the case may proceed. It is to form part of the certification materials. The proposed litigation plan provides a workable means of advancing the litigation and addresses all major steps of the litigation.

VIII. The Plaintiff does not have, on the Common Issues, Interests in Conflict with the Class

The proposed representative plaintiff's interests must not be in conflict with the interests of other class members. Every member of the class must have a common interest in the litigation of the proposed common issues set out above. The class representative needs to be similarly situated with other class members. As a practice point, a putative class representative should be wary about settling any part of their own individual claim if it will make his or her own circumstances different from those of the class right from the outset.[21]

IX. Concluding Remarks

Given that the three main goals of class actions are to encourage judicial economy, access to justice, and deterrence or behavior modification,[22] the key at a certification hearing is transparency. Class counsel must be in a position to convince a Court that the requirements in section 5(1) of the *CPA*[23] have been satisfied. In Ontario, this is often accomplished by way of a detailed motion record including affidavits that touch upon the *CPA* requirements. Cross-examination on affidavits, facta, and detailed books of authorities will often follow. Certification hearings often last several days, particularly if there are several causes of action that are at issue. Courts will certainly consider whether the pursuit of the litigation on an individual basis is truly the most economic means to carry the case or whether it should go forward as a class proceeding. Certification is generally to be preferred where the claims of individual class claimants would be small in comparison to the overall cost of the litigation. Practitioners should be mindful of the fact that the certification judge does have a duty to protect the putative class. As such, section 5(4) of the *CPA* does allow a judge to adjourn a proceeding to "permit the parties to amend their materials or pleadings or to permit further evidence".[24] However, this should not be taken to mean that class counsel can, or should, rely on the presiding judge to adjourn the proceeding to accommodate any gaps in the evidence. On the contrary, the certification hearing may well be the most important stage in the class proceeding. Counsel should always put their best foot forward as it is not only in their own best interests but it also in the best interests of the potential class.

In an innovative move, the Supreme Court of Prince Edward Island sets out draft class action legislation in the province's second contested class action decision - *King & Dawson v. Government of PEI*, 2019 PESC 27, by Carle Jane Evans, BCF, Business Law

This decision was rendered with respect to a motion for certification of a proposed class action in which the Plaintiffs claimed that their equality rights under the *Canadian Charter of Rights and Freedoms* (the "***Charter***") had been violated by the Defendant's policy of excluding people with disabilities caused by mental illness from qualification for benefits under the province's Disability Supports Program ("**DSP**"). The class consisted of all residents of Prince Edward Island ("**PEI**") with mental disabilities who allegedly could not access benefits due to the Government's discriminatory action.

As the only jurisdiction in Canada which does not have class action legislation, Prince Edward Island does not have many class actions. In fact, there had only been one other instance in which a class action was sought and contested in the province. This decision involved determining whether a class action should proceed in the province, how it should proceed, and whether the matter was one which ought to be certified.

The Court began by citing *Western Canadian Shopping Centres Inc. v. Dutton*[25] and taking direction from the Supreme Court of Canada to the effect that class actions should be available in all Canadian provinces and territories whether class action legislation exists and regardless of whether the provincial legislature intended for such proceedings to be allowed. Pursuant to the direction in *Dutton*, the Court then set out, in an appendix to the decision, the criteria to be applied to determine the availability of class actions in PEI and the procedure to be followed in the province. Borrowing heavily from the *Class Proceedings Act* of Newfoundland and Labrador, the Court notes that the scope of the appendix goes well beyond what is necessary to decide a certification motion, the Court's intention being to provide some of the "*ex ante* certainty" the absence of which was concerning to Chief Justice McLachlin in *Dutton*.

Based on counsel's submissions, affidavit evidence, transcripts of out-of-court examinations, a policy manual related to the DSP, and additional policy documentation, the Court was satisfied that the requirements for certification of the proceeding as a class action had been met. The pleadings disclosed a cause of action, namely that the equality rights of the Plaintiffs under s. 15 of the *Charter* had allegedly been infringed by a policy put in place by the Defendant and that the infringement was not justified under s. 1 of the *Charter*. The remedies sought were a declaration that the Plaintiffs' *Charter* rights were breached, compensatory damages pursuant to subsection 24(1) of the *Charter*, and an order requiring the Defendant to amend the DSP. The factual allegations of the case supported a claim, according to the Court, which would not obviously fail.

With respect to the putative class, "All living persons currently or formerly resident of Prince Edward Island between October 1, 2001 to the present who claim to suffer, or to have suffered, from a mental disability", the Court found that the class size was not an issue since Canadian courts have certified very large classes. To the extent the Defendant's concerns identified potential individual issues, the Court found they did not give rise to valid objections, which instead went to the question of preferable procedure.

The Defendants objected to the class description based on concerns that limitation defences may be applicable. The Court ruled that issues such as the applicability of limitation defences ought not to be decided at the certification stage. It also ruled that a class description would not fail solely because the claims of some class members could be defeated by a valid defence while others might be successful. Finally, although the class definition was without question broad, it was found to be rationally connected to the cause of action set out in the claim.

The common issues in this case were summarized as follows: (i) Is the exclusion of PEI residents with mental disabilities from the DSP a violation of s. 15 of the *Charter*? (ii) If the answer to (i) is yes, is the violation justified under s. 1 of the *Charter*? (iii) Is the DSP protected under s. 15(2) of the *Charter*? (iv) Are *Charter* damages a just and appropriate remedy?

A slight variation to the first common issue was made by the Court and restated as follows: "Was there exclusion of PEI residents with mental disabilities from the Disability Supports Program which violated their right to equality under section 15(1) of the *Canadian Charter of Rights and Freedoms?*"

The four common issues were found to meet the requirements for certification. The common issue analysis began by setting out the requirements in *Dutton* and then the refinements and clarifications to those rules developed in subsequent Canadian case law, including in *Fulawka v. Bank of Nova Scotia*.[26] These principles were found to be applicable to class actions in PEI and, based on *Dutton* and *Fulawka*, the Court concluded that the definition of common issues found in the class proceedings legislation in most jurisdictions was appropriate in PEI.

The evidence put before the Court established the existence of the proposed common issues and was sufficient to raise issues which engaged the Court's consideration of whether *Charter* equality guarantees had been infringed. The question of whether the unavailability of DSP benefits to people with mental disabilities engages and infringes s. 15 of the *Charter* required a contextual analysis, which was possible in a class action setting. With respect to the s. 1 and ss. 15(2) *Charter* questions, the answer was even more straightforward. Citing Justice La Forest in *Eldridge v. British Columbia (Attorney General)*,[27] the Court stated that the Government's activity on societal impact was to be assessed, rather than the impact upon individuals. Finally, the Court found that the question of whether *Charter* damages were appropriate as a remedy was an unsettled area of the law. What did appear clear was that the analytical framework for the general availability of *Charter* damages was focused on the "nature of the impugned government action and broad based policy questions related to the effect of making such awards on the legislative process and delivery of government programs and services".[28]

Moving on to the preferable procedure analysis, the Court again stated that it saw no principled reason to refrain from adopting the principles enunciated in *Dutton*, employing the language from legislation, and adopting the general law and its development over the years. This approach minimized the adverse impact on the development of the law, despite the absence of class action legislation.

The preferable procedure analysis was then structured along the lines of the three main goals of class proceedings: access to justice, behaviour modification, and judicial economy. Providing disadvantaged members of society with a more user-friendly mechanism for recovery was viewed by the Court as a hallmark of class proceedings. Class proceedings provided better access to justice than the Defendant's proposal that class members assert their rights before the human rights commission. This was because class actions are better suited to potential removal of the barriers identified by the Plaintiffs and the *Human Rights Act* complaint-process was likely to impose additional hurdles.

Turning to the considerations related to judicial economy, the Court believed that determining the proposed common issues would significantly advance the litigation of the claims as a whole. Moreover, the individual issues identified by the Defendant, such as those related to causation, would not overwhelm the common issues. Lastly, the burden of the behaviour modification goal was diminished in this case since the DSP had been continued. On these bases, the class proceeding was determined to be preferable to other litigation.

In assessing the suitability of the representative parties, the Court reviewed the representative parties' affidavits and had no difficulty in finding that each shared a sufficiency of common characteristics with the class and that both were motivated by a sense of perceived injustice. The Plaintiffs had produced a litigation plan which adequately set out a workable method of advancing the class proceeding. Lastly, the representative Plaintiffs' interests did not conflict with those of other class members. They were thus found to adequately represent the class.

Past Contributor Sarah Rose Publishes a Book

The BCF Class Action NetLetter is happy to inform its readers that past contributor Sarah Rose recently published a book entitled "The Genius Body". Available for download from The Mind Body Academy website (www.mindbody.academy/freebook), it "focuses on helping you lose weight the smarter way so you can make health a part of the way you get ahead in everything else you do".

The Mind Body Academy Podcast - including the audio introduction to The Genius Body - can be accessed via Apple Podcasts.

1 2020 QCCA 1104.

2 2019 SCC 42.

3 David Milosevic is the founding partner of Milosevic Fiske LLP in Toronto, Ontario. He is a commercial litigator and a class actions lawyer as well as a Certified Fraud Examiner. Cameron Fiske is also a partner at Milosevic Fiske LLP and a graduate of the McGill Faculty of Law's Transsystemic Programme. He is a commercial litigator and class actions lawyer. Cameron is also recognized by the Law Society of Ontario as a Specialist in Civil Litigation.

4 *Cloud v Canada (Attorney General)*, (2004), 73 OR (3d) 401 at para 38 (CA) [*Cloud*].

5 1992, SO 1992, c 6.

6 *Hurst v Berkshire Securities Inc*, [2006] OJ No 3647 at para 11 (Sup Ct).

7 *Hollick v Toronto (Municipality)*, 2001 SCC 68 at para 25 [*Hollick*].

8 *Ibid* at paras 15-16.

9 *Bendell v McGhan Medical Corp*, (1993), 14 OR (3d) 734 at 744 (Sup Ct Gen Div).

10 *Hollick*, *supra* note 7 at para 16.

11 *Cloud*, *supra* note 4 at para 50.

12 *McLaren v Stratford (City)*, [2005] OJ No 2288 at para 21 (Sup Ct).

13 *Hollick*, *supra* note 7 at para 25.

14 *Ford v F Hoffman-La Roche Ltd*, [2005] OJ No 1118 at para 17 (Sup Ct).

15 *Hollick*, *supra* note 7.

16 *Anderson v Wilson*, (1998), 37 OR (3d) 235 at 248-49 (Div Ct) varied [1999] OJ No 2494 (CA) leave to appeal refused [1999] SCCA No 476.

17 *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 39.

18 *Cassano v Toronto-Dominion Bank*, [2007] OJ No 4406 at para 55 (CA).

19 *1176560 Ontario Ltd v Great Atlantic and Pacific Cc of Canada Ltd*, 2002 CanLII 6199, 62 OR (3d) 535 at para 40 (Sup Ct) aff'd (2004), 70 OR (3d) 182 (Div Ct).

20 *Maxwell v MLG Ventures Ltd*, [1995] OJ No 1136 at para 10 (Gen Div).

21 *Lou v London Life Insurance Company,* 2017 ONSC 4188 at para 32.

22 AIC Limited v Fischer [2013] 3 SCR 949 at para 8.

23 1992, SO 1992, c 6.

24 Bakshi v Global Credit, 2015 ONSC 6842 at para 10.

25 2001 SCC 46 [*Dutton*].

26 2012 ONCA 443 [*Fulawka*].

27 [1997] 3 SCR 624.

28 Para 65 of the commented decision.

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