Tuesday, October 26
4:30pm-6:00pm

804 - Globalization of Class Actions

David Kent
Partner
McMillan LLP

Diego Martinotti
Litigation Manager
British American Tobacco Italia

Michael Mori
General Counsel
Epson Electronics America, Inc.

Session 804

Faculty Biographies

Ben Bradshaw
O'Melveny & Myers LLP

David Kent

David Kent is a partner in the litigation, competition, and IP/technology law groups of McMillan LLP. He is chair of the firm's Class Action Group and the national coordinator of its Advocacy Division (Competition, Labor and Litigation). Mr. Kent's litigation practice involves competition, IP, commercial, regulatory and securities/governance disputes in a variety of industries.

Mr. Kent previously served as law clerk to the Chief Justice of Ontario. He has extensive experience in domestic, international and Canada/US cross-border cartels, conspiracies and class actions. Mr. Kent has been defense counsel in two of the largest Canadian criminal cartel cases - Vitamins and Graphite Electrodes - and many of the major Canadian civil cartel cases, including Vitamins, Linerboard, Cross-border Vehicles, Rubber Chemicals and a variety of technology products (including DRAM, SRAM, Flash, LCDs and CRTs). His class action experience includes precedent setting decisions on a wide range of issues including securities law, cartel jurisdiction, cross-border discovery and class action certification and settlement. Mr. Kent has also advised Canadian and US broadcasters and Internet media on music copyright issues. Mr. Kent is recommended for class actions and competition litigation by publications in Canada and around the world and enjoys an AV rating from Martindale-Hubbell. He has also taught ADR at two Ontario law schools.

Mr. Kent speaks and writes regularly on competition, class action, litigation and copyright issues.

Mr. Kent is a graduate of the University of Toronto, LLB (Honors, Dean's Key) and Carleton University, BA (distinction).

Diego Martinotti

Diego Martinotti is British American Tobacco (BAT) Italia's litigation and regulatory counsel. He deals with complex litigation matters involving product liability, class actions, commercial, IP and antitrust issues. He also deals with administrative cases related with the privatization of the public entity acquired by BAT in Italy, as well as counsels on regulatory matters.

Mr. Martinotti's international background includes having worked as corporate counsel for British American Tobacco's operation in Brazil and for the cluster of Argentina, Uruguay and Paraguay. In those markets he was responsible for strategic litigation and for providing legal advice to different departments on issues related with IP, contracts,

corporate and labor law. Among other experience, Mr. Martinotti has worked as foreign attorney for Chadbourne & Parke (New York).

He has published different law review articles, has taught contracts at the University of Buenos Aires (Argentina) and has contributed to a mass tort textbook while studying in the US.

Mr. Martinotti received his law degree from the University of Buenos Aires and holds an LLM from the University of Pennsylvania Law School.

Michael Mori

R. Michael Mori is the general counsel of Epson Electronics America, Inc., international general counsel of Seiko Epson Corporation, and general litigation counsel of Epson Imaging Devices Corporation. His responsibilities include advising executive management and the board of directors of a globally recognized, multi-national corporation (and its Japan-based subsidiaries), negotiating and structuring major (including multi-million and multi-billion dollar) technology-related transactions, and overseeing and managing outside counsel with respect to regulator investigations and criminal and civil matters on a global level. Mr. Mori also conducts training and seminars on business and legal trends for in-house legal department members.

Before joining the Seiko Epson Group companies, Mr. Mori was in private practice as a copyright infringement and commercial litigator, as well as a commercial transactions attorney, advising on acquisitions and commercial real estate transactions, and had interned and clerked at the California Court of Appeal and the Superior Court of New Jersey, respectively.

Mr. Mori received his undergraduate degree from the University of California at Los Angeles (UCLA), graduating in the top 1% of his class, with Phi Beta Kappa, Golden Key National Honor Society and College of Letters and Science Honors inductions, and received his law degree from Loyola Law School (Los Angeles), where he was the recipient of a full scholarship.

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Globalization of Class Actions

USA

Michael Mori

General Counsel

The Seiko Epson Group Companies

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Triggering Event (Antitrust Class Actions)

- For example, a Grand Jury subpoena
- No subpoena, but your company makes or distributes the product that is the subject matter of the Grand Jury investigation
  - Tolling agreement
- Trend toward cooperation among competition authorities
  - In re: TFT-LCD (Flat Panel) Antitrust Litigation
    - Regulators in US, Canada, Europe (EC), Japan and Korea simultaneously issued subpoenas/requests for information in December 2006

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Getting Ramped Up 1 of 2

- Be aware of the attorney-client privilege/attorney work product laws in each applicable jurisdiction – protect internal investigations & communications
  - Generally, there is A/C privilege in jurisdictions that follow the common law legal tradition
  - Other jurisdictions, such as Japan: only an ethical duty of confidentiality
  - EC investigations – *Akzo Nobel* reaffirming the *AMS* rule; 2 elaborations
- Coordination among your company's regional legal departments
  - Measures to optimize AC privilege among subsidiary legal departments
- Outside Counsel Selection
  - Retain sooner than later
  - One firm to cover most jurisdictions where class or other actions have been initiated?
  - Local counsel for State AG Actions

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Getting Ramped Up 2 of 2

- Litigation hold notices & IT Dept. actions
  - Potential custodians for preservation of relevant information
  - Stop rotating (and set aside) back-up tapes
  - No delete settings, increase inbox capacities
- Sole defendant or multiple defendants
  - Joint defense group - to join or not to join…
    - Advantages – pooling of resources, cost sharing
    - Disadvantages – disagreement, interests may not always be aligned

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Investigations & Class Actions

- DOJ may seek to stay discovery in the class actions
  - Prevent interference with Grand Jury investigation
- Civil Investigative Demands – State AGs
- Plea Agreement with the DOJ
  - Impact on civil litigation and other investigations
    - Depends on scope and language of the PA
  - Tolling agreements with plaintiffs and State AGs (CIDs) - revocation
- Other investigations
  - EC - Statement of Objections
  - Brazil – Due

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Class Action Venues

- Class actions may be brought in federal courts
  - Federal question or diversity jurisdiction
  - FRCP 23 governs class actions in federal court
- Class actions may be brought in state courts
  - Many states have adopted rules similar to FRCP 23
  - The Class Action Fairness Act of 2005 (CAFA) allows state class actions involving 100 or more members to be removed to federal court if the aggregate claim is greater than $5M.

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Class Action Discovery

- Under a "no merits" (old) class certification standard, discovery would be divided into 2 phases:
  - Pre-certification discovery: class discovery
  - Post-certification discovery: merits discovery
- Under the new class certification standard, pre-certification discovery would encompass class and merits discovery to the extent they overlap
  - District court has wide discretion
  - Circumscribe discovery to avoid a mini-trial on the merits at the certification stage

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Class Certification FCRP 23 (1 of 2)

- Old class certification standards – Fraught with Uncertainty:
  - *Eisen v. Carlisle & Jacquelin* – no merits inquiry
  - *General Telephone Co. of the Southwest v. Falcon* – "rigorous analysis"
  - "Plausible" (not viable) expert theories sufficient

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Class certification FRCP 23 (2 of 2)

- 2003 amendments to Rule 23
  - No more conditional certification
  - Certification decision to be made at "an early practicable time"
- New class certification standards (Most Circuits)
  - Court may look beyond the pleadings and inquire as to the merits to the extent that they overlap with Rule 23 requirements
  - Court to consider all evidence bearing on Rule 23 requirements, including expert evidence
    - Increased scrutiny of experts
      - Expert testimony better than "not fatally flawed"
      - Daubert hearing only if required

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Settlement of Antitrust Class Actions 1 of 2

- Factors impacting settlement –
  - Exposure
  - Joint and several liability for all (trebled) damages flowing from the commerce of the conspiracy
    - No contribution among antitrust co-conspirators
  - Calculation of settlement amounts (single damages)
    - Overcharge
    - Jurisdiction (FTAIA & *Hartford Fire*)
  - Defenses
- Strategies – which cases should be settled first and when?
  - Settling the class actions vs. opt-out cases
  - Settling in a particular jurisdiction first
  - Settle sooner or later?

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Settlement of Antitrust Class Actions 2 of 2

•Other considerations –
- Settling independently v. settling with other defendants (group settlement)
  - Direct purchaser plaintiffs class
  - Indirect purchaser plaintiffs class
    - Defined settlement class (damages) - Repealer jurisdictions (22 states + DC)
    - Injunction – all states
- State AG lawsuits –
  - Direct purchases – All states may recover for direct purchases of price-fixed products
  - Indirect purchases - 38 states recognize that there is a right to recover (29 states by the State AG and private citizens, and 9 states by the State AG only (WA, AK, ID, AL, CT, KY, MT, OK, SC)):
    - *Parens patriae* (on behalf of resident purchasers)
    - State gov't as indirect purchaser
    - Issues: % of total population v. allocation based on consumer-friendly laws
      - DRAM cases –
        - Six defendants settled with 33 states for $173M (June 2010)
        - Samsung ($90M) and Winbond ($23M) reached a settlement for $113M (in 2007)

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Arbitration of Class Actions

- Arbitration of antitrust claims –
  - Under the FAA and CISG, the general rule is that there is no prohibition on the arbitration of federal antitrust claims, especially in the international commercial context.
- Arbitration of class actions
  - Before Stolt-Nielsen –
    - Look to the language of the arbitration agreement –
      - "arising under" – narrow so as to exclude tort and statutory claims
      - "arising under or related to" – broad; inclusive
  - After Stolt-Nielsen –
    - Where an arbitration agreement is "silent" as to whether class action arbitration is permitted, it may not be construed to so authorize.

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Globalization of Class Actions

CANADA

David Kent
McMillan LLP, Toronto

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Managing class actions *outside* the US

- Predicting
- Pre-empting
- Understanding
- Managing

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Predicting class actions outside the US

- Need cross-border/international attributes
- Common categories:
  - Antitrust
  - Product liability
  - Securities

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Predicting class actions outside the US (2)

- Be aware of the triggers
  - US or foreign "Dawn Raids"
  - US Grand Jury subpoenas
  - US regulatory action (eg recalls)
  - US securities filings by regulatory targets
  - US litigation

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Pre-empting class actions outside the US

- If a foreign class action is predicted:
  - Consider scope of US settlements
    - re foreign plaintiffs and/or foreign activities?
    - With individual opt-outs and/or class
  - Consider scope of US class

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Understanding class actions outside the US

- Need to know key characteristics of foreign class action process/practice
- Need to recognize key differences between US and foreign jurisdiction
- Local counsel will advise, but need some grounding (from foreign counsel or otherwise) to adequately manage/instruct

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Understanding class actions outside the US (2)

- Personal jurisdiction
  - Service
  - Long-arm?

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Understanding class actions outside the US (3)

- Court approval/supervision
- Certification discovery/evidence
- Classes
  - Indirect purchasers?
  - Opt-in vs opt-out?
  - National / extrajurisdictional?

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Understanding class actions outside the US (4)

- Damages exposure considerations
  - Juries?
  - Trebles?
  - Punitives?
  - Joint & several liability?
  - Contribution & indemnity?

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Understanding class actions outside the US (5)

- Characteristics of local plaintiffs' bar/practice
  - Trial readiness
  - Experience
  - "Parasite" bar

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Understanding class actions outside the US (6)

- Settlements
  - Court supervision?
  - National/international
  - Opt-outs
  - Bar orders

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Managing class actions outside the US

- Communications
  - Among law firms
  - With foreign attorneys
- Timing
  - Determining which cases should lead
  - Ensuring that "wrong" cases lag behind

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Managing class actions outside the US (2)

- Relationship to US case/exposure
  - Access to comparative data
- Settlements
  - Sending good and bad messages
    - Using "better" non-US resolution as counterweight to "worse" US result

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Globalization of Class Actions

EUROPE

Diego Martinotti

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

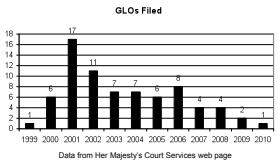
Collective Mechanism in Europe

- 14 countries have collective redress
- There is no 'US style Class Action'
  - Punitive Damages
  - Contingency Fees
  - Discovery
  - Opt-out
  - Private Enforcement

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

*Class Action Mechanism in Europe – **England & Wales***

- Group Litigation Orders (GLO) – CPR Part 19
- GLO vs. US Class Actions
  - Opt-in vs. Opt-out
  - Contingency fees
  - Punitive Damages
- GLO's filing evolution
  - 'Vibration White Finger'
  - McDonald's Hot Drink
  - John Wyeth (Ativam / Valium)



BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

*Class Action Mechanism in Europe – **Italy***

- *Azioni di Classe all'Italiana* (art. 140-bis of Consumer Code)
- Main Characteristics
  - Opt-in
  - Only one Class Action regarding same facts and defendant
  - "Identity" of rights
  - Non retroactive (facts after 15/08/2009)
  - Relevance of certification process
- Class Actions
  - More than 50 class actions announced since 01/01/2010
  - 1 class action already rejected (*Intesa SaoPaolo)*

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Class Action Mechanism in Europe

The wind is changing in Europe

- ☑ EU Legislation has facilitated antitrust damage litigation
  - EC Regulation 44/2001
  - EC Regulation 864/2007
- ☑ Pressure by consumers' associations and stakeholders
- ☑ EU is looking for a "balanced approach"

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Class Action Mechanism in Europe

EU Commission's Green Paper on "**Consumer Collective Redress**"

- Problem identified
  - Sensible sectors: financial services, telecommunications, transport and tourism)
- Four Options being explored, among which "Judicial Collective Redress Procedure"
- Result of the consultation and conclusions
- Next steps

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Class Action Mechanism in Europe

- ☑ EU Commission's White Paper on "Damages actions for breach of the EC **antitrust** rules" suggests:
  - Representative Actions
  - Opt-in Collective Actions
  - Minimum level of disclosure *inter partes*
  - Legal costs:
    - ✓ Should not disincentive antitrust damage claims
    - ✓ "Losers pays" can be derogated
  - Once victim shows breach of Art. 101 (*ex.* art. 81) or (*ex.* art. 82), infringer should be liable for damages unless "excusable error"

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX
ACC Association of Corporate Counsel

Is the US Class Action model being exported?

Europe fears the 'excesses' of the 'US style Class Action'

EU Commission detaches from US model:

- *"Balanced measures"* rooted in *"European legal culture and traditions"*
- Create effective system of private enforcement but not jeopardise *"strong public enforcement"*
- *"Avoid the negative effects of overly broad and burdensome disclosure obligations"*

BE THE SOLUTION.
ACC's 2010 Annual Meeting • October 24-27
Henry B. Gonzalez Convention Center, San Antonio, TX

ACC Association of Corporate Counsel

Is the US Class Action model being exported?

- Europe seems to be moving towards a EU Directive on Class Actions setting minimum standards for member states
- Arts. 81, 105, 169 of Treaty could be legal basis
- A EU directive would **look different** to 'US style Class Action'
- There will be forum shopping within Europe

ACC 2010 Panel 804
Globalization of Class Actions

Background Materials

1. *Gatekeepers or Ticket Takers: Canadian and U.S. Courts Diverge on the Role of Evidence in Antitrust Class Action Certification* (David Kent and Éric Vallières – McMillan LLP - 2010) (being published in Lexpert Cross-border Litigation Guide (November 2010) and Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada (January 2011)

2 *Settling National Class Actions in Canada* (ACC – Ogilvy Renault – 2006)

3 England & Wales' Civil Procedure Rules (CPR Part 19)

4. Commission of the European Communities *Green Paper on Consumer Collective Redress* (27.11.2008) (http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf)

5 *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (2.4.2008) (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF)

6. *Antitrust Review of the Americas* 2010 (Canada) (http://www.mcmillan.ca/Upload/Publication/ARTICLE_Competition%20and%20Antitrust_Canadian%20Antitrust%20Review%20of%20the%20Americas%202009_Canada_E_0909.pdf)

7. *Cross-Border Class Action Settlements: Unwilling Litigants in the US Courts* – David Kent (International Committee, ABA Section on Antitrust Law, Spring 2006) (http://www.mcmillan.ca/Upload/Publication/DKent_Cross-Border%20Class%20Action%20Settlements%20-%20Unwilling%20Litigants%20in%20the%20US%20Courts.pdf)

8. *Class actions Canadian Style* (Corporate Counsel, February 2003) (David Kent & Hilary Clarke) (http://www.mcmillan.ca/Upload/Publication/Class%20Actions%20Canadian%20Style_0103.pdf)

9. Federal Rules of Civil Procedure, Rule 23 (http://www.law.cornell.edu/rules/frcp/Rule23.htm)

10. Ontario *Class Proceedings Act* (http://www.canlii.org/en/on/laws/stat/so-1992-c-6/latest/so-1992-c-6.html)

11. Multijurisdictional Class Action Checklist

12. *Class Actions on the horizon in Europe* (ACC-2008 June)
http://www.acc.com/legalresources/resource.cfm?show=801828

13. *European Justice Forum: Position Paper No 2*
A Balanced Approach to Consumer redress in Europe (2008-February)
http://www.acc.com/legalresources/resource.cfm?show=16450

14. *BUSINESSEUROPE Position on collective actions* (2007-October)

15. "*Introducing EU Collective Redress-The Slippery Slope Towards US-Style Class Action*"(November-2007)

16. *Study regarding the problems faced by consumer in consumer in obtaining redress for infringement of consumer protection legislation, and the economic consequences of such problems*.(August – 2008)
http://ec.europa.eu/consumers/redress_cons/finalreport-problemstudypart1-final.pdf

17. *Class Actions in Belgium and in Europe* (ACC-2006-March)
http://www.acc.com/legalresources/resource.cfm?show=875741

18. *ACC's Europe Annual Conference – Session 105: Class Action*(ACC-2009-June)
http://www.acc.com/legalresources/resource.cfm?show=800210

19. *310 Class Actions Outside the US: Is the Cancer Spreading*? (ACC-2008)
http://www.acc.com/legalresources/resource.cfm?show=159594

20. *MEDEF's position on Class actions-summary*-(2007- May)

21. *Class Action Mechanism in the European Union* (ACC- 2010 June)
http://www.acc.com/legalresources/quickcounsel/camiteu.cfm

22. *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*.
http://curia.europa.eu/common/recdoc/convention/en/c-textes/_2001R0044-textes.htm

23. *Multi-Party Proceedings in England: Representative and Groups Actions- Neil Andrews*
http://www.law.duke.edu/shell/cite.pl?11+Duke+J.+Comp.+&+Int'l+L.+249

24. Consolidated versions of the Treaty of European Union and the Treaty of Functioning of European Union 2010/C/83/01 Title VII, *Common rules on competition, taxation and approximation of Laws.*
http://eur-lex.europa.eu/en/treaties/index.htm

25. Class Action in Italy: New article of art.140-bis of the Consumer Code.
http://www.classaction.it/index.php?option=com_content&view=article&id=138&Itemid=158

26. Italian Class Actions Eight Months In: The Driving Forces. Nera Economic Consulting. http://www.nera.com/nera-files/PUB_Italian_Class_Action_0910.pdf

27. Class Actions in Italy, by Diego Martinotti (ACC Docket, European Briefing, December 2010). Also on www.acc.com

28. Global Class Action Exchange – Stanford Law School
http://www.law.stanford.edu/library/globalclassaction/

29. Class Action Fairness Act of 2005 (CAFA)
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ002.109

30. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) ("In applying these general standards to a [Sherman Act] §1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.") http://www.law.cornell.edu/supct/html/05-1126.ZO.html

31. In re Tobacco II Cases, 46 Cal.4th 298 (2009) (Class rep must prove actual reliance on allegedly false or misleading statements with the same specificity to prove a fraud claim.) http://caselaw.lp.findlaw.com/data2/californiastatecases/s147345.pdf

32. Cohen v. *DirectTV*, Inc., 178 Call.App.4th 966 (2009) (Tobacco II addressed standing, not class action requirements; restitution not available to a consumer not exposed to the challenged practice.)
http://scholar.google.com/scholar_case?case=2255065501531601228&hl=en&as_sdt=2&as_vis=1&oi=scholarr

33. Eisen v. Carlisle & Jacquelin, 417 U. S. 156 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be

maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.")
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=417&invol=156

34. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982) ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. … With the same concerns in mind, we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.")
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=417&invol=156

35. 2003 amendments to FCRP Rule 23 (No conditional class certifications; class certification decision to be made at an "early practicable time.")
http://www.law.cornell.edu/rules/frcp/ACRule23.htm

36. In re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006) ("In light of the foregoing discussion, we reach the following conclusions: (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.")
http://ftp.resource.org/courts.gov/c/F3/471/471.F3d.24.html

37. In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008) ("Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23. . . . Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The district court

may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.") http://www.ca3.uscourts.gov/opinarch/071689p.pdf

38. Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571(9th Cir. 2010) ("First, when considering class certification under Rule 23, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims. It is important to note that the district court is not bound by these determinations as the litigation progresses. Second, district courts may not analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements. Relatedly, a district court performs this analysis for the purpose of determining that each of the Rule 23 requirements has been satisfied. Third, courts must keep in mind that different parts of Rule 23 require different inquiries. For example, what must be satisfied for the commonality inquiry under Rule 23(a)(2) is that plaintiffs establish common *questions* of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment. Fourth, district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini-trial on the merits at the certification stage. Fifth, different types of cases will result in diverging frequencies with which the district court will properly invoke its discretion to abrogate discovery. As just one example, we would expect a district court to circumscribe discovery more often in a Title VII case than in a securities class action resting on a fraud-on-the-market theory, because the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions and demonstrate the appropriateness of class resolution. Plaintiffs pleading fraud-on-the-market, on the other hand, may have to establish an efficient market to even raise common questions or show predominance.") http://scholar.google.com/scholar_case?case=23342710350864125 30&hl=en&as_sdt=2002&as_vis=1

39. American Honda Motor Company v. Allen, 600 F.3d 813 (7th Cir. 2010) (*Daubert* hearing would be required if the situation would warrant it.) http://scholar.google.com/scholar_case?case=2801408811373493539&hl=en&as_sdt=2&as_vis=1&oi=scholarr; Dukes (*Daubert* hearing not required prior to ruling on the admissibility of scientific evidence.); In re Zurn Pex Plumbing Prod. Liab. Litig., 2010 WL1839226 (D. Minn.) (In the 8th Circuit, *Daubert* hearing not required at class certification stage.) http://www.masonlawdc.com/documents/(133)-Memorandum-Opinion-and-Order.pdf

40. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (Under the FAA and CISG, the general rule is that there is no prohibition on the

arbitration of federal antitrust claims, especially in the international commercial context.)
http://scholar.google.com/scholar_case?case=5055691423012357826&hl=en&as_sdt=2&as_vis=1&oi=scholarr

41. Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., No. 08-1198 (April 27, 2010) (If an arbitration agreement is silent on whether a class action arbitration is allowed, it may not be so construed.) http://www.supremecourt.gov/opinions/09pdf/08-1198.pdf

42. Perdue v. Kenny A., No. 08-970 (April 21, 2010) (Prevailing plaintiffs' attorneys should not receive more than their lodestar, except where an enhancement is warranted, such as where the lodestar does not adequately measure the attorney's true market value, where the attorney makes "an extraordinary outlay of expenses" in an exceptionally protracted litigation, and where there is "exceptional delay in the payment of fees.") http://www.supremecourt.gov/opinions/09pdf/08-970.pdf

43. Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., No. 08—1008 (March 31, 2010) (In federal cases, FCRP Rule 23 pre-empts state-law limits on class certification.) http://www.supremecourt.gov/opinions/09pdf/08-1008.pdf

a cautionary note

July 2010

Gatekeepers or Ticket Takers: Canadian and U.S. Courts Diverge on the Role of Evidence in Antitrust Class Action Certification

Introduction[1]

Canadian and U.S. courts have sharply diverged in their approaches to certifying antitrust class actions. A key U.S. circuit has noticeably tightened up the standards applied to plaintiffs seeking certification, while a growing number of Canadian courts have taken the opposite approach, opening the door and lowering the bar for proposed class actions. Like ships passing in the night, U.S. courts have moved toward a more hands-on approach to certification evidence while Canadian courts have increasingly put their hands in the air. This reversal of form means that evidence of commonality and predominance that fails to meet U.S. certification standards may nevertheless suffice in Canada.

U.S. federal rules require a finding of "predominance" for a class to be certified.[2] In other words, questions common to the class must predominate over questions affecting individual class members. The analogous Canadian requirement is "preferability", a more ambiguous standard that does not necessarily require common issues to actually predominate. Nevertheless, in both countries, an examination of predominance or preferability requires a determination of which issues are common or individual in the first place.

In antitrust cases, the nature and extent of the defendants' alleged misconduct is usually acknowledged to be a common issue. What is hotly contested, however, is antitrust "impact" – whether (but not the extent to which) the defendants' alleged conduct affected the class members. A key certification question is whether the fact of harm or damage can be established for all class members on the basis of common proof, thereby making it a common issue.

1 This article is current to July 31, 2010 and is also published in the *Lexpert Cross-border Litigation Guide* (November 2010) and *Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada* (January 2011).

2 See Fed. R. Civ. P. 23

This article considers the evidentiary standards to be applied to the determination of commonality and, by extension, predominance and preferability as revealed in the certification proceedings in a series of antitrust cases in Canada and the United States. It starts with a review of the recent decision of the Third Circuit of the United States Court of Appeals in *Hydrogen Peroxide*,[3] and considers that court's "clarification" of the requirement that certification courts be active, engaged and inquiring decision makers. These expectations then provide a backdrop against which the Canadian courts' retreat to a relatively passive and deferential posture is examined and evaluated.[4]

A U.S. Approach – The Third Circuit in *Hydrogen Peroxide*

The Third Circuit of the United States Court of Appeals made a comprehensive review of the process by which certification courts must consider the parties' evidence in its December 30, 2008 *Hydrogen Peroxide* decision. In doing so it revisited its 2002 *Linerboard*[5] decision, in which it had affirmed certification based in part on presumed antitrust impact and in part on analysis by plaintiffs' expert, Dr. Beyer, whose use of charts and exhibits was the subject of some fascination for the court.[6]

Hydrogen Peroxide involved allegations of price-fixing. The District Court certified a class. After acknowledging the need for "rigorous analysis", the District Court concluded that antitrust impact was a common issue and that the predominance requirement had been met, noting as follows:[7]

> Either [Beyer's] market analysis or the pricing structure analysis would likely be independently sufficient at this stage. Plaintiffs and Dr. Beyer have provided us with both. Despite defendants' claims to the contrary, we should require no more of plaintiffs in a motion for class certification.
>
> ....
>
> So long as plaintiffs demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice. It will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants'. ... Plaintiffs need only make a

3 *In Re: Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) ("*US Hydrogen Peroxide*")

4 The recent common law Canadian cases reviewed for these purposes are *Pro-Sys Consultants Ltd.* v. *Infineon Technologies AG*, 2009 BCCA 503, rev'g 2008 BCSC 575 ("*BC DRAM*"); *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, 2010 ONCA 466, affg 2009 CanLII 23374 (Div. Ct.) ("Quizno's"); and *Irving Paper Limited v. Autofina Chemicals Inc.*, 2010 ONSC 2705("*Hydrogen Peroxide Canada*").

5 *In Re: Linerboard antitrust litig.*, 305f.3d 145(3d Cir. 2002) ("*Linerboard*")

6 See, for example, *Linerboard*, p. 155

7 *US Hydrogen Peroxide*, pp. 315 and 321

The net effect of these recent Canadian cases appears to be an unwillingness by Canadian certification courts to grapple fully with the issues that arise on certification motions. Cases should not be certified unless each of the certification requirements is met. The determination of the existence of a certification requirement, such as commonality, often turns on competing expert evidence. It represents a failure of decision making to hold that a plaintiff has made out the requirement merely because its evidence is plausible, particularly if it cannot be weighed against that of the defence and the certification judge is forbidden to resolve conflicts.

These "hands off" approaches to certification evidence signal the looming demise of the gatekeeping function established by class action legislation across Canada. It is not difficult to craft evidence that meets a "plausibility" standard when it cannot be weighed against competing evidence and when the reviewing judge is foreclosed from resolving conflicts with other evidence. Taken to its extreme, this approach disenfranchises defendants' ability to lead rebuttal evidence, and eviscerates the Supreme Court's conclusion that the certification process "appropriately allows the opposing party an opportunity to respond with evidence of its own."[49]

The Canadian pendulum has swung - from *Hollick*, out to *Chadha*, and then back to *Hydrogen Peroxide Canada*, *Quizno's*, *BC DRAM* and *Jacques*. The U.S. pendulum appears to be swinging in the opposite direction. It is in the nature of a pendulum to move, and change course. Whether, and where, the Canadian pendulum will move next remains to be seen.

By David Kent and Éric Vallières[50]

49 *Hollick*, para. 22

50 David Kent is a partner in the Toronto office of McMillan LLP and is Divisional Co-ordinator of the firm's advocacy practice, a member of the litigation and competition groups and Chair of the firm's class action practice. Éric Vallières is a partner in the Montreal office of McMillan LLP and specializes in class actions, antitrust matters and bankruptcy litigation.

problem in *Savoie* since the class was comprised only of direct purchasers, and since the alleged conspiracy related to a single, well defined and uniform price rise.

Savoie was followed a year later by *Jacques*.[47] Unlike *Savoie*, however, *Jacques* did not relate to a single, well defined and uniform price increase. The class period sought in *Jacques* covered four years, and spanned more than four different geographical markets. The court accepted the defendants' submissions that there had been a multitude of price variations over that period in those markets, which necessarily meant that individual class members were affected differently, or possibly not at all. Nevertheless, it cited approvingly the approach of the British Columbia Court of Appeal in *BC DRAM* and concluded (contrary to the decision of the Quebec Court of Appeal in *Harmegnies*) that the existence of damages need not be alleged for all class members for the case to be authorised. Instead, in certain cases, a collective prejudice will suffice.[48]

The *QC DRAM* is under appeal. Subject to any further guidance from the Quebec Court of Appeal in that case, *Jacques* marks a turning point in the Quebec case law that bears similarities to the shifts in the common law provinces reflected in *BC DRAM*, *Quizno's* and *Hydrogen Peroxide Canada*.

Conclusion

As is clear from these recent cases, Canadian courts are not only retreating from the willingness to examine evidence and resolve issues exhibited by the Ontario Court of Appeal in *Chadha*, they are also moving in a direction that is the direct opposite of the direction taken by the United States Court of Appeals for the Third Circuit in *Hydrogen Peroxide*.

- The Third Circuit held that certification requires findings that the certification requirements have been met, rather than threshold showings, while Canadian courts have accepted "attempts to postulate" "plausible methodologies".
- The Third Circuit exhorted courts to "resolve all factual or legal disputes relevant to class certification," including those involving expert evidence. Canadian courts have criticized judges for weighing plaintiffs' expert evidence and have ruled that conflicts should not be resolved at certification.
- Finally, the Third Circuit reminds certification courts that certification issues must be resolved, even if they overlap with the merits. Canadian courts, for their part, shy away from resolving serious conflict and instead advocate the deferral of certification issues that turn on disputed evidence.

47 *Jacques et al.* v. *Petro-Canada et al.*, C.S.Q. 200-06-000102-080, November 30, 2009 ("*Jacques*")

48 Defendants may not appeal decisions to authorize in Quebec.

> threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class.

The Court of Appeals disagreed with this approach, vacated the certification order and remanded the matter to be reconsidered on proper principles. The court began with a useful reminder that class certification has "pivotal status" and that, although a procedural step, it may nevertheless have "a decisive effect on the litigation":[8]

> [D]enying or granting class certification is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of the plaintiffs or create unwarranted pressure to settle non-meritorious claims on the part of defendants)….

With that in mind, the court reiterated U.S. Supreme Court jurisprudence to the effect that the various certification requirements deserve a "close look", and that certification is appropriate only if the certification court "is satisfied after a rigorous analysis" that those requirements are met.[9] The court made it clear that its understanding of a "rigorous analysis" was quite different from that of the District Court. In doing so, the Third Circuit "clarified" what it described as three key aspects of class certification procedure in the U.S.

First, the court held that certification requires a "finding" that each certification requirement is met, and not merely a "threshold showing" by the plaintiff.[10] The court held that it was insufficient for a plaintiff to demonstrate only an "intention" to try the case in a way that would satisfy the predominance requirement, and that a "threshold showing" standard would incorrectly imply that the plaintiff was subject to a lenient "*prima facie* showing" test or that it was entitled to deference or a presumption in its favour on the certification motion. Instead, the court asserted that the statutory requirements for certification "must be met, not just supported by some evidence."[11]

Second, the court stated that certification courts "must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits".[12] This flows from the fact that a case is not to be certified unless the certification requirements have been established. The court acknowledged that some issues relevant to certification may also be relevant to the underlying merits, but concluded that this overlap cannot permit the certification court to avoid addressing such

8 *US Hydrogen Peroxide*, p. 310

9 *US Hydrogen Peroxide*, p. 309

10 *US Hydrogen Peroxide*, pp. 307 and 321

11 *US Hydrogen Peroxide*, p. 321

12 *US Hydrogen Peroxide*, p. 307

issues. While noting a certification court's wide discretion to impose limits on the scope of evidence, the court held that genuine disputes with respect to certification requirements must be resolved, whether or not they overlap with the underlying merits, and adopted the assertion that "tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives."[13]

The court's third clarification, flowing from its second, was that a certification court's obligation to consider all of the evidence necessarily extends to expert evidence, whether led by the plaintiff or by the responding defendants. The District Court had assumed that it could not weigh the opinion of the defence expert against that of the plaintiffs' expert Dr. Beyer. Again, the appeal court held this approach to be in error. Repeating the need for "rigorous analysis", the court rejected the notion that expert testimony could establish a certification requirement "simply by being not fatally flawed."[14] Instead, it directed certification courts to assess *all* relevant evidence in determining whether any certification requirement was met, "just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit".[15] The court noted that a certification court must be "satisfied" or "persuaded" that each certification requirement is met before certifying a class, and held as follows:[16]

> Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The [certification] court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

A Canadian Approach

The evolution of Canadian class action certification jurisprudence discloses a marked, and deliberate, deviation in approach from that established by the U.S. Third Circuit. Canadian courts have recently bent over backwards to ease the path to certification, both by setting low hurdles to be cleared and by smoothing the way toward those hurdles by reducing defendants' ability to raise objections. This posture is not required by controlling Canadian class action legislation or jurisprudence, nor is it explained by the differences between class action rules in Canada and the U.S.

13 *US Hydrogen Peroxide*, p. 324

14 *US Hydrogen Peroxide*, p. 323

15 *US Hydrogen Peroxide*, p. 323

16 *US Hydrogen Peroxide*, p. 323

or predominance requirement. Class actions in Quebec are essentially authorised if the claimant's motion discloses a plausible cause of action, and if the case raises questions of law or fact that are either "identical", "similar" or even simply "related". Moreover, on a motion for authorization, Quebec courts must accept all of the claimant's pleaded facts. As a result, contradictory expert evidence on such issues as damages and causation is virtually unheard of in the Quebec authorisation process.

Despite being unhindered by evidence, Quebec's authorization jurisprudence in antitrust cases has followed a trend that is remarkably similar to that pattern in the common law provinces.

The Early Cases

A proposed class action against the oil industry in 1985 was one of the first antitrust class actions to be brought in Canada. The Quebec Court of Appeal refused to authorize it, citing the vagueness and the vacuity of the claimant's allegations.[43] Motions for authorization of antitrust class actions were not brought again in Quebec for almost two decades.

One of the first of the recent wave of cases to go before the Quebec Court of Appeal was *Harmegnies*.[44] This case was heard after *Chadha* but before *BC DRAM*. Although the Quebec Court of Appeal expressly eschewed common law precedents, it nevertheless adopted an approach that was reminiscent of *Chadha*. In substance, the court held that claimants must establish that damages exist on a class wide basis.

Harmegnies was followed in June 2008 by the Quebec DRAM decision ("*QC DRAM*").[45] The Superior Court, citing *Harmegnies*, considered that the class claimant had not alleged sufficient facts to satisfy the court that class wide damages had been suffered. This was in line with the lower court decision in *BC DRAM*, though is now in sharp contrast to the appeal decision rendered the following year.

The Petroleum Cases

Two more recent petroleum related cases mark what may be a turning point in the Quebec antitrust class action jurisprudence.

First, in November 2008, the Superior Court authorized its first antitrust class action in *Savoie*.[46] Class wide damages did not pose a significant

43 *Labranche* v. *Compagnie Pétrolière Impériale Limitée Esso et al.*, C.A.M. 500-09-001009-828, September 18, 1985

44 *Harmegnies v. Toyota Canada Inc.*, EYB 2008-130376 ("*Harmegnies*")

45 *Cloutier* v. *Infineon Technologies et al.*, C.S.Q. 500-06-000251-047 June 17, 2008 ("*QC DRAM*")

46 *Savoie* v. *Compagnie Pétrolière Impériale Ltée et al.*, (2008) QCCS 6634 ("*Savoie*")

> It is necessary to next examine the evidence of Drs. Beyer and Schwindt [the defence expert]. Before doing so, however, it bears remembering that it is not necessary to reconcile the conflicting opinions at this stage in the proceeding.
>
> ....
>
> … I understand the defendants' various criticisms of Dr. Beyer's report, but it seems to me that I need only be satisfied that a methodology may exist for the calculation of damages. Dr. Beyer's report attempts to postulate such a methodology. Whether his evidence will be accepted at trial is a completely different issue. It may well be that Dr. Schwindt's various criticisms are well-founded. However, at this stage of the proceedings and on the strength of the evidentiary record as it exists today, I simply am unable to say that Dr. Beyer's opinion will not be accepted by a court…. It is simply not possible at this stage of the proceeding to determine whose opinion is to be preferred.

In refusing to grant leave to appeal, the reviewing court approved this analysis and held:

> [T]he certification judge is to evaluate and weigh the expert evidence to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of the conflicting expert reports. …[40]
>
> While Dr. Schwindt challenges Dr. Beyer's opinion, the certification judge is not obliged to make any determination on the merits of these opinions.[41]
>
> I disagree with the moving parties' submission that *Chadha* requires a certification judge to evaluate the evidence respecting a methodology and make findings as to whether or not the methodology accords with sound principles of economic science.[42]

Québec

The Province of Quebec is Canada's only civil law jurisdiction, and its class action legislation, which dates back to the 1970s, predates that of the other Canadian provinces by nearly 20 years. Quebec's authorization (certification) process is also somewhat different. First, there is no preferability

40 *Hydrogen Peroxide Canada*, para. 51

41 *Hydrogen Peroxide Canada*, para. 55

42 *Hydrogen Peroxide Canada*, para. 61

Instead, it appears to reflect very different preferences on the part of Canadian judges.

In the Beginning There Was *Hollick*

The Supreme Court of Canada has provided relatively little specific guidance as to *how* certification courts should conduct their certification analysis, and on what basis they should determine whether certification requirements have been met. Such guidance as exists, at least for the common law provinces, is largely found in the Supreme Court's seminal 2001 ruling in *Hollick*.[17] *Hollick* involved a proposed class of residents living adjacent to a landfill site who complained of noise and physical pollution.

A key portion of the Supreme Court's decision lay in its conclusion that, even in the absence (and rejection) of a U.S.-style predominance requirement, the "question of preferability … must take into account the importance of the common issues in relation to the claims as a whole."[18] In the result, the Court held that a class proceeding would not be preferable, relying, in part, on the large number of individual issues relating to the existence and extent of physical or noise pollution across a long period of time, a wide geographical area and varied terrain. While the Court did not put it in these terms, it was effectively concerned that the impact of any polluting activities on class members could not be determined on a common basis and that, as individual issues, they would swamp the "negligible" common issues that arose from the case.[19]

The court dealt at some length with how certification requirements, including commonality and preferability, should be advanced by the parties and determined by certification courts. The court was influenced by the fact that a proposed preliminary merits test had been rejected when the relevant class proceedings legislation was enacted in noting that "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".[20] [emphasis in original]

That observation, however, begs the question of *how* the parties should demonstrate, and the court determine, whether the statutory requirements for a certification order have been met. The court addressed this question only in the broadest terms:[21]

17 *Hollick* v. *Toronto (City)*, 2001 SCC 68 ("*Hollick*")

18 *Hollick*, para. 30

19 *Hollick*, para. 32

20 *Hollick*, para. 16

21 *Hollick*, paras. 22-25

> The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. …In my view a [pre-legislative advisory report] appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party to respond with evidence of its own.
>
> In *Taub* … the [Ontario] court wrote that … while the [legislation] does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by [the legislative criteria for certification] as the basis for a certification order".
>
> …. In my view, the class representative must show some basis in fact for each of the certification requirements set out in the [legislation].

Accordingly, the Supreme Court made it clear that courts are to ensure that each certification requirement is considered on the basis of evidence.[22] In doing so, the court implicitly accepted the warning of the appellate court below that a non-evidentiary approach based only on the pleadings would be unsatisfactory: "otherwise… any statement of claim alleging the existence of [a certification requirement] would foreclose further consideration by the court".[23]

Unfortunately, in the circumstances, the Supreme Court was not required to elaborate on its general statements about evidentiary standards for certification. Accordingly, the court never discussed what it meant by its requirement that a class representative "show some basis in fact" for the various certification requirements nor what the certification court should do with contradictory evidence led by the "opposing party [which has] an opportunity to respond with evidence of its own". The interpretation and application of these statements has been left to succeeding courts.

Then There Was *Chadha*

The first reported Canadian appellate decision dealing with certification of a proposed antitrust class action was rendered about 18 months after *Hollick* by the Ontario Court of Appeal in *Chadha*.[24] This case alleged a price-fixing conspiracy among manufacturers of iron oxide pigments used to colour concrete bricks and paving stones. The plaintiff proposed an indirect purchaser class consisting of owners of homes in which building materials coloured with iron oxide were

22 The only exception is the requirement that the Statement of Claim disclose a valid cause of action, which is determined (like a motion to strike) on the face of the pleading – see *Hollick*, para. 25

23 *Hollick*, para. 9

24 *Chadha* v. *Bayer Inc.* (2003), 63O.R. (3d) 22 (C.A.), affg (2001), 54 O.R. (3d) 920 (Div. Ct.), revg (1999), 45 O.R. (3d) 29 (S.C.J.) ("*Chadha*")

the evidence.[37] In particular, the Divisional Court said that he should have backed away from any attempt to rationalize competing expert evidence:[38]

> It is neither necessary nor desirable to engage in a weighing of this conflicting evidence on a certification motion. 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. Where the assumptions are debated by experts, these questions are best resolved at a common issues trial. A motions judge is entitled to review the evidentiary foundation to determine whether there is some basis in fact defined that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports.

Ontario – *Hydrogen Peroxide*

Ontario's most recent contribution to the evolution of Canadian courts' approach to evidence in certification motions arises from the Canadian version of the *Hydrogen Peroxide* litigation. The Canadian plaintiffs led antitrust impact evidence from Dr. Beyer, along the lines of his U.S. evidence based on which the District Court originally certified the U.S. case. In September 2009, nine months after the Third Circuit vacated the U.S. certification, the Ontario motions court certified the Canadian case. In June 2010 a different judge from the same court refused leave to appeal. While the reviewing judge disagreed with some aspects of the certification judge's analysis, she agreed with the certification judge's treatment of the expert evidence and concluded that the decision to certify was correct. The approach of the certification judge, and the reviewing judge's analysis of the evidentiary standard on certification motions in antitrust actions, illustrate clearly the hands off approach now being espoused by Canadian courts.

The certification judge decided that the plaintiffs had done enough to demonstrate that antitrust harm was a common issue and thus concluded that a price-fixing class action was a preferable procedure. She noted that the parties' expert economic evidence was diametrically opposed on this issue, and dealt with this conflict as follows:[39]

37 The Ontario Court of Appeal affirmed the decision of the Divisional Court without commenting on this aspect of its reasons.

38 *Quizno's*, Divisional Court, para. 102

39 *Hydrogen Peroxide Canada*, paras. 119 and 143

> The record establishes a significant disparity in the level of industry knowledge and information between Dr. Ross vis-a-vis Ms. Sanderson and the other defence affiants that cannot be ignored. The weight of the evidence supports the contention of the defence that the simplification to use the PC channel as a proxy for the whole is not appropriate. In the absence of a higher degree of confidence in this fourth simplification, I am unable to place much confidence on Dr. Ross' proposed methodology….[34]

> [T]he evidence of Dr. Ross… is admitted to be general and preliminary, is not seasoned with industry knowledge or industry analysis; is premised on the need for considerable information which he was not able to state was available; requires analysis of pass through at every level of distribution channel for each product, and is hypothetical and simplified – not based upon real world economics; looking at the evidence over all there are significant deficiencies regarding the approaches proposed by the plaintiff.[35]

There is a similarly cautionary tale in what the Court of Appeal described as the "approach [that] was fundamentally unfair":[36]

> The [certification] judge subjected the evidence of Dr. Ross to rigorous scrutiny. He weighed it against the [defendants'] evidence and against Ms. Sanderson's evidence in particular.

Ontario – *Quizno's*

This litigation involved a proposed class action brought by Quizno's franchisees against the franchisor and others, complaining of antitrust and other misconduct arising from the manner in which the franchisor controlled the sale of food and other goods to franchisees. Again, the question of whether antitrust impact and fact of harm was a common or individual issue was a key battleground. Each side led detailed evidence on this point from well known economists. The motions judge dismissed the certification motion, in large part based on his assessment of the expert evidence. He compared the expert opinions, accepted the criticisms of the plaintiff's expert advanced by the defence expert and ultimately rejected the plaintiff's expert evidence.

By majority, the Divisional Court reversed and certified the action. Among other things, the Divisional Court criticized the motion judge's approach to

34 *BC DRAM*, para. 60

35 *BC DRAM*, para. 62

36 *BC DRAM*, para. 67

incorporated. It appeared to be common ground that the nature and extent of the alleged conspiracy were common issues. What divided the courts in this case was whether antitrust impact, a prerequisite for civil liability under the *Competition Act* or in tort, could be assessed on a common basis and, if not, whether preferability had been made out.

The parties filed conflicting expert economic evidence on this issue. The defence expert opined that the impact of any conspiracy overcharges by the manufacturers of a relatively trivial ingredient could not be traced through to ultimate home buyers, given the difficulties of the required pass through analysis, and that any such analysis would have to be conducted on an individual basis. The plaintiff's expert disagreed, and opined that there would be a measureable price impact on the members of the ultimate home buying class that could be determined on an overall basis by examining the net gains realized by the defendants.

The courts took very different approaches to the evidence. The certification motion judge certified the case on the basis that liability was a common issue. He reviewed the competing expert evidence and, without either weighing or choosing between the experts, held that "the conflict on the evidence only highlights the point that the issue will have to be resolved at trial, rather than on the pleadings".[25]

The Divisional Court reversed, by majority, on the basis that antitrust impact could not be proven on a common basis but instead raised individual issues that would overwhelm the common issues relating to the fact of conspiracy. Unlike the certification judge, the majority of the Divisional Court dug into the competing expert evidence. They accepted the evidence of the defence expert to the effect that the case presented significant pass-on problems, that there were numerous variables affecting the pricing at each stage from the manufacture of the iron oxide to the ultimate sale of a house, that whether or not any class member suffered a loss could only be determined on an individual basis and that, as a result, liability could not be a common issue.[26] Accordingly, the preferability requirement was not satisfied.

The Court of Appeal agreed with the majority of the Divisional Court. In doing so, it focussed on the inadequacies of the plaintiff's expert report, specifically the expert's apparent assumption that harm would be passed through to the class. The expert opined that there would be a "measurable price impact upon ultimate consumers", but did not indicate a basis for that conclusion or a method for proving or testing his assumption. Although not expressly acknowledged, it

25 *Chadha*, para. 27. The motion decision predated the Supreme Court's ruling in *Hollick*.

26 *Chadha*, para. 17

is implicit that the defence expert's critique of the plaintiff's expert's approach, and her description of the impediments to conducting any pass-through analysis, informed the Court of Appeal and animated its concern over the fatal significance of plaintiff's expert's assumption of harm.

Chadha was the first reported Canadian appellate antitrust certification decision, and one of the first significant appellate class action certification decisions of any kind, after the Supreme Court's decision in *Hollick*. The Ontario Court of Appeal took *Hollick's* requirement of "some basis in fact" for certification requirements as the basis for a careful examination of competing expert evidence on whether a key issue could be resolved on a common basis. The court concluded in that case that it could not, but only after considering the literature, examining the expert evidence and finding the plaintiff's expert's approach wanting. The certification judge's ruling that the issue on which the experts disagreed had to go to trial *because* they disagreed was rejected.

Recent Developments – The Courts Retreat

Chadha may reflect the high water mark for Canadian courts' interest in engaging and grappling with competing evidence on certification motions. Recent decisions certifying, or confirming the certification of, direct and indirect purchaser classes in antitrust class actions suggest that the courts have retreated a long way from that point. The position in common law Canada is illustrated by three cases from British Columbia and Ontario, the two principal common law jurisdictions for the development of Canadian class action law. A discussion of the situation in Quebec follows.

British Columbia - *DRAM*

In 2009, the British Columbia courts dealt with a proposed price-fixing class action involving DRAM computer memory. The uncontroverted evidence was that the class consisted almost entirely of indirect purchasers. One of the main certification issues was the degree to which antitrust impact, or fact of harm, could be demonstrated on a common basis. Each side led expert economic evidence. Dr. Ross, for the plaintiffs, opined that harm could be established on a common basis notwithstanding the need to engage in a pass-on analysis to address indirect purchasers. He made a number of "simplifying assumptions" to do so. The defence expert, Ms. Sanderson (the expert economist for the successful *Chadha* defendants), opined in part that Ross had simply assumed away the otherwise intractable pass on problems presented on the facts of this case.[27]

27 The defendants also led extensive fact evidence regarding the DRAM market and the wide variety of channels through which DRAM flows from its original sale to its incorporation in to finished goods and those goods' ultimate sale to indirect purchaser consumers. The plaintiff led no evidence about DRAM, did not challenge the defendants' DRAM evidence and made no effort to depose the defendants' industry expert.

The motions judge denied certification. He examined the Ross analysis and found it wanting. He accepted Sanderson's criticisms of Ross' proposed methodology, including his simplifications, and preferred her conclusion that fact of harm could not be assessed on a common basis. Accordingly, consistent with *Chadha*, he held that preferability had not been established.

The British Columbia Court of Appeal reversed, certifying the class.[28] The court noted the Supreme Court's statement in *Hollick* that a plaintiff is required to show "some basis in fact" for each certification requirement. It then effectively established that standard as a ceiling, rather than a floor, by going on to state that the evidentiary burden is not an onerous one and interpreting *Hollick* to require "only a 'minimum evidentiary basis'".[29] With respect to whether the issue of antitrust impact was common or individual, the court asserted that the plaintiff was required to show "only a credible or plausible methodology".[30]

A significant portion of the court's decision focused on the manner in which the certification judge had considered the evidence. The court stated that, in his consideration of the evidence and, in particular, his treatment of the Ross analysis, the certification judge "set the bar for the [plaintiff] too high" and that his approach was "fundamentally unfair".[31]

The Court of Appeal identified a number of statements by the certification judge as constituting the basis for its criticism that he "set the bar... too high". Some of those statements are set out below – it is revealing that the Court of Appeal quoted them as grounding its rebuke:

> In a case such as this where the context is pass through, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology that is capable of relating harm to Class Members…. Given the inherent complexities, the scrutiny cannot be superficial.[32]
>
> Dr. Ross' opinion that "it is possible to assess and quantify the overcharge" to direct purchasers and passed through to downstream purchasers cannot simply be taken at first blush. If scrutiny is not conducted at this stage, there is a real risk of dysfunction which cannot be in the interest of the litigations or the judicial process.[33]

28 A motion for leave to appeal to the Supreme Court of Canada was denied.

29 *BC DRAM*, supra, at para. 65

30 *BC DRAM*, para. 68

31 *BC DRAM*, paras. 63 and 67

32 *BC DRAM*, para. 58

33 *BC DRAM*, para. 58

Extras from ACC

We are providing you with an index of all our InfoPAKs, Leading Practices Profiles, QuickCounsels and Top Tens, by substantive areas. We have also indexed for you those resources that are applicable to Canada and Europe.

Click on the link to index above or visit http://www.acc.com/annualmeetingextras.

The resources listed are just the tip of the iceberg! We have many more, including ACC Docket articles, sample forms and policies, and webcasts at http://www.acc.com/LegalResources.