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CERTIFICATION

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Class Certification in the United States: The Rise of Rigor among the Federal Circuits

Though much of the discussion about class action reform in the United States has focused on procedural changes imposed by the *Class Action Fairness Act* of 2005 ("CAFA"), judicial refinements in the federal courts are now coming to the fore in raising the bar for obtaining class action status. In enacting *CAFA*, Congress expanded the jurisdiction of the federal courts to hear class action claims,[1] with the hope that, in federal courts, large class actions would be subjected to more demanding scrutiny.[2] The emerging federal trend has been to do exactly that. Though still operating under the same core provisions of Rules 23(a) and (b) of the Federal Rules of Civil Procedure as have been in place for decades,[3] circuit after circuit has recently adopted heightened standards for lower courts to follow in determining whether a class can or should be certified. In particular, motions for class certification in many cases will now require the submission of well-developed evidence and findings on that evidence, reaching even into the merits of the case itself, to confirm whether the elements for certification of a class can be met.

Conflicting Supreme Court Guidance

Class certification proceedings in the United States have long been colored by the United States Supreme Court's comment in *Eisen v. Carlisle & Jacqueline*, which was decided in 1974 and remarked that "[w]e find nothing either in the

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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".[4] As written at the time, the procedural portions of Rule 23 expressly provided that classes could be certified on a "conditional" basis, which was widely viewed to lend itself to certification on the basis of assumptions about how the evidence *might* develop.[5] Indeed, Rule 23 as then formulated called for class certification to be taken up by the court "as soon as practicable after the commencement of an action", which was often taken as calling for consideration of class certification at the outset of discovery, before the production of documents and examination of witnesses bearing on the merits of the case had progressed very far.[6] Decisions in various circuits relied on *Eisen* to permit classes to be certified on merely preliminary showings that the elements of Rule 23 could be satisfied. As articulated in one circuit court decision,

> *The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.*[7]

Despite the language in *Eisen*, other Supreme Court decisions recognized that an examination of whether the criteria for class certification could be met necessarily required consideration of the facts and theories alleged in the complaint and their expected manner of proof.[8] In 1982, the Supreme Court in *General Telephone Co. v. Falcon* asserted that "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question" and admonished courts considering class certification that a "rigorous analysis" should be applied.[9] Lower courts skeptical of efforts to obtain class certification often quoted *Falcon*'s "rigorous analysis" admonition.[10] Nonetheless, the actual burden of proof imposed upon a plaintiff seeking to certify a class as the case progressed through discovery toward trial remained vaguely undefined. In as late as 2005, for example, a circuit court considering both *Eisen* and *Falcon* in the context of a securities class action effectively concluded that the amount of evidence necessary to establish predominance was, at bottom, simply a question "of degree" and that "generalities" on the issue "are the best we can do".[11]

The Rise of Rigor in the Federal Circuits

A series of recent circuit court rulings has addressed the uncertainty flowing from these competing Supreme Court decisions by moving decisively in the direction of *Falcon*'s "rigorous analysis". In these recent rulings, circuit courts have expressly directed district courts to assess the merits of the claim to the extent necessary to determine if the criteria for class certification are met. Moreover, some of these decisions go so far as to require plaintiffs to proffer evidence sufficient to enable the court to render factual findings that the requirements for certification have been satisfied.

The most prominent exemplar of this emergent shift is the Third Circuit's decision earlier this year in *In re Hydrogen Peroxide Antitrust Litigation*,[12] where the Third Circuit reversed an order certifying a nationwide class of direct purchasers of hydrogen peroxide and related products. In doing so it explicitly undertook to clarify the standards imposed by Rule 23, holding that "the decision to certify a class calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met".[13] The court further held that such factual findings must be made by a preponderance of the evidence, and stated that "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits — including disputes touching on elements of the cause of action".[14] With regard to the Supreme Court's decision in *Eisen*, the court concluded that the decision is "best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement".[15] For merits issues bearing on class certification, however, the Third Circuit stipulated that the court's "obligation" to evaluate evidence extended to "all relevant evidence and arguments" and included "expert testimony, whether offered by a party seeking class certification or a party opposing it".[16]

Hydrogen Peroxide has garnered much attention because it was authored by Chief Judge Anthony Scirica, who, as Chair of the Standing Committee of Rules of Practice and Procedure of the Judicial Conference of the United States, oversaw a series of amendments to the procedural portions of Rule 23 that became effective in 2003. As pertinent here, the 2003 amendments made two important changes. First, while continuing to allow class certification decisions to be altered or amended up to the time of final judgment, the amendments removed the rule's language permitting "conditional" certification.[17] Second, the amendments clarified that the decision on class certification should be made "at an early practicable time", not "as soon as practicable", as the rule previously provided.[18] The *Hydrogen Peroxide* opinion emphasized that these changes recognized that the trial court needs to fully satisfy itself that the requirements for certification have been met given the significance of the certification decision.[19]

In this regard, the opinion explicitly rejected several permissive statements from prior case law, including language indicating that courts should "err in favor" of certification in certain types of matters for policy reasons. The court cautioned that such statements "invite error", explaining that:

> *Although the trial court has discretion to grant or deny class certification, the court should not suppress doubt as to whether a Rule 23 requirement is met — no matter the area of substantive law .... We recognize the Supreme Court has observed that predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. But it does not follow that a court should relax its certification analysis, or presume a requirement for certification is met, merely because a plaintiff's claims fall within one of those substantive categories.*[20]

Indeed, the policy considerations apparently driving the Third Circuit's analysis arise not from the types of cases in which class certification is sought but from the nature of the class action device itself. As articulated by the court, "[c]areful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation", because, for plaintiffs, "granting or denying class certification ... may sound the 'death knell' of the litigation", and for defendants, class certification can "create unwarranted pressure to settle non-meritorious claims".[21] The latter factor drew special emphasis by the court, which noted that in some cases class certification:

> *[M]ay force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. Accordingly, the potential for unwarranted settlement pressure is a factor we weigh in our certification calculus.*[22]

As noted above, *Hydrogen Peroxide* joins other recent circuit decisions requiring a more rigorous analysis, including analysis of any merits issues relating to Rule 23's requirements for class certification. The Second Circuit, for example, in *In re Initial Public Offering Securities Litig.* has now eschewed a standard that

would have required plaintiffs to simply make "some showing" that the class certification requirements are met.[23] Much like *Hydrogen Peroxide*, *In re IPO* acknowledged the confusion engendered by the Supreme Court's decision in *Eisen*, and noted that *Eisen*'s statement regarding consideration of the merits "has sometimes been taken out of context and applied in cases where a merits inquiry either concerns a Rule 23 requirement or overlaps with such a requirement".[24] *In re IPO* ultimately held that, on a motion for class certification, the court must resolve any factual disputes relevant to Rule 23's requirements and determine that each of the rule's requirements is met.[25] In a more recent decision in late 2008, *Teamsters Local 445 Freight Division Pension Fund v. Bombardier Inc.*, the Second Circuit carefully acknowledged that district courts retain discretion to limit discovery and determine the extent of the proceedings required to decide the motion for class certification, and that an evidentiary hearing is not required *per se*.[26] Nonetheless, for any "evidence proffered to establish Rule 23's requirements", the court confirmed that "findings" are required and that, in considering the proffered evidence, the "preponderance of the evidence" standard must be applied.[27]

The Fifth Circuit as well has moved toward expressly authorizing an inquiry into the merits at class certification. As did the Third Circuit in *Hydrogen Peroxide*, the Fifth Circuit has distinguished *Eisen* as imposing a prohibition against consideration of the merits only insofar as they pertain to matters unrelated to the class certification requirements.[28] Notably, in securities actions in particular, the Fifth Circuit requires plaintiffs to prove loss causation by a preponderance of the evidence at the class certification stage to invoke a presumption of reliance on a fraud-on-the-market theory.[29] Likewise, the Seventh Circuit has held that, when deciding whether to grant class certification, a district court is not required to accept the allegations in the complaint as true, but should make "whatever factual and legal inquiries are necessary" to assess Rule 23's requirements, even if those inquiries overlap with the merits of the case.[30]

Not all circuits, however, have gone so far. For example, in *In re New Motor Vehicles Canadian Export Antitrust Litig.*, the First Circuit recently held that lower courts are entitled to probe the merits of an action when assessing Rule 23's requirements, but stopped short of requiring the court to render factual findings.[31] Instead, the court held that when a plaintiff's claim depends on a "novel or complex" theory of injury, the court must conduct a "searching inquiry into the viability of that theory and the existence of facts necessary for that theory to succeed".[32] Though perhaps not quite as stringent as, for example, *Hydrogen Peroxide*, *New Motor Vehicles* nonetheless suggests that courts must take great care to ensure that plaintiffs are able to explain how their case can be proven using means of proof amenable to the class action mechanism.[33] Importantly, as in *Hydrogen Peroxide*, the decision in *New Motor Vehicles* suggested that such careful examination is warranted, in part, by the high stakes of a certified class for defendants and the considerable resources the class action device consumes. At the very outset of its opinion, the court specifically noted that certification can result in "financial exposure to defendants so great as to provide substantial incentives ... to settle non-meritorious cases in an effort to avoid both risk of liability and litigation expense".[34]

The Tenth Circuit also occupies a more moderate position, as set forth in an opinion issued a few months ago in *Vallario v. Vandehey*.[35] On one hand, *Vallario* stated that it was "clear" circuit precedent that courts should "generally accept the substantive, non-conclusory allegations of the complaint as true" at the class certification stage.[36] But, relying on some of the more demanding decisions in the other circuits, *Vallario* also went on to hold that district courts must "ensure Rule 23's provisions are satisfied by conducting a rigorous analysis, addressing the rule's requirements through findings, regardless of whether these findings necessarily overlap with issues on the merits".[37] *Vallario* ultimately appears to stand for the proposition that the court must determine whether plaintiffs have satisfied Rule 23's requirements for class certification, but in doing so must avoid "passing judgment on whether plaintiffs will prevail on the merits".[38]

Finally, the Ninth Circuit's position remains unclear in light of the status of that court's rulings in *Dukes v. Wal-Mart, Inc. Dukes* involved a gender discrimination class action contesting Wal-Mart's compensation and promotion practices. In an initial opinion issued in 2007, the Ninth Circuit affirmed an order certifying the class and specifically noted that "evaluating the weight of evidence or the merits of a case are improper at the class certification stage".[39] In response to a petition for

rehearing, however, the Ninth Circuit withdrew its decision and issued a superseding opinion that appeared to backtrack as to consideration of the merits. The court affirmed the order granting class certification but added that "[o]f course we recognize that courts are not only at liberty to but must consider evidence which goes to the requirements of Rule 23 at the class certification stage even if the evidence may also relate to the underlying merits of the case".[40] Even more recently, in February of this year, the Ninth Circuit granted yet another a petition for hearing, this time for *en banc* review, and has withdrawn the existing (revised) opinion.[41] Pending the decision on rehearing, the direction of the law in the Ninth Circuit thus remains an open question, with the ultimate outcome certain to be closely watched by the class action bar.

Conclusion

These various recent decisions appear to be heightening the standards generally for plaintiffs seeking to certify a class in federal courts in the United States. Motions for class certification can be expected to be a more evidence-intensive exercise for all parties. The increased focus on the merits promises to have implications not only for the decision of the motion for class certification itself, but for the management of the litigation from the outset and the parties' preparation for the motion. Litigants can expect that decision of the motion may be postponed until later in the litigation to allow for further discovery in many circumstances. In addition, the early development of definitive expert testimony will become essential for any issue on which class certification may rely.

Policy-wise, the potential effect of these changes on the stakes parties face in class action litigation may be less predictable. To be sure, plaintiffs commencing class actions in the hope of gaining settlement leverage through certification of a class early in the case may now face much larger investment costs before learning whether that leverage will be available. Yet ironically defendants, who might in some cases prefer early class certification motions in the hope of ringing the "death knell" before onerous discovery on the merits, may find that plaintiffs continue to hold early settlement leverage based on the sheer cost and distraction of the greater amount of discovery that plaintiffs may be able to demand before reaching the point at which certification decisions are made. The demands of the enhanced "rigorous analysis" flowing from these recent cases may thus create substantial new pressures for defendants as well as plaintiffs.

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1 See 28 U.S.C. § 1332(d); see also Edward F. Sherman, *Class Action Fairness Act and the Federalization of Class Actions*, 238 F.R.D. 504, 506 (2007).

2 See, *e.g.*, *Sherman*, *supra* note 1, at 506 ("As federal court judges became more critical of class actions, class action attorneys increasingly filed in state courts ... These kinds of concerns led to focusing the legislation on expanding federal court 'diversity jurisdiction' and defendants' right to remove state class actions to federal court.").

3 Class certification under Rule 23 has two sets of requirements. First the party seeking class certification must establish the four requirements of Rule 23(a): (1) "the class is so numerous that joinder of all members is impracticable" (often referred to as "numerosity"); (2) "there are questions of law or fact common to the class" ("commonality"); (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class" ("typicality"); and (4) "the representative parties will fairly and adequately protect the interests of the class" ("adequacy"), Fed. R. Civ. P. 23(a). If all four requirements of Rule 23(a) are met, the analysis turns to which of three types of class proceedings, each with additional requirements set forth in Rule 23(b), may be certified. For class actions in the consumer, securities, and antitrust areas among others, the most common avenue for certification is pursuant to Rule 23(b)(3), which requires the court to find (in addition to the elements of Rule 23(a)) that "questions of law or fact common to class members predominate over any questions affecting only individual members" ("predominance") and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" ("superiority"), Fed. R. Civ. P. 23(b)(3). Apart from stylistic changes only, the provisions of Rules 23(a) and (b) in effect today are the same as those originally adopted in 1966.

4 417 U.S. 156, 177 (1974).

5 See, *e.g.*, *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 160-61, 166 (S.D. W.Va. 1996) (relying on conditional certification to permit claims arising from release of toxic gas to proceed on a class basis despite "serious and substantial questions" as to the provability of injury and manageability of the action across the class); *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 638 (D. Colo. 1986) (noting that "certification is conditional" and that "[b]ecause the class certification is subject to later modification, the court should err in favor of, and not against, the maintenance of the class action").

6 See, *e.g., Morris v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D 336, 341 (N.D. Ill. 2001) (citing rule and certifying class based on allegations in the complaint alleging violation of *Fair Debt Collection Practices Act*, notwithstanding defendant's request for prior discovery to investigate whether a class was appropriate).

7 *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 135 (2d Cir. 2001).

8 *E.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (observing that the "determination of class action questions is intimately involved with the merits of the claims").

9 457 U.S. 147, 160, 161 (1982).

10 *E.g.*, *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 297-98 (1st Cir. 2000).

11 *In re Polymedica Corp. Secs. Litig.*, 432 F.3d 1, 17 (1st Cir. 2005) (considering whether common issues of reliance predominate in a securities case).

12 552 F.3d 305, 307 (3rd Cir. 2009).

13 552 F.3d at 307; see also *ibid.* at 320 (noting that "[t]he plain text of Rule 23 requires the court to 'find', not merely assume, the facts favoring class certification") (citation omitted).

14 *Ibid.* at 307.

15 *Ibid.* at 317.

16 *Ibid.* at 307.

17 See Fed. R. Civ.P. 23(c)(1)(C), Advisory Committee's notes, 2003 Amendments; see also Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, September 2002 at 11-12 (available at <http://www.uscourts.gov/rules/Reports/ST9-2002.pdf>) (amendment deleted the "provision for conditional class certification ... to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied".).

18 See Fed. R. Civ.P. 23(c)(1)(A), Advisory Committee's notes, 2003 Amendments; see also *McLaughlin on Class Actions*, § 3.1 (5th ed. 2008) (noting that "the prior rule's emphasis on dispatch in making the certification decision had, in some circumstances, led courts to believe that they were tightly constrained in the period before certification").

19 See 552 F.3d at 318-20.

20 *Ibid.* at 321-22 (internal quotations and citations omitted).

21 *Ibid.* at 310 (citation omitted).

22 *Ibid.* (internal quotations and citations omitted).

23 *See* 471 F.3d 24, 27 (2d Cir. 2006), *rehearing denied* 483 F.3d 70 (2d Cir. 2007).

24 *Ibid.* at 34.

25 *Ibid.* at 41.

26 546 F.3d 196, 204 (2d Cir. 2008).

27 *Ibid.* at 202.

28 See *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 381 (5th Cir. 2007).

29 See *Luskin v. Intervoice-Bright Inc.*, 261 Fed. Appx. 697, 701-02 (5th Cir. 2008); *Oscar Priv. Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 266-69 (5th Cir. 2007).

30 *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001); *see also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("Thus, while an evaluation of the merits to determine the strength of plaintiffs' case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits.").

31 522 F.3d 6, 26 (1st Cir. 2008).

32 *Ibid.*

33 See *ibid.* at 29.

34 *Ibid.* at 8.

35 554 F.3d 1259 (10th Cir. 2009).

36 *Ibid.* at 1265.

37 *Ibid.* at 1267 (internal quotations and citation omitted).

38 *Ibid.*

39 *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1227 (9th Cir. 2007).

40 *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1178 n.2 (9th Cir. 2007) (internal quotations and alterations omitted).

41 See 556 F.3d 919.

PRELIMINARY MOTIONS

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"This Way to the Exit, Please": New Doors Open for Québec Defendants Who Seek a Way Out

The Québec *Code of Civil Procedure*[1] provides a number of what are called "preliminary exceptions", essentially pre-trial motions available to defendants in contesting the action filed against them. Needless to say, such motions are important tools for defendants.

The application of the rules governing the different preliminary motions in the context of class actions has not always been clear as courts and authors continue to struggle with how the "procedural vehicle" that is the class action exactly fits into the wider architecture of Québec civil procedure.

The present comment focuses on two recent decisions addressing the application of such preliminary exceptions to class actions.

Popovic v. Montréal (City of),[2] was rendered by the Québec Court of Appeal on December 11, 2008 and confirmed that it is possible to obtain the summary dismissal of a certified class action because it is unfounded in law. As we shall see, prior to *Popovic*, it was commonly believed that such motions were unavailable once a class action was certified.

The second judgment, *Bouchard v. Ventes de véhicules Mitsubishi du Canada inc.*,[3] was rendered by the Québec Superior Court on December 19, 2008. For the first time, the Superior Court expressly states that it is both possible and appropriate for it to adjudicate a motion challenging its territorial or personal jurisdiction prior to the certification hearing.

In short, the two judgments are noteworthy for defence counsel and their clients in that they open new doors

for defendants who seek an early way out of ill-fated class actions.

Popovic v. Montréal

The *Popovic* case arose on May 1, 2000 when busloads of demonstrators took to the streets of Westmount, one of Montréal's most affluent neighbourhoods, to commemorate International Workers' Day and denounce capitalism. Events quickly took a turn for the worse and the police proceeded to make arrests. In the end, over one hundred individuals were detained and charged with summary offences under the *Criminal Code*.[4] Due to an agreement between the Québec Attorney General and the City of Westmount delegating the prosecution of summary offences to the City, the cases proceeded before the municipal court of Westmount and were prosecuted by a private practitioner, appointed as the City's court prosecutor by the municipal council. Most of the defendants eventually pled guilty to a lesser offence; the charges were ultimately dropped against the remainder.

Alexandre Popovic, one of the demonstration's organizers, sought to file a class action on behalf of the demonstrators against the City and members of the police force for unlawful arrest, and against the City prosecutor for malicious prosecution. The class action was certified by the Superior Court on May 28, 2004 and filed on March 7, 2006. Shortly thereafter, both the City prosecutor, on the one hand, and the City and police officers on the other filed pre-trial motions for summary dismissal pursuant to Article 165(4) *CCP*.

Briefly, Article 165(4) *CCP* provides that a defendant to an action can ask for its dismissal before trial if "the suit is unfounded in law, even if the facts alleged are true". The procedure is fairly simple. For the purposes of the motion, the defendant must essentially convince the court that, even if at trial the plaintiff could prove the facts alleged in his action and the supporting exhibits, the action would ultimately fail on legal grounds. Art. 165(4) *CCP* is thus a useful tool that allows defendants to rid themselves of unfounded actions without having to go through a trial.

In *Popovic*, the City and police officers based their 165(4) *CCP* motion on the fact that the motion for certification of the class action had been filed after the applicable limitations period had lapsed. The City prosecutor, who was being sued for malicious prosecution, argued that the class action motion failed to contain all four elements required by the case law for this type of action, *i.e.* that it lacked allegations demonstrating the absence of reasonable and probable cause for the prosecution and the presence of malicious intent or an improper purpose on the part of the defendant. The Superior Court granted both motions and dismissed the class action on November 2, 2006.

Prior to *Popovic*, it was generally accepted that the court could not hear a pre-trial motion for dismissal pursuant to Art. 165(4) *CCP* after a class action was certified, save for exceptional cases where the law had changed since certification.

The apparent prohibition against motions to dismiss can be traced back to a 2000 Superior Court decision in *Dikranian v. Québec (Procureur général)*.[5] In that case, Justice Journet noted that the judge seized of the motion for certification was already required by Article 1003(b) *CCP* to rule on whether "the facts alleged seem to justify the conclusions sought". The exercise required by Art. 1003(b) *CCP*, he reasoned, was essentially the same as the one performed by the judge in the context of a motion to dismiss under Art. 165(4) *CCP*, and the arguments made by the defendant in each case were of the same nature. As such, Journet J. likened the motion to dismiss to a disguised appeal of the certification judgment.[6]

The plaintiff in *Popovic* appealed the Superior Court decision and argued before the Court of Appeal that the Superior Court should not have heard the motions to dismiss, for the reasons given by the Superior Court in *Dikranian*.

Justice Rochon, writing for the Court, dismissed the reasoning of Journet J. in *Dikranian*. First, Rochon J.A. noted that Article 1012 *CCP* specifically provides that the defendant can urge preliminary exceptions (which include motions pursuant to Art. 165(4)) against the class representative, so long as they are common to a substantial part of the class members and bear on a common issue. Second, and most importantly, the parallel drawn by Journet J. between Art. 1003(b) and 165(4) is inaccurate.

Indeed, as early as 1981, the Supreme Court of Canada had had the opportunity in *Comité régional des usagers v. Q.U.C.T.C.* to pronounce on the level of scrutiny required from the court under Art. 1003(b) *CCP* and

concluded that the judge at certification should not rule on the merits in law of the conclusions:

> *The matter for decision is essentially whether under para. (b) of art. 1003 the Court, in order to authorize institution of the class action, must decide the merits in law of the conclusions, having regard to the facts alleged, or whether it is sufficient that the allegations support the conclusions prima facie or disclose a colour of right.*
>
> *[…]*
>
> *I conclude, therefore, that the phrase "seem to justify" means that there must be in the judge's view a good colour of right for him to authorize the action,* ***though he is not thereby required to make any determination as to the merits in law of the conclusions, in light of the facts alleged****.*[7]

The Supreme Court's interpretation of the test under Art. 1003(b) *CCP* in *Q.U.C.T.C.* contrasts sharply with the clear drafting of Art. 165(4) *CCP*, which expressly requires the court to ask itself whether, in light of the facts alleged, "the suit is unfounded in law". Thus, Rochon J.A. noted that, unlike the judge at certification, the judge seized with a motion to dismiss must rule on questions of law, no matter how complex they appear. Although the judge must exercise due care not to prematurely end potentially viable claims, it would be contrary to the interests of justice to allow a legal debate to drag on when the claim is unfounded in law.

Bouchard v. Ventes de véhicules Mitsubishi du Canada inc.

The *Mitsubishi* case deals with the possibility of contesting the territorial or personal jurisdiction of the Québec Superior Court prior to the certification hearing.

The plaintiff sought the certification of a class action against three companies forming part of the Mitsubishi corporate group, none of which had head offices or establishments in the province of Québec. Essentially, the plaintiff alleged that the defendants participated in a conspiracy to maintain artificially high the prices of their vehicles sold in Canada in comparison to vehicles sold in the United States. The defendants responded by filing a motion contesting the jurisdiction of the Québec Superior Court.

In traditional actions, defendants who wish to contest the territorial or personal jurisdiction of Québec courts can, and in fact generally must, do so at the earliest opportunity. Indeed defendants who fail to raise the issue in a timely manner are often precluded from doing so at a later stage because they are deemed to have tacitly consented to the jurisdiction of the Québec courts.

One would normally have expected class action defendants to have the same right to challenge the court's jurisdiction at the very first opportunity and thus quickly put an end to proceedings commenced before the wrong forum.

Unfortunately, the courts instead developed a rather idiosyncratic distinction between challenges based on subject-matter jurisdiction (commonly known as *ratione materiae* jurisdiction) under Article 164 *CCP* and challenges based on territorial or personal jurisdiction (*ratione loci* jurisdiction) under Article 163 *CCP*.[8] In the case of *ratione materiae* jurisdiction, courts often agreed to hear challenges prior to certification. And, in 2004, the Court of Appeal confirmed that such challenges could indeed be heard as soon as they were raised.[9] On the other hand, except where the parties agreed to proceed earlier,[10] the courts deferred challenges based on *ratione loci* jurisdiction to the certification hearing, an approach approved by the Court of Appeal in an *obiter* in the same decision.

As a result, class action defendants over whom Québec courts had no jurisdiction were forced to remain in the proceedings and contest the certification of the class action. Frankly, the reasons given for treating class action defendants differently than defendants in traditional actions were unconvincing. While certification proceedings may be, as the saying goes, a mere "filtering mechanism", they are nevertheless a costly and time-consuming exercise, not only for the defence, but for the plaintiff and the judicial system as well. There is also no denying that the mere fact of being named in a class action, even an ill-founded one, can have all sorts of negative implications for defendants. Why, then, prevent class action defendants from raising all jurisdictional challenges at the outset of the proceedings?

The Court of Appeal revisited the issue in 2008 in *Gauthier v. Québec (Société d'habitation)*,[11] when it ruled that a class action defendant could bring a motion arguing that the proposed class action had been filed before the wrong judicial district (*i.e.*, a *ratione loci* exception raised in the *domestic* context as opposed to the *international* context) before the hearing on certification. In so doing, the Court noted that, prior to

the certification of the class action, the plaintiff's individual recourse nevertheless exists and is governed, with certain necessary adaptations, by the ordinary rules of procedure. As such, there is no reason why exceptions raised against the plaintiff's recourse cannot be heard prior to the certification hearing.

In *Mitsubishi*, the Superior Court built on the ruling in *Gauthier* and found, correctly in this author's opinion, that the reasoning holds just as true in the context of a challenge to the international jurisdiction of the Court.[12] As such, the Superior Court has the discretion to adjudicate on its *ratione loci* jurisdiction before the hearing and adjudication of the motion for certification.

Conclusion

The motion to dismiss pursuant to Article 165(4) *CCP* and the motion for lack of *ratione loci* jurisdiction pursuant to Article 163 *CCP* offer two examples of how, over the years, the case law had developed rather peculiar rules governing the availability of certain preliminary exceptions to class action defendants, which put them at a certain strategic disadvantage when compared to defendants in traditional actions.

In the case of the motion to dismiss, the case law seemed to prohibit its use against a certified class action, though the provisions of the *CCP* clearly allowed it. Obviously, the motion to dismiss remains an exceptional remedy, which will only be granted when there is no doubt that the claim is unfounded in law. Yet, exceptional as the remedy may be, the *Popovic* case illustrates its importance. When applied correctly, Article 1003(b) *CCP* provides a "filtering mechanism", which ensures that manifestly ill-founded class actions are not certified. Sometimes, class actions that manage to pass this *prima facie* test can nevertheless reveal themselves, upon closer scrutiny, to be unfounded in law. Before *Popovic*, defendants who found themselves in that unfortunate predicament had no other choice but to bide their time until trial. This is no longer the case.

The case of the motion for lack of *ratione loci* jurisdiction was not as radical. Its use was not prohibited by the case law, but merely deferred to the certification hearing. Nevertheless, nobody wins by having legal proceedings drag on unnecessarily. The judgments in *Gauthier* and *Mitsubishi* suggest that class action defendants over whom Québec courts have no jurisdiction can now seek to have the proceedings against them dismissed at the earliest opportunity.

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1 R.S.Q. c. C-25 ("CCP").

2 [2008] J.Q. No. 13110, 2008 QCCA 2371 ("Popovic"). The author acted as co-counsel for co-defendant, John Donovan, before the Court of Appeal.

3 [2008] Q.J. No. 13487, 2008 QCCS 6033 ("Mitsubishi").

4 R.S.C. 1985, c. C-46.

5 [2000] J.Q. No. 7212, [2000] R.J.Q. 1583 (Sup.Ct.) ("Dikranian").

6 Whereas the plaintiff has an automatic right of appeal if his motion for certification is denied, the defendant is expressly prohibited from appealing the judgment that certifies the class action under Article 1010 *CPP*.

7 *Comité régional des usagers v. Q.U.C.T.C.*, [1981] S.C.J. No. 37, [1981] 1 S.C.R. 424 at 426 and 429 ("Q.U.C.T.C.") [emphasis added].

8 See *Option consommateurs v. Servier Canada inc.*, [2002] J.Q. No. 5672, [2003] R.J.Q. 470 (Sup. Ct.).

9 *Société Asbestos ltée v. Lacroix*, [2004] J.Q. No. 9410 (C.A.) ("Société Asbestos"). See also *Québec (Procureur général) v. Charest*, [2004] J.Q. No. 13504 (C.A.).

10 See *e.g. Alves v. My Travel Affiliates Inc.*, [2005] J.Q. No. 16108 (Sup. Ct.).

11 [2008] J.Q. No. 4372, 2008 QCCA 948 ("Gauthier").

12 The reader should note that both exceptions are governed by Article 163 *CCP*.

RECENT DECISIONS

Canada Post v. Lépine and What It Says about Class Action Notice, Comity and Quebec's Rules on Private International Law

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Class action notices must be precise, unambiguous and accessible to satisfy the requirements of procedural fairness. That is just one of the key messages delivered by the Supreme Court of Canada in *Canada Post Corporation v. Lépine*,[1] a decision, which not only highlights the importance of natural justice and comity, but which weighs in on the scope and application of Quebec's rules of private international law.

Facts

In September of 2000, Canada Post Corporation began marketing a lifetime Internet access service in Canada. Consumers purchased software that was sold for $9.95, and agreed to have advertising transmitted to their computers in exchange for free Internet service. Canada Post discontinued the service on September 15, 2001. Consumer complaints, and the filing of various proceedings across Canada, ensued.

On February 6, 2002, Michel Lépine filed a motion to institute a class action against Canada Post with the Quebec Superior Court on behalf of every natural person residing in the province who had purchased the Internet package. Class proceedings were later commenced in Ontario and British Columbia. In Alberta, a settlement was reached in December 2002. An enhanced settlement was then offered in Quebec, Ontario and British Columbia. The settlement offers were accepted in British Columbia and Ontario. Mr. Lépine, the petitioner in the proposed Quebec class action, which was still pending at the time of the settlement discussions, refused to participate.

Quebec Superior Court

The Quebec Superior Court heard the motion for authorization on November 5, 6, and 7, 2003, and the judge reserved his decision. As of November 2003, the Ontario application for certification included residents of every province in Canada except British Columbia, and included Quebec residents. On December 22, 2003, the Ontario Superior Court of Justice certified the class proceeding and approved the settlement for residents of every Canadian province except for British Columbia. This was done despite a letter sent to the judge by Mr. Lépine's attorney asking that jurisdiction be declined with respect to Quebec residents. The very next day, on December 23, 2003, the Quebec Superior Court authorized a class action on behalf of a class composed of Quebec residents only. A class action against Canada Post was therefore pending before the Quebec Superior Court when the Ontario Superior Court had approved the "national" settlement.

In June of 2004, the Corporation applied to the Quebec Superior Court to have the Ontario judgement recognised and enforced. The application was dismissed on the basis that the Ontario decision was rendered contrary to the fundamental principles of procedure. According to the Superior Court, the certification notice was inadequate because it had failed to mention that a separate class action was already underway in that province.

Quebec Court of Appeal

The Quebec Court of Appeal dismissed Canada Post's appeal and unanimously reaffirmed the decision of first instance. The Court of Appeal found that although the Ontario Superior Court had general subject-matter jurisdiction, it should have declined jurisdiction over Quebec residents by invoking the doctrine of *forum non conveniens*. The Court also found that the two proceedings gave rise to *lis pendens*. In other words, the Quebec courts were precluded from recognizing the Ontario judgment because the Quebec proceeding had been commenced first.

Supreme Court of Canada

In a unanimous ruling, the Supreme Court of Canada upheld the decisions in first instance and appeal, although it disagreed with some aspects of the Court of Appeal's reasoning.

At the outset, Justice Lebel, who authored the unanimous opinion, noted that he preferred to characterize the Ontario decision as an "external" rather than a "foreign" judgment. He went on to explain that the basic principle articulated in article 3155 of the *Civil Code* ("C.C.Q.") is that any decision rendered by a foreign authority must be recognized unless one of the limited exceptions specified in that provision is found to apply. He stated that a court must limit itself to considering whether the requirements for recognizing a foreign judgement have been satisfied. A court may not review the merits of the case. According to article 3164 *C.C.Q.* and other provisions of the *Civil Code*, a foreign authority is generally deemed to have jurisdiction if the Quebec court would, by applying its own rules, have asserted jurisdiction in the same circumstances.

Despite the broad wording of article 3164 *C.C.Q.*, LeBel J. found that it does not give Quebec courts the power to refuse to recognize an external judgment on the basis that the foreign court should have declined jurisdiction because it was not the most convenient forum. To apply the doctrine of *forum non conveniens* when considering an application for recognition would be to overlook the basic distinction between *establishing* jurisdiction and *exercising* it. In LeBel J.'s view, a literal interpretation of article 3164 *C.C.Q.* is irreconcilable with the general, fundamental principle articulated in article 3155 *C.C.Q.* that a foreign judgment must be recognised once the jurisdiction of the originating court has been established. Put simply, the judge of first instance only needed to inquire into whether the Ontario Superior Court had jurisdiction over the dispute — which it clearly did.

In deciding to recognize a judgment, however, a Quebec court must determine whether the steps

leading up to the decision and its implementation are consistent with the fundamental principles of procedure. This analysis, which LeBel J. stated is particularly important in the case of class actions, does not amount to a review of the merits of the decision.

In class actions, because any decision will affect not only the representative and the defendant, but all the members of the class, adequate information is necessary to ensure that individual rights are safeguarded. Notification is essential because it informs the class members of how the certification judgment affects them, of their rights under the judgment and occasionally, as here, about the settlement of the litigation.

In this case, the notice approved by the Ontario Superior Court was not consistent with the fundamental rules of procedure because it did not properly explain the impact the settlement would have on Quebec class members. The enforcement of the judgment in Quebec was therefore precluded by 3155(5) *C.C.Q.*. Notices must be crafted to ensure that relevant information will reach the intended recipients. The wording of the notice must take into account the context in which it will be published and the situation of the recipients. These requirements constitute a fundamental consideration in the class action setting and are no less compelling in a case involving the recognition of a judgment rendered by another Canadian court. Justice LeBel noted that clarity was particularly important in this context, where parallel proceedings had been commenced in Quebec and Ontario.

As for the question of *lis pendens,* the uncontested evidence clearly demonstrated that the motion for authorization had been filed with the Quebec Superior Court prior to December 23, 2003 and that the Quebec Court had been the jurisdiction first seized of the litigation. The recognition of the Ontario judgment was therefore impossible under the circumstances.

Analysis

This latest decision by the Supreme Court is significant for at least three reasons. In the first place, it underscores the importance of providing adequate notice, whether in the international or inter-provincial setting, a point already made in the common law context by the Ontario Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd*.[2] Notices that are imprecise, ambiguous, misleading or improperly distributed run the serious risk of being considered in breach of the fundamental rules of procedure (in Quebec) or those of natural justice (in the rest of Canada). Practically speaking, as we suggested in an earlier article, (2006) Vol. 1 No. 2 CADQ 24, a class action notice should:

- afford the class member the right to opt-out of the proceedings;
- inform the class member that he or she can present objections;
- describe the action and the class members' rights in it;
- appear in more than one provincial newspaper or in national newspapers and newswires (in the case of multijurisdictional classes);
- be issued in publications which have traditionally been used for that purpose;
- be drafted in plain English or French;
- avoid confusion;
- appear in print more than once;
- be published in French and English-language media if some or all class members are Quebec residents.

In the second place, *Lépine* has apparently settled a debate that had been going on in Quebec between doctrinal authorities and within the case law itself as to whether a Quebec judge can not only determine whether a foreign court is able to establish jurisdiction according to the codified rules of private international law, but also weigh the relative convenience of the foreign court with respect to the underlying dispute. By ruling that convenience cannot be considered in deciding whether to recognize a foreign judgment, the Supreme Court has arguably made it easier for multijurisdictional class actions to be certified outside of the province, provided that the action is filed in the external forum first, the class action notice is adequate and the strict requirements for asserting jurisdiction are satisfied. Nevertheless, *Lépine* does not address the underlying constitutional issues that were raised by Justice Bich, in *obiter*, in *Hocking v. Haziza*.[3]

Finally, it is worth noting that LeBel J. not only fails to makes reference to this *obiter*, but does not analyse,

mention or even cite *Hocking*, one of the most recent and controversial class action decisions to come out of Quebec. In *Hocking*, a majority of the Court of Appeal had suggested, among other things, that a Quebec court might be able to assess the appropriateness of a foreign court's decision to exercise jurisdiction by examining how well that decision harmonizes with the general provisions of Quebec's rules on private international law. It is this theory, called that of the "little mirror", which was apparently shattered by LeBel J. in *Lépine*. Yet if *Lépine* is meant to partly overturn or qualify the majority opinion in *Hocking*, it is strange that the Supreme Court did not say so explicitly. If, on the contrary, the two cases are meant to be read together, it is equally strange that this was not made explicit. Unfortunately, this silence leaves national class actions in something of a muddle, at least insofar as Quebec is concerned. Like Justice Baudouin in *Hocking*, LeBel J. also turns to the legislature for guidance.

Conclusion

Lépine is important both because of what it says and what it does not say. It stands for the proposition that a notice must be clear, unambiguous and properly disseminated in order to satisfy the requirements of procedural fairness and natural justice. It is also reinforcing the principle of inter-provincial comity, according to which pending proceedings initiated in a sister jurisdiction cannot simply be ignored. What remains unclear is the constitutional status of multijurisdictional class actions and the extent to which national class actions filed outside of Quebec are now likely to be recognized and enforced in this province.

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1 [2009] S.C.J. No. 16, 2009 SCC 16.
2 [2005] O.J. No. 506, 2005 CanLII 3360.
3 [2008] J.Q. no 3423, 2008 QCCA 800.