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Certification of class actions in Canada - has the tide turned for product liability class actions?

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Canadian courts once described product liability cases as the paradigm cases for class action. That was before the Supreme Court of Canada made its first comments on class actions in three decisions released in 2001: *Western Canadian Shopping Centres Inc v Dutton*,[1] *Hollick v Toronto (City)*[2] and *Rumley v British Columbia*.[3] These decisions, referred to as the class action 'Trilogy', address the level of commonality that is necessary to justify certification. The product of the Trilogy is a rigorous commonality test that requires representative plaintiffs to introduce evidence to demonstrate:

- the existence of common issues; and
- that a class proceeding is the preferable procedure for the resolution of the common issues.

The Ontario Superior Court of Justice has now applied the Supreme Court of Canada's commonality test in *Gariepy v Shell Oil Company*,[4] a product liability action. In so doing, the Court denied certification and effectively raised the bar that plaintiffs must get over in order to certify a class proceeding. This article will review the Supreme Court of Canada's comments on commonality in the Trilogy, and their application in *Shell*.

The Trilogy

The Trilogy gave the Supreme Court of Canada an opportunity to consider the requirements for certification in jurisdictions with class action legislation (*Rumley* and *Hollick*) and jurisdictions without class action legislation (*Western Canadian Shopping Centres*). It is clear from these decisions that all representative plaintiffs in common law Canada[5] must demonstrate the existence of common issues and the preferability of a class proceeding as a method of resolving the common issues.

Rumley and *Hollick*

In *Rumley*, the plaintiffs brought an action against the Provincial Government for compensatory and punitive damages based upon allegations of sexual, physical and emotional abuse suffered at a residential school for children with disabilities. The plaintiffs sought to have the proceeding certified as a class proceeding under s 4(1) of British Columbia's *Class Proceedings Act*, RSB c 1996 c 50 (BCCPA), which states that a court 'must' certify a proceeding as a class proceeding if:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of two or more persons;
(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members; and
(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

In *Hollick*, the plaintiffs brought an action against the City of Toronto for injunctive relief, and compensatory and punitive damages based on allegations of pollution from a landfill site operated by the City. The plaintiffs in this case sought to have the proceeding certified as a class proceeding under s 5(1) of Ontario's *Class Proceedings Act 1992*, SO 1992 c 6 (OCPA), which states that a court 'shall' certify a proceeding as a class proceeding if:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of two or more persons;
(c) the claims or defences of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who:
  (i) would fairly and adequately represent the interests of the class;
  (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
  (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

In both *Rumley* and *Hollick*, the

Supreme Court of Canada's primary concern was whether the plaintiffs had satisfied the commonality and preferability requirements for certification under the BCCPA and the OCPA respectively. The *Rumley* and *Hollick* decisions were released on the same day and contain the same analysis of commonality. In each decision, the Court stated that the guiding question in determining commonality should be a practical one, namely, 'will allowing an action to proceed as a class action avoid duplication of fact finding or legal analysis?'. Thus, an issue will be common only where its resolution is necessary to the resolution of each class member's claim. Further, an issue will not be common in the requisite sense unless the issue is a 'substantial ingredient' of each class member's claim.[6]

In *Rumley*, the Court warned against framing commonality between class members in overly broad terms, stating that it would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably, such an action would break down into a series of individual proceedings.[7]

It is also noteworthy that in *Hollick* the Court states that plaintiffs must provide a minimum evidentiary basis for certification. In particular, plaintiffs must come forward with sufficient evidence to demonstrate the existence of common issues.[8] In *Hollick*, the plaintiff met this burden by introducing Ggovernment records of 950 complaints about pollution from the landfill site.

In addition to considering the commonality requirement for certification, the Supreme Court of Canada also considered the preferability requirement for certification in both *Rumley* and *Hollick*. The preferability requirement is closely related to the common issue requirement, but is set out as a separate requirement in both the BCCPA and the OCPA. Both statutes require the plaintiff to demonstrate that a class proceeding is the 'preferable procedure' for the resolution of the common issues.[9] A class proceeding will be 'preferable' if it will provide a fair, efficient and manageable method of advancing the claim and there is no other available method of advancing the claim that is more fair, efficient and manageable.[10]

The BCCPA and the OCPA both state that a class proceeding must be the preferable procedure for the resolution of the common issues, as opposed to the controversy as a whole. It is not surprising, therefore, that many courts have determined the question of preferability with reference to the common issues alone.[11] The problem with this narrow approach to preferability is that common issues are almost always best resolved in a common proceeding. Therefore, the mere existence of any common issue could lead to certification.[12]

In *Hollick*, the Supreme Court of Canada considers the proper scope of the preferability inquiry and cautions that undue weight should not be placed on the fact that the legislation uses the phrase 'resolution of the common issues' rather than 'resolution of class members' claims'. The Court notes that American plaintiffs are required to demonstrate that a class proceeding is the best method of resolving the 'controversy' and ultimately concludes that the preferability inquiry in Canada must take into account the importance of the common issues in relation to the claims as a whole. 'I cannot conclude,' Chief Justice McLachlin stated, 'that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context.'[13]

In the end result, certification was denied in *Hollick* on the basis that a class proceeding would not be the preferable procedure for the resolution of the common issues. Although the factual question of whether the landfill unlawfully emitted pollution was clearly a common issue, the Court found that the issue was 'negligible' in relation to the individual issues that would have to be resolved in order to determine liability.[14] One individual issue was the extent and effect of the pollution on individual class members, given when and where they resided during the relevant period. Accordingly, a resolution of the common issues would only mark the beginning of the liability inquiry.

In *Rumley*, on the other hand, certification was granted on the basis that a class proceeding would be the preferable procedure for the resolution of the common issues. In that case, the Court found that the common issues regarding duty and breach were a 'substantial ingredient' in each class member's claim, while the individual issues regarding injury and causation where 'relatively minor' aspects of the claims.[15]

Western Canadian Shopping Centres Inc

While *Rumley* and *Hollick* represent the Supreme Court of Canada's approach to certification in jurisdictions with class action legislation, *Western Canadian Shopping Centres Inc* represents the Court's approach to certification in a jurisdiction without class action legislation. It is interesting to note that the Court's commonality and preferability inquiry in all three decisions is virtually identical.

In *Western Canadian Shopping Centres* the plaintiffs purchased debentures in WCSC, a company incorporated for the purpose of helping immigrants to qualify as permanent residents in Canada. When WCSC invested the plaintiffs' funds in a real estate project that never materialised, the plaintiffs commenced an action in the Province of Alberta against WCSC on the basis that it had breached its fiduciary duty to investors by mismanaging their funds.

As there is no class action legislation in Alberta,[16] the plaintiffs in *Western Canadian Shopping Centres* moved to certify their action as a class proceeding under r 42 of the *Alberta Rules of Court*, alta reg 390/68, which states:

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorised by the Court to defend on behalf of or for the benefit of all.

Despite the clear intention of the Alberta legislature to permit some form of class actions, it did not provide any guidance regarding class action

practice. Noting this dilemma, the Supreme Court of Canada in *Western Canadian Shopping Centres Inc* concluded that in the absence of class action legislation the superior courts must fill in the void pursuant to their inherent power to settle the rules of practice and procedure in disputes brought before them.[17] Thus, the Court moved to fill in the procedural vacuum by setting out four conditions for certification:

1. the class must be capable of clear definition;
2. there must be issues of fact or law common to all class members;
3. with regard to the common issues, success for one class member must mean success for all; [and]
4. the representative must adequately represent the class.[18]

Unlike the statutory requirements for certification in British Columbia and Ontario, these requirements do not contain a separate condition that a class proceeding is the 'preferable procedure' for the resolution of the common issues. Instead, the preferability inquiry is merged into the commonality inquiry, which the Court describes as follows:

> Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlining question is whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis. Thus an issue will be 'common' only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.[19]

Thus, a common issue is one that every class member must resolve in order to establish liability. Furthermore, a common issue must be a substantial ingredient of each class member's claim in order to justify a class action.

Thus, a common issue is one that every class member must resolve in order to establish liability. Furthermore, a common issue must be a substantial ingredient of each class member's claim in order to justify a class action. The Court in *Western Canadian Shopping Centres* also concluded that a court should deny certification if it considers another procedure a 'better solution' for resolving the common issues.[20]

Applying these principles to the facts of the case before it, the Court in *Western Canadian Shopping Centres* found that the plaintiffs' claim raised common issues. For example, the Court found that a resolution of one class member's breach of fiduciary duty claim would effectively resolve the claims of every other class member. Furthermore, a class proceeding was the preferable procedure for the resolution of the common issues. Although individual issues did exist, they could be easily managed apart from the common trial.

Shell decision

The Supreme Court of Canada's comments in the Trilogy are now being applied to specific requests for

certification. For example, the Ontario Superior Court of Justice recently applied the Trilogy in three cases involving alleged violations of the *Competition Act*, environmental torts and product liability torts, respectively.[21] In all three cases, certification was denied.

The *Shell* decision is significant because it is the first reported decision in Canada to apply the Trilogy in a product liability case. In *Shell*, the Court denied certification on the basis that the plaintiffs' proposed common issues did not rise to the level of commonality required by the OCPA. Furthermore, a class proceeding would not have been the preferable procedure for a resolution of the class members' claims.[22]

The dispute in *Shell* arose out of alleged defects in two products used in potable water plumbing systems: polybutylene pipe and acetal fittings. Shell Oil Company (Shell) supplied polybutylene resin to manufacturers of polybutylene pipe and Shell's co-defendant, Hoechst Celanese (Celanese), supplied acetal resin to manufacturers of acetal fittings. The plaintiffs claimed that their potable water plumbing systems were failing prematurely as a direct result of these resins supplied by the defendants. Although neither defendant manufactured polybutylene pipe or acetal fittings, the plaintiffs asserted causes of action including negligent design, failure to warn, misrepresentation and breach of warranty.

In support of their motion for certification, the plaintiffs relied on numerous pre-Trilogy decisions certifying product liability cases. The plaintiffs argued that product liability cases were the 'paradigm' cases for certification. The Court, however, rejected the plaintiffs' pigeonhole approach to certification, warning that every case must be evaluated on its own facts.[23]

Looking at the facts in *Shell*, the Court found that the proposed common issues did not reach the level of commonality required by s 5(1)(c) of the OCPA. For example, one common issue proposed by the plaintiffs was the suitability of the defendants' resins for use in potable water plumbing systems. The plaintiffs argued that suitability was a scientific question that could be answered without input from individual plaintiffs. The record, however, demonstrated that suitability turned on a variety of individual factors, including chlorine levels in potable water which varied from one geographic location to another. Accordingly, a finding that the defendants' resins were unsuitable for use in one plaintiff's potable water plumbing system would not shed any light on the suitability of the defendants' resins for use in any other plaintiff's system. Therefore, the proposed common issue of suitability was not common at all. Any attempt to resolve this issue at a common trial would lead inevitably to an unmanageable series of individual inquiries about chlorine levels and other factors affecting the suitability of the defendants' resins.

Furthermore, in light of the individual issues that would have to be resolved in order to establish liability, the Court concluded that a class proceeding was not the preferable procedure for the resolution of any common issues. Even if suitability was a common issue and a finding of unsuitability was made, every plaintiff would still be required to prove that the defendants' resins caused his or her plumbing system to fail in order to establish liability. The record demonstrated that causation was an individual issue because plumbing systems fail for a variety of reasons, including improper handling and/or installation. Accordingly, the resolution of any common issue would not move the litigation forward to a degree sufficient to justify certification of the action as a class proceeding. Instead, the resolution of any common issue would essentially mark the commencement of the liability inquiry.

While evaluating the contribution of the resolution of any common issues to the overall resolution of the class members' claims, the Court in *Shell* considered a statement made by the Ontario Court of Appeal in *Carom v Bre-X Minerals Ltd.*[24] In that case, the Court of Appeal noted that previous courts had been wary of 'setting the bar too high on the common issue factor'. The plaintiffs in *Shell* relied on this statement to argue that there was a 'low

bar' for the common issues. The Court expressly rejected the plaintiffs' argument, however, and placed the Court of Appeal's comment in its proper context:

> ... [the Court of Appeal's] view, of what [it] subsequently characterised as the 'low bar' for the common issues, must be read in the context of the later [Trilogy] decisions of the Supreme Court of Canada on this issue.[25]

Five important principles can be extracted from the *Shell* decision.

- Certification cannot be determined simply by the genre of the claims advanced. The fact that numerous product liability cases had been certified in the past was not sufficient to warrant certification in *Shell*.
- Proposed common issues will be rigorously scrutinised for commonality. An issue in which all class members are interested will not be common in the requisite sense unless success for one plaintiff (with respect to that issue) means success for all.
- Plaintiffs must introduce evidence to demonstrate the existence of common issues. Certification was denied in *Shell* because the record failed to demonstrate that the class members' claims could be resolved on a class-wide basis and, in fact, demonstrated the opposite.
- The mere existence of common issues will not, by itself, justify certification. Certification is only justified if the resolution of the common issues will significantly advance the litigation. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to the individual issues.
- The Ontario Court of Appeal's assertion that there is only a 'low bar' to get over in order to certify a class action must be re-examined in light of the Trilogy.

One final note on the *Shell* decision relates to the issue of costs.[26] In Ontario, costs awards are based on a 'loser pays' principle. Accordingly, an unsuccessful party is typically ordered to pay some or all of the successful party's legal costs. The unsuccessful plaintiffs in *Shell*, however, argued that this approach should not apply in the context of a class proceeding in order to ensure access to justice, which is an important goal of class action regimes in Canada.

In concluding that the courts' approach to costs should be the same in a class proceeding as in any other proceeding,[27] the Court in *Shell* makes two interesting remarks. First, the Court deflates the 'David and Goliath' argument that is often advanced by unsuccessful plaintiffs:

> ... the principle of access to justice is sometimes too readily invoked to justify a result that may superficially appear appropriate but which, in reality, bears little relationship to the principle. It is easy in theory to portray the representative plaintiff as the weak party of modest or little means taking the battle to the powerful and well funded corporate defendant, but the reality is frequently not so simple and straightforward. As the experience in the United States shows, and which the Canadian experience has begun to emulate, plaintiff's counsel is very often as capable, as well funded and with equal access to resources, both financial and evidentiary, as is defendant's counsel.[28]

Second, the Court acknowledges the risk that certification poses for a defendant and the impact that risk has on a defendant's response to a certification motion:

> ... a class proceeding represents a significant risk to a defendant given the enormous potential liability that attaches to such claims if the proceeding is certified. It must be expected, therefore, that a defendant will respond to a certification motion utilising all of its available effort and resources with the result that the certification battle is likely to be both lengthy and expensive.[29]

In the end result, Shell was awarded $80,000 as costs of the certification motion and Shell's co-defendant, Celanese, was awarded $95,000. These two costs awards are the largest reported costs awards against plaintiffs in a class proceeding in Canada. These awards may force plaintiffs and their counsel to examine the strength of their arguments and evidence more closely before moving for certification, as plaintiffs are no longer allowed a 'free shot' at certification.

The post-Trilogy cases will likely generate rulings in the various appeal

courts and those rulings will likely refine the manner in which the Trilogy will be applied. The *Shell* decision, for example, is under appeal. For the time being, however, it appears that proposed class actions will be scrutinised more rigorously than has previously been the case. ●

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Endnotes

1. *Western Canadian Shopping Centre Inc v Dutton* (2001) 201 DLR (4th) 385.
2. *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19.
3. *Rumley v British Columbia* (2001) 205 DLR (4th) 39.
4. *Gariepy v Shell Oil Company* (9 July 2002) Toronto 99-CT-030781CP (Ont SCJ).
5. The province of Quebec operates under a civil law regime.
6. *Rumley v British Columbia* (2001) 205 DLR (4th) 39 at 52 para 29 (SCC) and *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19 at 30 para 18 (SCC).
7. *Rumley v British Columbia* (2001) 205 DLR (4th) 39 at 52 para 29.
8. *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19 at 32 paras 22-26. See also *Chadha v Bayer* (13 January 2003) Toronto 200330114 (Ont CA), which provides an excellent illustration of the way in which evidence must be used to establish the existence of common issues.
9. British Columbia *Class Proceedings Act* RSB c 1996 c 50, s 4(1)(d) and Ontario *Class Proceedings Act* 1992 SO 1992 c 6, s 5(l)(d).
10. *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19 at 34 paras 28-31 and *Rumley v British Columbia* (2001) 205 DLR (4th) 39 at 55 para 35.
11. See, for example: *Campbell v Flexwatt Corp* (1997) 15 CPC (4th) 1 (BCCA); and *Nantais v Telectronics Proprietary (Canada) Ltd* (1995) 25 OR (3d) 331 (Gen Div).
12. *Hollick v Toronto (City)* (2001) 205 DLR (4th) 19 at 35 para 29.
13. Paras 29 and 30.
14. At 36 para 32.
15. *Rumley v British Columbia* (2001) 205 DLR (4th) 39 at 56 para 36.
16. Alberta and certain other provinces still have traditional 'representative action' regimes.
17. *Western Canadian Shopping Centre Inc v Dutton* (2001) 201 DLR (4th) 385 at 399 para 34 (SCC).
18. At 404 para 48.
19. At 401 para 39.
20. At 402 para 42.
21. *Price v Panasonic Canada Inc* (Ont SCJ 6 June 2002); *Gariepy v Shell Oil Company* (9 July 2002) Toronto 99-CT-030781CP (Ont SCJ); and *Pearson v Inco Ltd* (Ont SCJ 15 July 2002).
22. The Ontario Superior Court of Justice's decision to refuse certification in *Shell* is currently under appeal.
23. *Gariepy v Shell Oil Company* (9 July 2002) Toronto 99-CT-030781CP (Ont SCJ) at 29 para 69, and 31 para 76.
24. *Carom v Bre-X Minerals Ltd* (2000) 51 OR (3d) 236 at para 41 (CA).
25. *Gariepy v Shell Oil Company* (9 July 2002) Toronto 99-CT-030781CP (Ont SCJ) at 20 para 55.
26. See: 'Supplementary Reasons — Costs' in *Gariepy v Shell Oil Company* (30 August 2002) Toronto 99-CT-030781CP (Ont SCJ).
27. At para 9.
28. At para 6.
29. At para 5.