

⁴ *Robinson v. Medtronic, Inc.*, [2009] O.J. No. 4366 (S.C.J.) ("*Robinson*") (Stikeman Elliott LLP is counsel for the Medtronic defendants in this action.).

⁵ *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, [2002] 1 S.C.R. 595 ("*Whiten*").

⁶ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1) ("*CPA*").

⁷ *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 63 O.R. (3d) 22 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 106 ("*Chadha*").

⁸ *Ibid.* at para. 55; *Caputo v. Imperial Tobacco*, [2004] O.J. No. 299, 236 D.L.R. (4th) 348 at para. 55 (Ont. S.C.J.).

⁹ *Supra* note 2.

¹⁰ *Irving Paper*, *supra* note 2.

¹¹ *Ibid.* at para. 113.

¹² *Ibid.* at para. 118.

¹³ *Ibid.* at para. 107(vi).

¹⁴ *Pro-Sys*, *supra* note 2.

¹⁵ *Ibid.* at para. 39 (emphasis added). The British Columbia statute is the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1).

¹⁶ *Pro-Sys Consultants v. Microsoft Corporation et al.*, [2010] B.C.J. No. 380, 2010 BCSC 285 at para. 120 ("*Microsoft*"). Leave to appeal has been sought in both *Infineon* and *Microsoft*.

¹⁷ *Markson v. MBNA Canada Bank* (October 26, 2009), Toronto 03-CV-254970CP (Ont. S.C.J.).

¹⁸ *Ibid.* at para. 22.

¹⁹ *Ibid.* at para. 21.

²⁰ *Peter v. Medtronic, Inc.*, [2009] O.J. No. 4364.

²¹ *Ibid.* at paras. 25, 27.

²² *Peter v. Medtronic Inc.*, [2010] O.J. No. 1480 (Div. Ct.). The bifurcation decision in *Peter* was also heard simultaneously with the certification decision in *Robinson* in which Perell J. certified common issues relating to waiver of tort but held that questions relating to quantum and apportionment should be bifurcated for the reasons set out in *Peter*. Justice Perell also recently bifurcated similar issues relating to waiver of tort in *Goodridge v. Pfizer Canada (Inc.)*, [2010] O.J. No. 655, 2010 ONSC 1095.

²³ *Andersen v. St. Jude Medical Inc.*, [2010] O.J. No. 8 (S.C.J.) ("*Andersen*").

²⁴ Importantly, in light of the plaintiffs' newly added waiver of tort pleading, *Andersen* will likely be the first decision to expand upon the scope and application of waiver of tort.

²⁵ *Andersen*, *supra* note 23, at para. 27.

²⁶ *Supra* note 5. In *Whiten*, the Supreme Court of Canada restored a \$1 million jury punitive damages award and provided guidelines on an appropriate charge to the jury in respect of punitive damages. See para. 94.

²⁷ *Supra* note 4, at para. 167.

²⁸ *Ibid.* at para. 171.

²⁹ *Ibid.* at para. 176.

³⁰ *Robinson v. Medtronic, Inc.*, [2010] O.J. No. 1479 (Div. Ct.) See also the reasons of Dambrot J. dated April 7, 2010 (Div. Court File. No. 90/10).

³¹ *Ibid.* at para. 12.

³² *Supra* note 23, at para. 32.

³³ *Ibid.* at para. 37.

EVALUATING THE EVIDENCE ON A CERTIFICATION APPLICATION: IS PRO-SYS v. INFINEON THE FINAL WORD?



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This article is concerned with two interrelated questions. First, how much evidence is required from an applicant seeking certification? And second, how is that

evidence to be evaluated, if the respondent seeks to call it into question through cross-examination or by leading contradictory evidence? These questions are engaged, but rarely confronted, in every contested certification application. It is easier for a trial court to resolve factual questions rather than to articulate the approach it is taking to the exercise.

These questions expose a fundamental tension in class proceedings between two competing imperatives: on the one hand, a certification application is not a trial, discovery is curtailed, and it is unfair in such circumstances to require a plaintiff to prove elements of its case; on the other hand, the aggregation of individual claims through the class action mechanism imposes on defendants an incentive to settle even very weak claims. The evidentiary requirement for certification exists in part so that defendants will not be exposed to that pressure, on the basis of unsubstantiated allegations alone.

*Pro-Sys Consultants Ltd v. Infineon AG*¹ is the most recent appellate effort addressing these questions. It articulates a standard, but without a full discussion of the underlying policy imperatives. This article will review and provide context for an assessment of the decision of the British Columbia Court of Appeal, touching on U.S. jurisprudence raising similar issues.

Fundamental background propositions

*Hollick v. Toronto*² is the Canadian starting point for the evidentiary inquiry on certification. *Hollick* stands for two propositions. First, the applicant must lead “some evidence” in support of all elements of the test for certification other than the requirement that the pleadings disclose a cause of action. This first proposition might be termed “the evidence rule”. Second, the certification application is “decidedly” not a preliminary hearing on the merits of the claim. That is, the applicant does not have to establish a *prima facie* case, as it would on an injunction application. The second proposition might be termed “the merits rule”.

Defendants resisting certification emphasize the evidence rule while plaintiffs seeking certification rely on the merits rule. Putting partisanship to one side, it is important to note that neither trumps the other. Evidence which bears on the merits of an application for certification may overlap with evidence which bears on the merits of the underlying allegations. In an alleged price-fixing conspiracy, a defendant may point to the lack of evidence of class-wide harm and it should be no answer for the plaintiff to assert that proof of harm is a part of its case on the merits and cannot be considered. Evidence of class-wide harm, for example, may be essential both to certification and to the trial on the merits. The merits rule does not avoid the evidence rule.³ Conversely, the fact that the evidence rule may require the plaintiff in an alleged price-fixing conspiracy to bring forward some evidence of class-wide harm, does not mean that the plaintiff must prove that there has been class-wide harm in the same way that it must at trial. The evidence rule does not override the merits rule.

The applicant for certification must bring forward “some evidence”. What does that mean? In particular,

what does that mean where the evidence in question is doubtful or contested?

Pro-Sys Consultants v. Infineon

Pro-Sys Consultants Ltd. v. Infineon Ltd. involved allegations of price-fixing in the world-wide market for DRAM, a computer hardware component, sold from 1999 to 2002.⁴ All the defendants but one pleaded guilty in the United States to associated criminal charges, the exception having co-operated with the authorities in exchange for amnesty in the criminal proceedings, in which the other defendants paid fines totalling US\$731 million. A U.S. class proceeding brought by direct purchasers was settled for US\$160 million.

In the B.C. action, the proposed class was limited to residents of British Columbia who purchased DRAM (direct purchasers) or products containing DRAM (indirect purchasers) during the class period.

The certification hearing involved a battle of experts who were cross-examined in advance of the hearing, as well as extensive legal argument. The evidentiary issue was whether there was a viable method for the quantification of the claim advanced on behalf of the class on a class-wide basis, that is, without necessitating what would otherwise be extensive individual inquiries. At first instance, Justice Masuhara embarked upon a detailed assessment of this evidence and denied certification. Speaking for the Court of Appeal, Smith J.A. held that Masuhara J. erred in his approach to the evidence. He stated:

The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: Hollick at para. 16. The burden is on the plaintiff to show ‘some basis in fact’ for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: Hollick, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one — it requires only a ‘minimum evidentiary basis’....

Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial. On this point, I adopt the remarks of J.L. Lax J. in Griffin v. Dell Canada Inc., [2009] O.J. No. 418 (S.C.J.) at para. 76:

*The court's 'gatekeeper' role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in R. v. Mohan, [1994] 2 S.C.R. 9, and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible*⁵

[Some citations omitted]

These passages tell us what approach is not to be taken to the evidence, but they do not articulate a positive test. While the court must exercise its gatekeeper role in relation to expert evidence, the evidentiary burden is 'not onerous' and 'should not be subjected to the exacting scrutiny required at a trial'.

Later in its reasons, the court came closer to stating a positive test:

The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. ... The dispute here is over whether total gain or loss can be determined as a practical matter on the particular facts of this case. Those facts have not yet been fully developed and it was therefore premature of the chambers judge to reject Dr. Ross' opinion. The close examination to which he subjected it should have been left for the trial judge, whose task it will be to evaluate the conflicting expert opinions and to decide what weight to give them. In my view, Dr. Ross' evidence met the low threshold required to establish for purposes of certification that gain and its counterpart, damage, can be shown on common evidence.⁶

[Emphasis added]

This particular formulation — the requirement of a credible or plausible methodology — must be read in the context of the court's assessment that the dispute between the experts, Dr. Ross and Ms. Sanderson, did not concern the existence of a method for the assessment of class-wide harm, in the form of statistical regression analysis. The defendants' expert accepted that a regression analysis could calculate an overcharge but raised serious questions as to whether such an analysis could be practical in the industry in question. The language of the court is, however, suggestive of a

general test, that the evidence proffered by a plaintiff in relation to a factual issue germane to the requirements for certification must be 'plausible or credible'.

*Pro-Sys Consultants Ltd v. Microsoft Corp.*⁷ is a subsequent case involving allegations of anti-competitive behaviour on the part of a single defendant in the sale of computer software. Again, the court was faced with conflicting expert evidence addressing the question of class-wide harm. Justice Myers took *Pro-Sys v. Infineon* as having established, as a general matter, that "the plaintiff need only show a credible or plausible methodology".⁸ He applied this test through his assessment of the evidence, finding that the approach put forward by the plaintiff's expert was at least plausible, and this was sufficient.⁹

These two decisions outline a test but do not discuss its content. In particular, what is required on a contested certification application to demonstrate a credible or plausible theory? Is it enough that a qualified expert expresses an opinion that class-wide harm can be established? It is not yet clear how far the court may go in considering conflicting evidence in order to determine whether the plaintiff has demonstrated a credible or plausible methodology or other position in relation to an issue to be determined on certification.

A competing perspective: the "air of reality cases"

Several Canadian authorities have subjected a certification application to an "air of reality" assessment. In these cases, the courts have been clear that this is not a preliminary merits test. Rather, it appears to be an evaluation of the evidence adduced in order to assess the connection between the proposed class and the claims advanced.

*Samos Investments Inc. v. Pattison*¹⁰ involved a proposed class action brought against businessman, Jimmy Pattison, and others on behalf of former investors in various companies controlled by him. Justice Bauman (as he then was) relied on an absence of evidence in support of the plaintiff's complaint, stating:

So there is a distinction between looking for evidence that members of the proposed class have individually a claim on the merits

and testing the reality of the proposed linkage between the plaintiff's claim and the proposed class.

The former is not an appropriate enquiry on the certification application, but the latter is.

...

Hollick, of course, was a case of alleged nuisance created by a municipal landfill operation. So in seeking to ensure an identifiable class, the court sought evidence of some rational relationship between the class and the common issues, that is, the interference in the enjoyment of property by means of noise and physical emissions.

*That, I conclude, is an air of reality test of a sort: in the type of case where an identifiable class of persons with common issues is not obvious, the putative representative must show that the proposed class is defined sufficiently narrowly by leading evidence on the certification application. In Hollick, it was evidence that other members of the proposed class complained of the nuisance.*¹¹

Applying this air of reality test, in the context of a case where there was significant difficulty with the proposed class definition, Bauman J. held that it was material to consider the absence of complaints from other members of the proposed class in circumstances where these might have been expected and he relied on this as an alternative ground to dismiss the certification application.

The Court of Appeal dismissed an appeal, declining to comment on this aspect of Bauman J.'s reasoning.¹²

Justice Groberman (as he then was) took "air of reality" reasoning a little further in *Nelson v. Hoops L.P.* by extending it beyond consideration of the existence of an identifiable class to the question of preferability generally.¹³ The plaintiff claimed on behalf of 1,465 Vancouver Grizzlies seasons ticketholders after the team was moved out of Vancouver. The cause of action was for misrepresentation of the owner's intentions, on the theory that the ticketholders would not have renewed their tickets had they known that the team would be leaving. Justice Groberman viewed the proposed class as "far from homogenous" and thought the theory of the case "unrealistic" in relation to more than "a very small number" of ticketholders. He stated:

In this regard, I agree with the observations of Bauman J. in Samos Investments v. Pattison, 2001 BCSC 1790, 22 B.L.R.(3d) 46, that a form of 'air of reality test' ought to be applied in the analysis of whether a class proceeding is an efficient and fair procedure by which to try a claim. In the words of counsel in that case, quoted at paragraph 156 of the judgment:

Is there an air of reality to the plaintiff's claim of an identifiable class with common issues such that considerations of fairness, efficiency and access to justice tip the balance in favour of certification?

*In my view, it is desirable in a case such as this one to show that there is an air of reality in the suggestion that a large class of persons acted on the same basis and with the same motivations as the plaintiff is alleged to have acted upon.*¹⁴

The "air of reality" approach was also adopted in *Chartrand v. General Motors Corporation*¹⁵ and *McFarlane v. United Parcel Service Canada Ltd.*,¹⁶ both cases of failed certification applications. On the other hand, Chief Justice of B.C. Finch rejected an attempt to extend Bauman J.'s approach to the point that plaintiffs would be required generally to bring forward evidence of demand for the class proceeding from members of the putative class; *Hoy v. Medtronic, Inc.*¹⁷ And in *Lambert v. Guidant*,¹⁸ Justice Cullity forcefully criticized the notion of a preliminary merits test in the form of a search for an air of reality, although without mentioning any of the British Columbia cases where "air of reality" is discussed.

The "air of reality" inquiry might be seen as a modified preliminary merits test or as a differently formulated expression of the plaintiff's failure to demonstrate a "credible or plausible" theory. These two articulations manifest the tension identified at the beginning of this article and underscore the need for the courts to further develop and refine the content of the evidentiary inquiry at the certification stage.

U.S. jurisprudence

The tension between the evidence rule and the merits rule is clearly visible in the U.S. jurisprudence, with federal appellate circuit courts stating a more robust standard for testing expert and other evidence at the certification stage.

In *Eisen v. Carlisle & Jacquelin*,¹⁹ the U.S. Supreme Court held that the class certification stage was not an occasion for the examination of the merits of a case. However, subsequent decisions have drawn a distinction between an inquiry into the merits of the issues to be decided under Federal Rule 23 and an inquiry into the merits of the underlying claims.

As is often the case, appellate courts are not agreed on the content of the inquiry.²⁰ *Brown v. American Honda*²¹

provides a useful summary of the differing positions. At issue was the defendants' contention that the district court had not engaged in "a sufficiently searching inquiry into the relevant merits issues". The court described it as "settled" that some inquiry into the merits is required at the certification stage "to the extent that the merits overlap with the Rule 23 criteria". The court observed that, while the inquiry is described generally as "searching", the federal circuit courts differ as to what constitutes a "searching" inquiry. Some circuits require findings to be made in respect of the Rule 23 issues whereas others do not require findings, nor hold that an inquiry will always be necessary. In *Brown*, the court held that a novel theory of loss and its supporting facts must be subject to a searching inquiry into whether the plaintiffs would be able to prove their case. In that regard, the court stated that it was looking

not for hard factual proof, but for a more thorough explanation of how the pivotal evidence behind the plaintiff's theory can be established. If there is no realistic means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win.

Other U.S. courts look for a "rigorous" inquiry. Underlying this approach is open recognition that the certification stage is often critical, as defendants, faced even with a weak case, seek to avoid potentially ruinous recovery; see *Hevesl v. Citigroup Inc.*²²

*Re: Hydrogen Peroxide Antitrust Litigation*²³ was a rigorous analysis case, where the court held that a "threshold showing" was insufficient. Rigorous analysis of expert evidence was required: such evidence should not be uncritically accepted. The court went further, holding: "Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis rule". The court observed that to fail to resolve disputes between experts would mean that a plaintiff could obtain certification merely by hiring a competent expert.²⁴

The language of some of these decisions is markedly different from that in *Pro-Sys v. Infineon*. These U.S. cases require a deeper, more aggressive inquiry into the evidence bearing on certification. Demonstrating a credible or plausible theory would not be sufficient to

satisfy the evidentiary requirement set by these appellate circuit courts.

Assessment

Pro-Sys v. Infineon is a first step in providing some clarity to the Canadian picture. It calls for some evidentiary inquiry, recognizing the unfairness of imposing a higher standard on the plaintiff prior to full discovery, and, likewise, the unfairness to the defendant if evidence is not subjected to some scrutiny. Plaintiffs obtain the benefit of a low threshold, while defendants are not excluded from attacking the approach put forward by the plaintiffs' experts on the basis that it is not plausible and credible. In this way, the "credible and plausible" test goes some way to meeting the concerns of both sides. More needs to be done by the courts, however, to guide future litigants.

The inquiry must remain within the confines imposed by the evidence rule, but it is not always an easy matter to determine to what extent the court may have reached its decision because of its view of the underlying case. While referring to the evidence in the context of the evidence rule, parties often seek to persuade the court of the merit, or lack thereof, of the underlying claim. Judges are not immune to this advocacy. The Court of Appeal in *Pro-Sys v. Infineon* appears to have been influenced by the guilty pleas and fines that were the backdrop to that case; just as Groberman J. in *Nelson v. Hoops L.P.* clearly thought the action at hand was far-fetched. It will assist if the courts will fully set out their reasoning in addressing the evidence; in this way, the content of the inquiry will become better defined and the distinction between the evidence rule and merits rule will be respected.

Focusing on the objectives of the inquiry will assist in defining its content. One of these objectives requires the court to be satisfied that the proceeding will be manageable and efficient, or at least, will likely be so. In the context of the evidentiary requirements, the court can be so satisfied where there is evidence of a credible or plausible theory or methodology to prove liability and quantum on a class-wide basis.

It would be reasonable to expect that the courts will require more than the fact of a qualified expert opinion

to find that a theory is credible. While the courts are likely to be very cautious in weighing evidence, a distinction should be drawn between the weighing of evidence to determine which expert is to be preferred and the assessment of evidence to determine whether a proffered theory is fundamentally flawed or otherwise lacking in credibility.

As the certification decisions better define the content of the evidentiary inquiry, the courts should be mindful of the inherent tensions in the process in seeking to maintain a fair balance between the concerns of the parties in these important applications.

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¹ [2009] B.C.J. No. 2239, 2009 BCCA 503.

² [2001] S.C.J. No. 67, 2001 SCC 68.

³ See Ward K Branch, *Class Actions in Canada* (looseleaf) (Toronto: Canada Law Book, current to December, 2002): at paras. 4.1530-40; which was approved in *Hoffman v. Monsanto Canada Inc.*, [2003] S.J. No. 259, 2003 SKQB 174 at para. 43 and *Cole v. Prairie Centre Credit Union Ltd.*, [2007] S.J. No. 493, 2007 SKQB 330 at para. 4.

⁴ *Supra* note 1.

⁵ *Ibid.* at paras. 65-66.

⁶ *Ibid.* at para. 68.

⁷ [2010] B.C.J. No. 380, 2010 BCSC 285.

⁸ *Ibid.* at para. 22.

⁹ *Ibid.* at paras. 126, 133, 144, 154, 159, 164 and 190.

¹⁰ [2001] B.C.J. No. 2702, 2001 BCSC 1790, 22 BLR (3d) 46.

¹¹ *Ibid.* at paras. 160-161 and 165-166.

¹² [2003] B.C.J. No. 348, 2003 BCCA 87 at paras. 48-50.

¹³ [2003] B.C.J. No. 382, 2003 BCSC 277, *aff'd* [2004] B.C.J. No. 618, 2004 BCCA 174.

¹⁴ *Ibid.* at paras. 38-39.

¹⁵ [2008] B.C.J. No. 2520, 2008 BCSC 1781.

¹⁶ [2009] B.C.J. No. 1112, 2009 BCSC 740.

¹⁷ [2003] B.C.J. No. 1251, 2003 BCCA 316 at para. 58.

¹⁸ [2009] O.J. No. 1910 (S.C.J.) at paras. 67-71.

¹⁹ 417 U.S. 156 (1974).

²⁰ In considering the U.S. authorities, it is important to bear in mind that in some jurisdictions, pre-certification document discovery and depositions may be much more comprehensive than is the case in Canada. This may well inform the courts' views of the nature of the inquiry to be undertaken at a certification hearing.

²¹ 522 F. 3d 6 (1st Cir. 2008).

²² 366 F. 3d 70 (2nd Cir. 2004).

²³ 552 F. 3d 305 (3rd Cir. 2008).

²⁴ In this regard, see also *West v. Prudential Securities, Inc.*, 282 F. 3d 935 at 938 (7th Cir. 2002)

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