

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

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Introduction

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

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

In antitrust cases, the nature and extent of the defendants’ alleged misconduct is usually acknowledged to be a common issue. What is hotly contested, however, is antitrust “impact”—whether (but not the extent to which) the defendants’ alleged conduct affected the class members. A key certification question is whether the fact of harm or damage can be established for all

class members on the basis of common proof, thereby making it a common issue.

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

A US Approach — The Third Circuit in *Hydrogen Peroxide*

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

Hydrogen Peroxide involved allegations of price-fixing. The District Court certified a class. After acknowledging the need

for “rigorous analysis”, the District Court concluded that antitrust impact was a common issue and that the predominance requirement had been met, noting as follows:⁷

Either [Beyer’s] market analysis or the pricing structure analysis would likely be independently sufficient at this stage. Plaintiffs and Dr. Beyer have provided us with both. Despite defendants’ claims to the contrary, we should require no more of plaintiffs in a motion for class certification.

...

So long as plaintiffs demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice. It will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants’. ... Plaintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class.

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

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

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

First, the court held that certification requires a “finding” that each certification requirement is met, and not merely a “threshold

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

Second, the court stated that certification courts “must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits”.¹² This flows from the fact that a case is not to be certified unless the certification requirements have been established. The court acknowledged that some issues relevant to certification may also be relevant to the underlying merits, but concluded that this overlap cannot permit the certification court to avoid addressing such issues. While noting a certification court’s wide discretion to impose limits on the scope of evidence, the court held that genuine disputes with respect to certification requirements must be resolved, whether or not they overlap with the underlying merits, and adopted the assertion that “tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.”¹³

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

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



stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

A Canadian Approach

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

In the Beginning There Was *Hollick*

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

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

The court dealt at some length with how certification requirements, including commonality and preferability, should be advanced by the parties and determined by certification courts. The court was influenced by the fact that a proposed preliminary merits test had been rejected when the relevant class proceedings legislation was enacted in noting that "the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action".²⁰ [emphasis in original]

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

The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. ... In my view a [pre-legislative advisory report] appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party to respond with evidence of its own.

In *Taub* ... the [Ontario] court wrote that ... while the [legislation] does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by [the legislative criteria for certification] as the basis for a certification order".

... In my view, the class representative must show some basis in fact for each of the certification requirements set out in the [legislation].

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

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

Then There Was *Chadha*

The first reported Canadian appellate decision dealing with certification of a proposed antitrust class action was rendered about 18 months after *Hollick* by the Ontario Court of Appeal in *Chadha*.²⁴ This case alleged a price-fixing conspiracy among manufacturers of iron oxide pigments used to color concrete bricks

and paving stones. The plaintiff proposed an indirect purchaser class consisting of owners of homes in which building materials colored with iron oxide were incorporated. It appeared to be common ground that the nature and extent of the alleged conspiracy were common issues. What divided the courts in this case was whether antitrust impact, a prerequisite for civil liability under the *Competition Act* or in tort, could be assessed on a common basis and, if not, whether preferability had been made out.

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

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

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

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

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

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

Recent Developments – The Courts Retreat

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

British Columbia — DRAM

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

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

preferability had not been established.

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

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

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

In a case such as this where the context is pass through, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology that is capable of relating harm to Class Members. ... Given the inherent complexities, the scrutiny cannot be superficial.³²

Dr. Ross' opinion that "it is possible to assess and quantify the overcharge" to direct purchasers and passed through to downstream purchasers cannot simply be taken at first blush. If scrutiny is not conducted at this stage, there is a real risk of dysfunction which cannot be in the interest of the litigations or the judicial process.³³

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

...

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

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

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

Ontario — *Quizno's*

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

By majority, the Divisional Court reversed and certified the action. Among other things, the Divisional Court criticized the motion judge's approach to the evidence.³⁷ In particular, the Divisional Court said that he should have backed away from any attempt to rationalize competing expert evidence:³⁸

It is neither necessary nor desirable to engage in a weighing of this conflicting evidence on a certification motion. The plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent that they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader. Where the assumptions are debated by experts, these questions are best resolved at a common issues trial. A motions judge is entitled to review the evidentiary foundation to determine whether there is

some basis in fact defined that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports.

Ontario — *Hydrogen Peroxide*

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

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

It is necessary to next examine the evidence of Drs. Beyer and Schwindt [the defense expert]. Before doing so, however, it bears remembering that it is not necessary to reconcile the conflicting opinions at this stage in the proceeding.

...

... I understand the defendants' various criticisms of Dr. Beyer's report, but it seems to me that I need only be satisfied that a methodology may exist for the calculation of damages. Dr. Beyer's report attempts to postulate such a methodology. Whether his evidence will be accepted at trial is a completely different issue. It may well be that Dr. Schwindt's various criticisms are well-founded. However, at this stage of the proceedings and on the strength of the evidentiary record as it exists today, I simply am unable to

say that Dr. Beyer's opinion will not be accepted by a court. ... It is simply not possible at this stage of the proceeding to determine whose opinion is to be preferred.

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

[T]he certification judge is to evaluate and weigh the expert evidence to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of the conflicting expert reports.⁴⁰

...

While Dr. Schwindt challenges Dr. Beyer's opinion, the certification judge is not obliged to make any determination on the merits of these opinions.⁴¹

I disagree with the moving parties' submission that *Chadha* requires a certification judge to evaluate the evidence respecting a methodology and make findings as to whether or not the methodology accords with sound principles of economic science.⁴²

Québec

The Province of Québec is Canada's only civil law jurisdiction, and its class action legislation, which dates back to the 1970s, predates that of the other Canadian provinces by nearly 20 years. Québec's authorization (certification) process is also somewhat different. First, there is no preferability or predominance requirement. Class actions in Québec are essentially authorized if the claimant's motion discloses a plausible cause of action, and if the case raises questions of law or fact that are either "identical", "similar" or even simply "related". Moreover, on a motion for authorization, Québec courts must accept all of the claimant's pleaded facts. As a result, contradictory expert evidence on such issues as damages and causation is virtually unheard of in the Québec authorization process.

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

The Early Cases

A proposed class action against the oil industry in 1985 was one of the first antitrust class actions to be brought in Canada.

The Québec Court of Appeal refused to authorize it, citing the vagueness and the vacuity of the claimant's allegations.⁴³ Motions for authorization of antitrust class actions were not brought again in Québec for almost two decades.

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

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

The Petroleum Cases

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

First, in November 2008, the Superior Court authorized its first antitrust class action in *Savoie*.⁴⁶ Class wide damages did not pose a significant problem in *Savoie* since the class was comprised only of direct purchasers, and since the alleged conspiracy related to a single, well defined and uniform price rise.

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

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

Conclusion

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

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

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

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

The Canadian pendulum has swung — from *Hollick*, out to *Chadha*, and then back to *Hydrogen Peroxide Canada*, *Quizno's*, *BC*

DRAM and *Jacques*. The US pendulum appears to be swinging in the opposite direction. It is in the nature of a pendulum to move, and change course. Whether, and where, the Canadian pendulum will move next remains to be seen. ■

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2. See Fed. R. Civ. P. 23
3. In *Re: Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) ("*US Hydrogen Peroxide*")
4. The recent common law Canadian cases reviewed for these purposes are *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, rev'g 2008 BCSC 575 ("*BC DRAM*"); *Quizno's Canada Restaurant Corporation v. 2038724 Ontario Ltd.*, 2010 ONCA 466, affg 2009 CanLII 23374 (Div. Ct.) ("*Quizno's*"); and *Irving Paper Limited v. Autofina Chemicals Inc.*, 2010 ONSC 2705 ("*Hydrogen Peroxide Canada*").
5. In *Re: Linerboard antitrust litig.*, 305f.3d 145(3d Cir. 2002) ("*Linerboard*")
6. See, for example, *Linerboard*, p. 155
7. *US Hydrogen Peroxide*, pp. 315 and 321
8. *US Hydrogen Peroxide*, p. 310
9. *US Hydrogen Peroxide*, p. 309
10. *US Hydrogen Peroxide*, pp. 307 and 321
11. *US Hydrogen Peroxide*, p. 321
12. *US Hydrogen Peroxide*, p. 307
13. *US Hydrogen Peroxide*, p. 324
14. *US Hydrogen Peroxide*, p. 323
15. *US Hydrogen Peroxide*, p. 323
16. *US Hydrogen Peroxide*, p. 323
17. *Hollick v. Toronto (City)*, 2001 SCC 68 ("*Hollick*")
18. *Hollick*, para. 30
19. *Hollick*, para. 32
20. *Hollick*, para. 16
21. *Hollick*, paras. 22-25
22. The only exception is the requirement that the Statement of Claim disclose a valid cause of action, which is determined (like a motion to strike) on the face of the pleading – see *Hollick*, para. 25
23. *Hollick*, para. 9
24. *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), affg (2001), 54 O.R. (3d) 920 (Div. Ct.), revg (1999), 45 O.R. (3d) 29 (S.C.J.) ("*Chadha*")
25. *Chadha*, para. 27. The motion decision predated the Supreme Court's ruling in *Hollick*.
26. *Chadha*, para. 17
27. The defendants also led extensive fact evidence regarding the DRAM market and the wide variety of channels through which DRAM flows from its original sale to its incorporation into finished goods and those goods' ultimate sale to indirect purchaser consumers. The plaintiff led no evidence about DRAM, did not challenge the defendants' DRAM evidence and made no effort to depose the defendants' industry expert.
28. A motion for leave to appeal to the Supreme Court of Canada was denied.
29. *BCDRAM*, *supra*, at para. 65
30. *BCDRAM*, para. 68
31. *BCDRAM*, paras. 63 and 67
32. *BCDRAM*, para. 58
33. *BCDRAM*, para. 58
34. *BCDRAM*, para. 60
35. *BCDRAM*, para. 62
36. *BCDRAM*, para. 67
37. The Ontario Court of Appeal affirmed the decision of the Divisional Court without commenting on this aspect of its reasons.
38. *Quizno's*, Divisional Court, para. 102
39. *Hydrogen Peroxide Canada*, paras. 119 and 143
40. *Hydrogen Peroxide Canada*, para. 51
41. *Hydrogen Peroxide Canada*, para. 55
42. *Hydrogen Peroxide Canada*, para. 61
43. *Labranche v. Compagnie Pétrolière Impériale Limitée Esso et al.*, C.A.M. 500-09-001009-828, September 18, 1985 (« *Labranche* »)
44. *Harmegnies v. Toyota Canada Inc.*, EYB 2008-130376 (« *Harmegnies* »)
45. *Cloutier v. Infineon Technologies et al.*, C.S.Q. 500-06-000251-047 June 17, 2008 (« *QC DRAM* »)
46. *Savoie v. Compagnie Pétrolière Impériale Ltée et al.*, (2008) QCCS 6634 (« *Savoie* »)
47. *Jacques et al. v. Petro-Canada et al.*, C.S.Q. 200-06-000102-080, November 30, 2009 (« *Jacques* »)
48. Defendants may not appeal decisions to authorize in Québec.
49. *Hollick*, para. 22



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David is a partner in the firm's litigation and competition groups, coordinator of the firm's national Advocacy Division and chair of the firm's class action practice. David's practice emphasizes complex litigation, including competition, IP, commercial and regulatory disputes. His class action experience includes national cases involving competition, consumer deception and securities claims in the pharmaceutical, chemicals, automotive and electronics industries; raising issues including cross-border discovery, settlement and certification. Counsel in numerous competition cases, including over 20 cartel class actions (e.g. graphite electrodes, vitamins, linerboard, rubber chemicals, cross-border vehicle sales and computer components such as DRAM, SRAM and LCD and CRT monitors) as well as private actions, contested mergers and Competition Bureau investigations. David taught ADR at Osgoode Hall Law School (Toronto) and Queen's University Law School (Kingston) for nine years. Member, CBA and ABA (section on antitrust). LLB (Hons), University of Toronto. Ontario Bar (1983). Law Clerk to the Chief Justice of Ontario (1983/1984). Rated AV, Martindale-Hubbell. David speaks and writes on issues including competition law, class actions and the intersection of competition and IP law.



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Éric Vallières is a Montréal litigator specializing in sophisticated high-end litigation that includes class actions, competition cases and bankruptcy matters with a focus in anti-trust, product liability and consumer protection. His clients include multinational corporations, international organizations, national market leaders, financial institutions and private equity funds. He routinely advises clients in connection with matters relating to Canada's Competition Act, including alleged cartels and situations of abuse of dominance. Among others, Eric is currently acting as defense counsel in the DRAM class action, in the Air Cargo class action, as well as in the Québec Gas Stations Class Actions. Eric is a graduate of Laval University in Québec City (1991 - Gold medalist) and of the King's College of the University of London, UK (1993 - with merits). Eric is a frequent speaker in Canada and abroad on topics relating to competition law, bankruptcy matters, and cross-border litigation.