

# Developments in Class Actions Law: The 2013-2014 Term — The Supreme Court of Canada and the Still-Curious Requirement of “Some Basis in Fact”

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## I. INTRODUCTION

The certification of class actions stands at the intersection of legal principle, socio-economic policy and judicial reform. In fact, it is no exaggeration to say that certification is one of the most overtly political motions known to Canadian law. Passionate arguments both for and against class actions have been made on both sides of the debate. This melting pot of values and beliefs has the potential to produce strange legal results, as Cullity J. observed in his 2011 article, “Certification in Class Proceedings — The Curious Requirement of ‘Some Basis in Fact’”.<sup>1</sup>

It was within this context that the Supreme Court of Canada delivered five judgments in the 2013-2014 Term (referred to herein as the “2013-2014 Decisions”) addressing the test for certifying class actions, or “authorization” as it is known in Quebec. The claims at issue in these cases reflect the broad spectrum of disputes that have become the fodder of modern class proceedings. The first three cases, *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,<sup>2</sup> *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*<sup>3</sup> and *Infineon Technologies AG v. Option consommateurs*,<sup>4</sup>

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<sup>1</sup> (2011) 51 Can. Bus. L.J. 407 [hereinafter “Cullity”].

<sup>2</sup> [2013] S.C.J. No. 57, [2013] 3 S.C.R. 477 (S.C.C.) [hereinafter “*Microsoft*”]. The author was co-counsel to the Respondents in *Microsoft*.

<sup>3</sup> [2013] S.C.J. No. 58, [2013] 3 S.C.R. 545 (S.C.C.) [hereinafter “*Sun-Rype*”].

<sup>4</sup> [2013] S.C.J. No. 59, [2013] 3 S.C.R. 600 (S.C.C.) [hereinafter “*Infineon*”].

were competition class actions brought on behalf of the purchasers of allegedly overpriced goods. The fourth case, *AIC Ltd. v. Fischer*,<sup>5</sup> was a class action by investors against mutual fund managers who allegedly permitted improper trading activities to occur in the investors' funds. The fifth case, *Vivendi Canada Inc. v. Dell'Aniello*,<sup>6</sup> was a class action by retired employees and dependants concerning changes to the defendant employer's health insurance plan.

Collectively, the 2013-2014 Decisions represent the Court's most significant foray into the field of class actions in more than 10 years. They touch on multiple issues of importance to class actions procedure (e.g., the identifiable class, common issues and preferable procedure criteria, the use of the aggregate damages provisions at certification, and the legal differences between common law Canada and Quebec). This is to say nothing of the many substantive matters they address (such as the passing-off defence, the legal tenability of indirect purchaser claims, waiver of tort and constructive trusts). However, from the point of view of the class actions practitioner, the most important discussion in the judgments is likely to concern the standard of proof that plaintiffs must meet to certify their claims. More than any other issue, it is the standard of proof that increasingly determines the degree to which parties can advance or oppose certification in any given case.

The purpose of this paper is to examine the standard of proof that emerges from the 2013-2014 Decisions, focusing on the common law rather than Quebec jurisprudence. The paper begins by exploring the background to this issue, with reference to the history of Canadian class actions legislation and the Supreme Court's 2001 judgment in *Hollick v. Toronto (City)*,<sup>7</sup> where the standard of proof was famously described as requiring "some basis in fact". Thereafter, the paper outlines the judicial treatment of the "some basis in fact" test in the wake of *Hollick*, and engages in a detailed analysis of the Court's approach to this issue in the 2013-2014 Decisions.

As shall be apparent from this review, the 2013-2014 Decisions arguably lower the *Hollick* standard of proof. In doing so, they raise several new questions about class actions going forward. In the Court's drive to articulate a flexible certification test that can accommodate the

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<sup>5</sup> [2013] S.C.J. No. 69, [2013] 3 S.C.R. 949 (S.C.C.) [hereinafter "*AIC*"].

<sup>6</sup> [2014] S.C.J. No. 1, [2014] 1 S.C.R. 3 (S.C.C.) [hereinafter "*Vivendi*"].

<sup>7</sup> [2001] S.C.J. No. 67, [2001] 3 S.C.R. 158 (S.C.C.) [hereinafter "*Hollick*"].

class action's "significant social and legal role",<sup>8</sup> it has produced an open-ended standard which provides little guidance about the practical threshold that litigants are expected to meet. Further, the Court's approach is subject to unexplained inconsistencies, and lacks a balanced assessment of the impact that facilitating class actions may have upon defendants as compared to plaintiffs alone. The end result is that the "some basis in fact" requirement remains a curious one. Indeed, it would appear to resemble more of a tool for implementing judicial policy preferences than a serious attempt to formulate a principled evidentiary standard.

## II. BACKGROUND

### 1. The History of Class Actions Legislation in Canada

The class action can be traced to the equity jurisprudence of the English Court of Chancery in the 17th and 18th centuries.<sup>9</sup> During this period, the courts developed a compulsory joinder rule which required that all those interested in the subject matter of a dispute be made parties. The rule was eventually relaxed to permit representative actions in cases where numerous persons had a common interest in the subject of the litigation, and this became codified in the rules of court with the fusion of law and equity in 1873.<sup>10</sup> Similar provisions were added to the rules of

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<sup>8</sup> *Marcotte v. Longueuil (City)*, [2009] S.C.J. No. 43, [2009] 3 S.C.R. 65, at para. 43 (S.C.C.) [hereinafter "*Marcotte*"].

<sup>9</sup> See generally *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] S.C.J. No. 63, [2001] 2 S.C.R. 534, at paras. 19-20 (S.C.C.) [hereinafter "*Dutton*"]. The English Chancery practice also applied to the Canadian Chancery courts before the fusion of law and equity: *General Motors of Canada Ltd. v. Naken*, [1983] S.C.J. No. 9, [1983] 1 S.C.R. 72, at 83 (S.C.C.) [hereinafter "*Naken*"]. For an excellent review of the historical origins of Canadian class actions, see M.A. Eizenga & E. Davis, "A History of Class Actions: Modern Lessons from Deep Roots" (2011) 7 *Can. Class Action Rev.* 3.

<sup>10</sup> M.A. Shone, "The Modern Class Action Comes to Alberta" (2005) 42 *Alta. L. Rev.* 913, at 914. The rule was first found in the *Supreme Court of Judicature Act 1873* (U.K.), 36 & 37 *Vict.*, c. 66, Sch., s. 10, and was later moved to the *Supreme Court of Judicature Act 1875* (U.K.), 38 & 39 *Vict.*, c. 77, First Sch., Order XVI, s. 9, where it provided that "[w]here there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested". Significant cases interpreting this rule included *Duke of Bedford v. Ellis*, [1901] A.C. 1 (H.L.); *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.); and *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (C.A.).

court in most Canadian jurisdictions,<sup>11</sup> and they remained in force until the widespread proliferation of class actions legislation in the late 20th and early 21st centuries. However, these rules did not require a plaintiff to obtain judicial certification or authorization prior to bringing a representative action. Instead, if a defendant wished to challenge the appropriateness of the representative action as a procedural vehicle for the litigation, it would bring a motion to strike the action after it was commenced, on the basis that the claim did not satisfy the requirements of the rule.

The first modern class actions legislation in Canada took the form of amendments to the Quebec *Code of Civil Procedure*<sup>12</sup> in the late 1970s.<sup>13</sup> The principal provisions remain articles 1002-1003, which at the time required a plaintiff to move for judicial authorization prior to instituting a class action with affidavit evidence, including by establishing that “the facts alleged seem to justify the conclusions sought”.<sup>14</sup> This was interpreted to mean that the plaintiff must show a “good colour of right”, so as to exclude any “frivolous or manifestly improper action”.<sup>15</sup> The

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<sup>11</sup> See, e.g., Rule 42 of the Alberta Rules of Court, Alta. Reg. 390/68 at issue in *Dutton*, which provided that “[w]here 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 authorized by the Court to defend on behalf of or for the benefit of all”.

<sup>12</sup> CQLR, c. C-25 [hereinafter “CCP”].

<sup>13</sup> The amendments were adopted in 1978 and became effective on January 19, 1979: see *Comité régional des usagers des transports en commun de Québec v. Québec (Urban Community Transit Commission)*, [1981] S.C.J. No. 37, [1981] 1 S.C.R. 424, at 425 (S.C.C.) [hereinafter “*Urban Community*”].

<sup>14</sup> Articles 1002-1003 originally provided:

1002. A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.

The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act; the allegations of the motion are supported by an affidavit. It is accompanied with a notice of at least ten days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action.

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

- (a) the recourses of the members raise identical, similar or related questions of law or fact;
- (b) the facts alleged seem to justify the conclusions sought;
- (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
- (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

<sup>15</sup> *Urban Community*, *supra*, note 13, at 429. The good colour of right requirement has also been expressed as a “*prima facie* case”: *Marcotte*, *supra*, note 8, at para. 23.

Supreme Court of Canada cautioned that, in applying this test, “[t]he judge is not called upon to determine the merits of the case”.<sup>16</sup> However, the Court also appeared to suggest that the authorization judge could weigh the evidence in determining whether this threshold was met, at least insofar as it held the authorization inquiry should be guided by the following test for interlocutory injunctions:

The judge from whom it is sought cannot either allow it or refuse it by giving the evidence submitted to him, at this stage, the effect of final evidence adduced for a decision on the merits of the action; *he should only weigh the evidence so that he can decide whether the applicant does or does not appear to have a good and valid right to enforce*: as to the right, the applicant is entitled to have the respondent refrain from or cease performing a given operation if there is a good colour of right ...<sup>17</sup>

Effective 2003, article 1002 of the CCP was amended to remove the requirement that the plaintiff submit an affidavit in support of authorization, and now provides that “the motion may only be contested orally and the judge may allow relevant evidence to be submitted”.<sup>18</sup>

Outside Quebec, modern class actions legislation was not enacted until the Ontario legislature passed the *Class Proceedings Act, 1992*.<sup>19</sup> The impetus for this new legislation came from three primary sources.

The first was the Supreme Court of Canada’s watershed judgment in *Naken*.<sup>20</sup> It involved an action under the Ontario representative action rule (Rule 75 of the Supreme Court of Ontario Rules of Practice)<sup>21</sup> by the owners of Firenza automobiles, which were alleged to contain mechanical defects, in breach of various warranties and representations existing between the manufacturer and the class members. Justice Estey for a unanimous Court granted the manufacturer’s motion to strike, finding that Rule 75 was inadequate to address the complexities of the case. In contrast to the class actions legislation in the Quebec CCP and

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<sup>16</sup> *Guimond v. Quebec (Attorney General)*, [1996] S.C.J. No. 91, [1996] 3 S.C.R. 347, at para. 11 (S.C.C.) [hereinafter “*Guimond*”]. See also *Marcotte*, *supra*, note 8, at para. 22.

<sup>17</sup> *Urban Community*, *supra*, note 13, at 428-29, citing *Pérusse et Papa v. Commissaires d’écoles de St-Léonard de Port-Maurice*, [1969] J.Q. no 12, [1970] C.A. 324, at 329-30 (Que. C.A.) (emphasis added). See also *Guimond*, *supra*, note 16, at para. 9.

<sup>18</sup> For an extensive discussion of the effect of this amendment, see *Pharmascience inc. v. Option Consommateurs*, [2005] Q.J. No. 4770, 2005 QCCA 437 (Que. C.A.), leave to appeal refused [2005] S.C.C.A. No. 253 (S.C.C.).

<sup>19</sup> S.O. 1992, c. 6 [hereinafter “Ontario CPA”].

<sup>20</sup> *Naken*, *supra*, note 9.

<sup>21</sup> R.R.O. 1970, Reg. 545 [hereinafter “old Ontario Rules”].

Rule 23 of the United States *Federal Rules of Civil Procedure*,<sup>22</sup> both of which Estey J. referred to for comparative purposes, the Court held that the representative action rule failed to address several important features of aggregate litigation (*e.g.*, pre-trial processes, limitation periods, the assessment of damages, costs, and the *res judicata* effect of a common issues judgment upon absent class members).<sup>23</sup> In other words, the *Naken* Court took the view that the representative action rule conferred an overabundance of discretion upon the judiciary. As Estey J. concluded:

... Here the rule is simple but entirely inadequate to the task which the respondents have brought before the courts in reliance upon the rule. The rule is very simple; indeed, perhaps too simple. ...

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It is my conclusion that the rule, consisting as it does of one sentence of some thirty words, is totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one.<sup>24</sup>

The second major impetus for the Ontario class actions legislation was the report of the Ontario Law Reform Commission (the “OLRC”) published in 1982, shortly before the *Naken* decision was released.<sup>25</sup> Similar to the CCP and U.S. Federal Rule 23, the OLRC Report recommended that Ontario impose a judicial certification requirement before a class action could proceed. As part of certification, the OLRC recommended that the court conduct a “preliminary merits test” which would require that the plaintiff establish the “substantive adequacy” of his or her case, including by demonstrating that there was “a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class”.<sup>26</sup> Additionally, the OLRC Report proposed that “both the representative plaintiff and the defendant should be required to file one or more affidavits setting out the facts material to the proposed certification tests upon which they intend to

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<sup>22</sup> 28a U.S.C. § 23.

<sup>23</sup> *Naken*, *supra*, note 9, at 96-105.

<sup>24</sup> *Id.*, at 93 and 105.

<sup>25</sup> Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) [hereinafter “OLRC Report”]. The OLRC Report was referred to in *Naken*, *supra*, note 9, at 93.

<sup>26</sup> OLRC Report, *supra*, note 25, at 312 and 324.

rely, and they should be permitted to examine the deponents of any such affidavits”<sup>27</sup>.

The nature of the preliminary merits test envisioned by the OLRC is noteworthy. In particular, the test required the plaintiff to go beyond the mere establishment of a triable issue:

The test that we propose is not aimed at those cases where it is clear that the action cannot succeed. These cases can be dealt with under Rule 126 of the present Supreme Court of Ontario Rules of Practice, and its equivalent in the proposed rules of civil procedure. At the same time, the Commission is concerned about imposing a standard that would be too high — in other words, one that would have the effect of disqualifying the vast majority of suits commenced as class actions. To ensure that our proposed class action procedure is truly useful, it must be available in a wide variety of circumstances. *The preliminary merits test that we propose would require a standard of proof that is not as strict as a prima facie case test, but more than simple proof that a triable issue exists.* We are satisfied that our preliminary merits test strikes a reasonable balance.<sup>28</sup>

The OLRC Report was not immediately implemented by the Ontario legislature. Instead, it was reconsidered in 1990 when the third driver behind the Ontario statute — the class actions report of the Attorney General of Ontario’s Advisory Committee — was released, containing the model legislation that was ultimately enacted, with some modifications, as the Ontario CPA.<sup>29</sup> While the Ontario Attorney General’s Report adopted many of the recommendations in the OLRC Report, it declined to endorse the preliminary merits test (though without comment),<sup>30</sup> and proposed in its place that the plaintiff on certification be required to establish that “a cause of action” exists. This was the approach ultimately followed by the legislature in section 5(1)(a) of the Ontario CPA, and is echoed by section 5(5), which states that “[a]n order certifying a class proceeding is not a determination of the merits of the proceeding”.

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<sup>27</sup> *Id.*, at 436.

<sup>28</sup> *Id.*, at 323-24 (emphasis added). The “triable issue” test which the OLRC is referring to in this passage appears to be the evidence-based test that was imposed upon a defendant when responding to a plaintiff’s summary judgment motion under Rule 58 of the old Ontario Rules: see the prior discussion of this test in the OLRC Report, *id.*, at 316-17.

<sup>29</sup> Ontario, Attorney General’s Advisory Committee on Class Action Reform, *Report of the Attorney General’s Advisory Committee on Class Action Reform* (Toronto: The Committee, 1990) [hereinafter “Ontario Attorney General’s Report”].

<sup>30</sup> *Id.*, at 30-33.

Interestingly, the Ontario Attorney General's Report did draw upon the OLRC Report in making another proposal. It would have required that, on certification, "the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely", in relation to which there would also be an entitlement to cross-examination.<sup>31</sup> However, when the Ontario CPA was enacted, no such provision was included, with the only requirement for evidence at certification being the obligation upon both parties to file affidavits providing their best information regarding the number of members in the class (section 5(3)).

Since the coming into force of the Ontario CPA in 1993, every common law province other than Prince Edward Island has adopted comprehensive class actions legislation. All contain a test for certification that is similar to section 5(1) of the Ontario CPA:

- 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or the notice of application discloses a cause of action;
  - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
  - (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.

Nonetheless, while these statutes are indistinguishable in many respects, they contain some interesting differences regarding the role of

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<sup>31</sup> *Id.*, at 33. See also 31 ("Both the plaintiff and the defendant should be able to file affidavit material on the motion for certification").

evidence at certification.<sup>32</sup> In particular, unlike Ontario, section 5 of the British Columbia *Class Proceedings Act*<sup>33</sup> requires the plaintiff and the defendant to file affidavits at the certification motion setting out all the material facts upon which they intend to rely (though the court may order otherwise with respect to the defendant).<sup>34</sup> By contrast, no Canadian jurisdiction other than British Columbia requires both the plaintiff and the defendant to file a material fact affidavit on the certification motion. Indeed, the only other certification legislation which requires that a material fact affidavit be filed is Rule 334.15 of the Federal Courts Rules,<sup>35</sup> and it only imposes this obligation upon the plaintiff, while permitting — but not requiring — the defendant to file an affidavit in reply. The remaining jurisdictions do not require the parties to file any affidavits at the certification hearing at all, not even one setting out an estimate of the class size as under the Ontario CPA.<sup>36</sup> That said, the legislation enacted in these provinces still contemplates the use of evidence on the certification motion, since it universally permits the court to adjourn the certification hearing in order to “permit *further* evidence”.<sup>37</sup>

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<sup>32</sup> Subtle variations also exist with respect to the test for certification itself. For instance, some of the provisions in the statutes contain explicit guidance on the factors to be considered by a court in assessing whether a class action would be the preferable procedure.

<sup>33</sup> R.S.B.C. 1996, c. 50 [hereinafter “B.C. CPA”].

<sup>34</sup> One could surmise that the reason for this difference is that the B.C. CPA creates a “no costs” regime, whereas under the Ontario CPA, plaintiffs are still exposed to the possibility of adverse costs awards. In removing this disincentive to bringing frivolous claims in British Columbia, the legislature may have concluded that it was necessary to ensure a more rigorous evidentiary review on certification. For an argument that no-costs jurisdictions like British Columbia should involve a more robust certification inquiry (albeit in relation to the pleadings) than jurisdictions like Ontario, see *Hoffman v. Monsanto Canada Inc.*, [2007] S.J. No. 182, 283 D.L.R. (4th) 190, at paras. 46-47 (Sask. C.A.), leave to appeal refused [2007] S.C.C.A. No. 347 (S.C.C.).

<sup>35</sup> SOR/98-106.

<sup>36</sup> They thus follow the approach recommended by the Uniform Law Conference of Canada, *Uniform Class Proceedings Act*, 1996.

<sup>37</sup> See: *Class Proceedings Act*, S.A. 2003, c. C-16.5 [hereinafter “Alberta CPA”], s. 6(1); *Class Actions Act*, S.S. 2001, c. C-12.01, s. 7(1); *Class Proceedings Act*, C.C.S.M. c. C130, s. 5(1); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 7(1); *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 6(1) (emphasis added). A similar provision is contained in s. 5(4) of the Ontario CPA and s. 5(6) of the B.C. CPA. See also the *Class Proceedings Act*, S.N.S. 2007, c. 28, which not only contemplates an adjournment of the certification hearing to permit the filing of further evidence (s. 8(1)), but also cross-examinations as of right on any affidavit filed with respect to certification (s. 21(1)). These evidentiary variations between the British Columbia, Ontario and proposed Alberta legislation were noted by the Alberta Law Reform Institute, *Final Report No. 85: Class Actions* (Edmonton: The Institute, 2000), at 207-208.

## 2. The 2001 Trilogy

The Supreme Court of Canada did not examine the test for certification in the common law provinces until the seminal 2001 trilogy of *Dutton* (on appeal from Alberta),<sup>38</sup> *Hollick* (on appeal from Ontario) and *Rumley v. British Columbia* (on appeal from B.C.)<sup>39</sup> (collectively, the “2001 Trilogy”). Of the three, the decision in *Hollick* contains the most significant analysis of the standard of proof, and remained the leading judgment on this issue until the 2013-2014 Decisions.<sup>40</sup>

*Hollick* involved a proposed class action alleging noise and pollution from a landfill operated by the defendant City, brought on behalf of 30,000 people who lived in the landfill’s vicinity. The claim was certified at first instance, but both the Supreme Court and the intermediate appellate courts held that certification should have been refused. The reason given for this by the Supreme Court itself was that the plaintiff failed to establish that a class action would be the preferable procedure for resolving the common issues pursuant to section 5(1)(d) of the Ontario CPA. In arriving at this conclusion, McLachlin C.J.C. for the unanimous panel made several important comments regarding the applicable standard of proof.

First, McLachlin C.J.C. noted that the Ontario legislature chose to reject the preliminary merits test proposed in the OLCRC Report, and that “it is essential therefore that courts not take an overly restrictive approach to the legislation”:<sup>41</sup>

... In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a “preliminary merits test” as part of the certification requirements. The proposed test would have required the putative class representative to show that “there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class” ... . Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim

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<sup>38</sup> *Dutton, supra*, note 9. The *Dutton* decision was rendered prior to the enactment of the Alberta CPA, and was decided under the Alberta representative action rule.

<sup>39</sup> [2001] S.C.J. No. 39, [2001] 3 S.C.R. 184 (S.C.C.) [hereinafter “*Rumley*”].

<sup>40</sup> Interestingly, *Hollick* was also the only decision of the 2001 Trilogy in which the Court reserved judgment, and the only one in which certification was denied. The appeals from certification in both *Dutton* and *Rumley* were dismissed from the bench, though the Court still reserved its reasons in each.

<sup>41</sup> *Hollick, supra*, note 7, at para 15.

“disclos[e] a cause of action” ... . Thus the certification stage is decidedly not meant to be a test of the merits of the action ... . Rather 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 ... .<sup>42</sup>

Therefore, in contrast to *Naken*, the Court in the 2001 Trilogy decided to adopt a “flexible and liberal” approach to class actions.<sup>43</sup> Indeed, as some commentators have noted, “*Hollick* is peppered with language indicating that the need for a class representative to establish ‘some basis in fact’ for the certification requirements ... is a low bar”.<sup>44</sup>

Second, however, and notwithstanding this renunciation of a “preliminary merits test”, McLachlin C.J.C. contemplated that the plaintiff could still be required to establish certain matters which overlapped with the merits as part of the certification criteria. In particular, she held that the plaintiff needed to show that each proposed class member had a “colourable claim” against the defendant, or put differently, that it was “implicit” in section 5(1) of the Ontario CPA that a “rational relationship” between the class members and the common issues must exist:

In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). ... The difficult question, however, is whether each of the putative class members does indeed have a claim — or at least what might be termed a “colourable claim” — against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues ...

The respondent is of course correct to state that implicit in the “identifiable class” requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case

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<sup>42</sup> *Id.*, at para. 16 (underlining in original).

<sup>43</sup> *Dutton*, *supra*, note 9, at para. 51.

<sup>44</sup> E.R. Hoaken & I.C. Matthews, “The Supreme Court of Canada’s Class Action Limbo: Just How Low Can the Certification Bar Go?” (forthcoming in the *Annual Review of Civil Litigation*) (Toronto: Thomson Carswell, 2014) [hereinafter “Hoaken & Matthews”]. As Hoaken and Matthews observe, such language includes McLachlin C.J.C.’s assertions that the requirement to show a rational relationship between the class and the common issues is “not an onerous one” (*Hollick*, *supra*, note 7, at para. 21), and that the preferable procedure criterion “was meant to be construed broadly” (*id.*, at para. 28).

(for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.<sup>45</sup>

Interestingly, in elaborating upon this requirement to show a “colourable claim” or “rational relationship” between the class and the common issues, McLachlin C.J.C. cited cases that denied certification based on findings of fact which clearly overlapped with the merits:

... There must be some showing ... that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see *W. K. Branch, Class Actions in Canada* (1996), at para. 4.205; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.) (*claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause*); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) (*claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation*).

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In *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. *The representative provided no evidence, however, suggesting that the mould had been*

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<sup>45</sup> *Hollick, supra*, note 7, at paras. 19-20. This requirement for a “colourable claim” by the class members that rationally connects them to the common issues is also evident from *Robertson v. Thomson Corp.*, [2006] S.C.J. No. 43, [2006] 2 S.C.R. 363, at paras. 59 and 62 (S.C.C.), where a copyright class action had been certified on behalf of staff and freelance writers of the defendant publisher. In the context of a post-certification summary judgment and injunction motion, the Court held that the staff writers “should not have been certified as members of the class because they have no cause of action”, since there was “no evidence” they took the necessary steps to restrain publication as was required to give rise to a claim under the *Copyright Act*, R.S.C. 1985, c. C-42.

*found anywhere but in her own apartment.* The court wrote (at pp. 380-81) that “the CPA requires the representative plaintiff to provide a certain minimum evidential basis for a certification order”.<sup>46</sup>

Chief Justice McLachlin then noted that:

... While the *Class Proceedings Act, 1992* does not require a preliminary merits showing, “the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order” (p. 381).<sup>47</sup>

Third, and following from these comments, the Court held that the standard of proof at certification required the plaintiff to establish “an evidentiary basis” or “some basis in fact” for each of the certification criteria in the Ontario CPA other than s. 5(1)(a):

... [T]he representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the *Report of the Attorney General’s Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 (“evidence on the motion for certification should be confined to the [certification] criteria”). The Act, too, obviously contemplates the same thing: see s. 5(4) (“[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence”). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is “plain and obvious” that no claim exists: see *Branch, supra*, at para. 4.60.<sup>48</sup>

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<sup>46</sup> *Hollick, supra*, note 7, at paras. 21 and 24 (underlining in original; emphasis added).

<sup>47</sup> *Id.*, at para. 24.

<sup>48</sup> *Id.*, at para. 25. An analogous principle to the “some basis in fact” requirement was previously hinted at in *Dutton, supra*, note 9, at para. 45, where the Court held that the circumstances in which a defendant could strike a proceeding under the Alberta representative action rule were not limited to those in which it was “plain and obvious” that the claim would fail. Instead, because “[d]enial of class status under Rule 42 ... does not defeat the claim ... [but] merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity”, the Court held a defendant could strike the claim on other bases as well, which would presumably include a lack of evidence that the requirements of the representative action rule were met.

Fourth, in assessing whether this threshold of “some basis in fact” was satisfied, the Court’s reasons contained several indications that certification judges could engage in a limited weighing of the evidence. For one, the Court held that defendants were permitted to file responding evidence at certification, even though the recommendation to this effect in the Ontario Attorney General’s Report was not explicitly incorporated into the Ontario CPA at issue in *Hollick* (in contrast to the B.C. CPA):<sup>49</sup>

The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. ... The 1990 report of the Attorney General’s Advisory Committee ... suggests that “[u]pon a motion for certification ..., the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely”... . In my view the Advisory Committee’s report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately *allows the opposing party an opportunity to respond with evidence of its own*.<sup>50</sup>

As well, McLachlin C.J.C. cited case law holding that a solicitor’s affidavit based on “information and belief”, despite being *admissible* on a certification motion under the Ontario Rules of Civil Procedure,<sup>51</sup> was still “*insufficient*” to support certification as a matter of its substantive “adequacy”:

This appears to be the existing practice of Ontario courts. In *Caputo, supra*, the representative brought a class action against cigarette manufacturers claiming that they had knowingly misled the public about the risks associated with smoking. In support of the certification motion, *the class representative filed only a solicitor’s affidavit based on information and belief. The court held that the evidence adduced by*

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<sup>49</sup> Curiously, this distinction between the Ontario CPA and B.C. CPA respecting the role of defence evidence at certification was not referenced in the 2001 Trilogy. Presumably, that is because the only Trilogy case decided under the B.C. legislation, *Rumley*, did not raise the same issues about whether the plaintiffs met the test for some basis in fact. Instead, the defendant government in *Rumley* acknowledged its responsibility for the abuse that occurred at the residential school attended by the class members, based on a public report establishing that such abuse occurred. This report was cited extensively by the *Rumley* Court.

<sup>50</sup> *Hollick, supra*, note 7, at para. 22 (underlining in original; emphasis added).

<sup>51</sup> R.R.O. 1990, Reg. 194 [hereinafter “Ontario Rules”]. Rule 39.01(4) provides that “[a]n affidavit for use on a motion may contain statements of the deponent’s information and belief, if the source of the information and the fact of the belief are specified in the affidavit”. The admissibility of such evidence on certification has been noted by some commentators: see Hon. W.K. Winkler & H.T. Strosberg, “Issues of Evidence in a Class Action: An Introduction and Overview” (2003) Spec. Lect. L.S.U.C. 57, at 59 [hereinafter “Issues of Evidence”].

*the class representative was insufficient to support certification, and that the defendant manufacturers should be allowed to examine the individual class members in order to obtain the information required to allow the court to decide the certification motion. The “primary concern”, the court wrote, is “[t]he adequacy of the record”, which “will vary in the circumstances of each case” (p. 319).<sup>52</sup>*

Finally, the manner in which the Court applied these principles to the facts in *Hollick* is instructive. While McLachlin C.J.C. found that the plaintiffs had established some basis in fact for a rational relationship between the proposed class and the common issues, she did so on the basis of an extensive evidentiary record that overlapped with the merits of the plaintiff’s nuisance claim to a considerable degree:

*In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Environment and Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.<sup>53</sup>*

Further, McLachlin C.J.C.’s conclusion that the plaintiff failed to satisfy the preferable procedure criterion was influenced by the lack of evidence that resolving the common issues would promote the goal of judicial economy. In this regard, she observed that “there is no reason to think

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<sup>52</sup> *Hollick*, *supra*, note 7, at para. 23 (emphasis added).

<sup>53</sup> *Id.*, at para. 26 (emphasis added).

that any pollution was distributed evenly across the geographical area or time period specified in the class definition”.<sup>54</sup>

In the wake of *Hollick*, it was unclear precisely what the standard of proof at certification involved. On the one hand, the Court was at pains to emphasize that a “broad” approach to class actions was preferable to an “overly restrictive” one, and that there was no “preliminary merits test” involved in assessing whether a claim should be certified, so only a “minimum evidentiary basis” was required. On the other hand, the Court held that plaintiffs were required to show “some basis in fact” for most of the certification criteria, including the existence of a “colourable claim” or “rational relationship” between the class members and the common issues through evidence which could overlap with the merits, and that the certification judge should consider the “adequacy” of this evidence while the defendant “respond[ed] with evidence of its own”.

In retrospect, therefore, the *Hollick* approach to the standard of proof was ambiguous.<sup>55</sup> And the effect of this ambiguity was to provide courts with a large measure of judicial discretion in deciding whether to certify class actions. In a somewhat ironic turn of events, the 2001 Trilogy returned the law to a position similar to the one that was criticized in *Naken*, in which courts “rel[ie]d on their own inherent power over procedure ... to devise *ad hoc* solutions to procedural complexities on a case-by-case basis”,<sup>56</sup> and thereby “ta[xed] judicial resources and den[ie]d the parties *ex ante* certainty as to their procedural rights”.<sup>57</sup> This is illustrated by the cases decided during the interval between the 2001 Trilogy and the 2013-2014 Decisions.

### 3. The Intervening Case Law on “Some Basis in Fact”

Post-*Hollick* cases adopted a broad spectrum of approaches to the standard of proof at certification, ranging from lenient to rigorous.<sup>58</sup> This

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<sup>54</sup> *Id.*, at para. 32.

<sup>55</sup> The uncertain nature of the “some basis in fact” test from *Hollick* has been noted by several commentators: see, e.g., R.B. Bell, C.A. Jordaan & F. Yachoua, “Join the Conversation: Isn’t it Time for Class Action Reform?” in T.L. Archibald & R.S. Echlin, eds., *Annual Review of Civil Litigation, 2012* (Toronto: Thomson Carswell, 2012) 279.

<sup>56</sup> *Hollick*, *supra*, note 7, at para. 14.

<sup>57</sup> *Dutton*, *supra*, note 9, at para. 33.

<sup>58</sup> The propensity for disparate certification results in the wake of *Hollick* is well-documented: see C. Dafoe, R.L. Hayley & J. Samson, “Evidence on Certification/Authorization Motions: est-ce qu’il y a vraiment ‘deux solitudes’?”, in *Développements récents en recours collectifs 2007* (Cowansville, QC: Éditions Yvon Blais, 2007) 127 [hereinafter “Evidence on

variation in judicial approaches was evident from several different aspects of the certification inquiry, and illustrates the malleability of the *Hollick* principles.

As a starting point, the notion that certification was not an inquiry into the merits of the proposed action was repeatedly emphasized by the courts.<sup>59</sup> As a result, many courts rejected the need for evidence of the existence of the claims, finding this to be inconsistent with the legislative rejection of a preliminary merits test and the directive in *Hollick* that no evidence was admissible to show whether the pleadings disclosed a cause of action pursuant to provisions like section 5(1)(a) of the Ontario CPA.<sup>60</sup> On this view, plaintiffs were not even “required to indicate the evidence upon which they will prove” their claims<sup>61</sup> (though such cases still generally accepted that “[t]here must, of course, be some basis in fact to support the commonality of the issues selected as ‘common’”<sup>62</sup>).

This approach sat uneasily alongside the *Hollick* requirement for a “colourable claim” or “rational relationship” between the class and common issues.<sup>63</sup> That requirement was occasionally relied on for the proposition that plaintiffs must lead evidence to show an “air of reality”

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Certification”]; and C. Marafioti-Mazza, “The Post-Trilogy Class Action Certification Regime: A More Onerous Threshold for Plaintiffs to Meet” (2004) 1 *Can. Class Action Rev.* 235 [hereinafter “Post-Trilogy Class Action”]. For a good discussion of the post-*Hollick* case law as it relates to the standard of proof, see also C. Poltak, “The Space Between Rule 201 and 21: The Evidentiary Burden on Certification” (2010) 6 *Can. Class Action Rev.* 449.

<sup>59</sup> See, e.g., *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 73 O.R. (3d) 401, at paras. 38 and 50 (Ont. C.A.), leave to appeal refused [2005] S.C.C.A. No. 50 (S.C.C.) [hereinafter “*Cloud*”]; *Ayrton v. PRL Financial (Alta.) Ltd.*, [2006] A.J. No. 296, 265 D.L.R. (4th) 240, at para. 10 (Alta. C.A.); *Knight v. Imperial Tobacco Canada Ltd.*, [2006] B.C.J. No. 1056, 267 D.L.R. (4th) 579, at para. 20 (B.C.C.A.); *Soldier v. Canada (Attorney General)*, [2009] M.J. No. 32, 236 Man. R. (2d) 107, at paras. 21 and 97 (Man. C.A.); and *Microcell Communications Inc. v. Frey*, [2011] S.J. No. 708, [2012] 3 W.W.R. 423, at para. 17 (Sask. C.A.), leave to appeal refused [2012] S.C.C.A. No. 42 (S.C.C.) [hereinafter “*Microcell*”].

<sup>60</sup> *Chalmers (Litigation guardian of) v. AMO Canada Co.*, [2010] B.C.J. No. 2451, 13 B.C.L.R. (5th) 37, at paras. 20-21 (B.C.C.A.). See also *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918, 78 O.R. (3d) 641, at para. 52 (Ont. C.A.), leave to appeal refused [2006] S.C.C.A. No. 1 (S.C.C.) [hereinafter “*Pearson*”]; and *McCracken v. Canadian National Railway Co.*, [2012] O.J. No. 2884, 111 O.R. (3d) 745, at paras. 80, 141-143 (Ont. C.A.) [hereinafter “*McCracken*”].

<sup>61</sup> *2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corp.*, [2009] O.J. No. 1874, 96 O.R. (3d) 252, at para. 74 (Ont. Div. Ct.), affd [2010] O.J. No. 2683, 100 O.R. (3d) 721 (Ont. C.A.), leave to appeal refused [2010] S.C.C.A. No. 348 (S.C.C.) [hereinafter “*Quizno’s*”].

<sup>62</sup> *Microcell*, *supra*, note 59, at para. 67.

<sup>63</sup> The fact that courts relied on merits-based evidence after *Hollick* has been observed before: see, e.g., “Post-Trilogy Class Action”, *supra*, note 58; J.A. Kimmel, “The Merits of the Merits in the Class Certification Analysis” (2007) 4 *Can. Class Action Rev.* 3 [hereinafter “Merits of the Merits”].

to the commonality of other class member's claims, in the sense that the plaintiff's claims were actually shared by those class members.<sup>64</sup> In some cases, the court's treatment of this requirement came close to suggesting that plaintiffs must lead evidence of the merits of the class members' claims. Thus, in *Jameson Livestock Ltd. v. Toms Grain & Cattle Co.*, the Saskatchewan Court of Appeal held that *Hollick* made it "necessary for the applicants to file evidence to show that members of the proposed class have, in common, the claim asserted against the defendants", and that the requirement for a "colourable claim" meant that "[i]n effect, the class description must describe persons who in fact have a claim asserted in the statement of claim".<sup>65</sup>

Another rationale for requiring merits evidence emerged from the plaintiff's obligation to demonstrate that the claim raised common issues. The Ontario Court of Appeal's decision in *Fulawka*<sup>66</sup> is interesting here. In *Fulawka*, Winkler C.J.O. suggested that in addition to establishing that the claim satisfies "the legal principles concerning the common issues requirement",<sup>67</sup> such as the need for a common issue to be a "substantial ingredient" of the class members' claims,<sup>68</sup> the plaintiff must also show "some evidentiary basis indicating that a common issue *exists* beyond a bare assertion in the pleadings".<sup>69</sup> Elaborating on this, Winkler C.J.O. suggested that it required evidence to support the "factual assertions [which] form the building blocks of the common issues",<sup>70</sup> and noted that this had been done in *Fulawka* itself (an unpaid overtime claim by employees) through affidavit evidence that clearly related to the merits

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<sup>64</sup> *Samos Investments Inc. v. Pattison*, [2003] B.C.J. No. 348, [2003] 4 W.W.R. 39, at paras. 48-50 (B.C.C.A.). See also *Fresco v. Canadian Imperial Bank of Commerce*, [2010] O.J. No. 3762, 103 O.R. (3d) 659, at para. 72 (Ont. Div. Ct.), rev'd on other grounds [2012] O.J. No. 2883, 111 O.R. (3d) 501 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 379 (S.C.C.) [hereinafter "*Fresco*"] (noting that "there must be 'some basis in reality' for the assertion of common issues"). This paragraph of the Divisional Court's ruling in *Fresco* was cited with approval in *Fulawka v. Bank of Nova Scotia*, [2012] O.J. No. 2885, 111 O.R. (3d) 346, at para. 79 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 326 (S.C.C.) [hereinafter "*Fulawka*"]. The presence of an "air of reality" test in some of the post-*Hollick* cases is discussed in "Evidence on Certification", *supra*, note 58, at 137-40.

<sup>65</sup> [2006] S.J. No. 93, 279 Sask. R. 281, at paras. 20 and 28 (Sask. C.A.). See also *Alves v. Red Seal Vacations Inc.*, [2011] S.J. No. 624, 342 D.L.R. (4th) 409, at para. 48 (Sask. C.A.); and *Alves v. First Choice Canada Inc.*, [2011] S.J. No. 625, 342 D.L.R. (4th) 427, at paras. 60-62 (Sask. C.A.), leave to appeal refused [2011] S.C.C.A. No. 541 (S.C.C.) [hereinafter "*Alves*"].

<sup>66</sup> *Fulawka*, *supra*, note 64.

<sup>67</sup> *Id.*, at para. 81.

<sup>68</sup> *Id.*, at para. 84.

<sup>69</sup> *Id.*, at para. 79 (emphasis added).

<sup>70</sup> *Id.*, at para. 83.

(e.g., the class members regularly worked overtime, with the approval of the defendant employer).<sup>71</sup> While Winkler C.J.O. was careful to note that “the evidentiary basis for establishing the *existence* of a common issue is not as high as proof on a balance of probabilities”,<sup>72</sup> he observed that it still required “some basis in fact”.<sup>73</sup>

Finally, certain cases openly suggested that certification required the plaintiff to establish an “arguable” or “triable” claim. In *Windsor v. Canadian Pacific Railway Ltd.*, the Alberta Court of Appeal held that plaintiffs were required to show an “arguable case”<sup>74</sup> based on “some threshold level of evidence”,<sup>75</sup> noting that “[t]here are some actions that are purely speculative, have no air of reality, or are doomed to fail, and they will not be certified even if the pleadings disclose a cause of action”.<sup>76</sup> Similar comments were made by the Ontario Divisional Court in *Williams v. Canon Canada Inc.*, where it held that “to justify certification, the plaintiffs must raise a legitimate possibility that the question or questions could be answered in their favour”,<sup>77</sup> such that the “burden at the certification stage is to show that there is at least a triable issue”.<sup>78</sup>

Another source of debate concerned the ability to assess evidence which, even if not directed towards the merits, nevertheless overlapped with them, when determining whether the procedural certification

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<sup>71</sup> *Id.*, at paras. 60-61, 83.

<sup>72</sup> *Id.*, at para. 79 (emphasis added).

<sup>73</sup> *Id.*

<sup>74</sup> [2007] A.J. No. 1047, [2007] 12 W.W.R. 5, at para. 35 (Alta. C.A.).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* In the same paragraph, the Court concluded that, because “[t]here was some evidence ... from which an inference of damage might be drawn[,] [t]here is ‘some basis in fact’ for the claim (as the matter was put in *Hollick*, at para. 25) to justify the certification order”.

<sup>77</sup> [2012] O.J. No. 3120, 294 O.A.C. 251, at para. 23 (Ont. Div. Ct.) [hereinafter “*Williams*”].

<sup>78</sup> *Id.* The requirement that the plaintiff establish a “triable issue” was also echoed in some British Columbia cases: *Collette v. Great Pacific Management Co.*, [2004] B.C.J. No. 381, 26 B.C.L.R. (4th) 252, at paras. 30-32 (B.C.C.A.), leave to appeal refused [2004] S.C.C.A. No. 174 (S.C.C.). See also *Elms v. Laurentian Bank of Canada*, [2001] B.C.J. No. 1284, 90 B.C.L.R. (3d) 195, at para. 39 (B.C.C.A.) (a decision rendered after the oral judgments in *Dutton* and *Rumley*, but before the release of the reasons in the 2001 Trilogy); and *Thorburn v. British Columbia (Public Safety and Solicitor General)*, [2013] B.C.J. No. 2412, 52 B.C.L.R. (5th) 223, at para. 38 (B.C.C.A.) (a decision handed down one week after the Indirect Purchaser Trilogy but without reference to it). However, other B.C. cases suggested that this requirement to establish a “triable issue” applied only under s. 4(1)(a) of the B.C. CPA, and thus did not involve an evidentiary component: *Pearson v. Boliden Ltd.*, [2002] B.C.J. No. 2593, 222 D.L.R. (4th) 453, at paras. 37, 41 (B.C.C.A.), leave to appeal refused [2003] S.C.C.A. No. 29 (S.C.C.) [hereinafter “*Boliden*”]; *James v. British Columbia*, [2005] B.C.J. No. 518, [2005] 8 W.W.R. 417, at paras. 59, 61-62 (B.C.C.A.) [hereinafter “*James*”].

requirements in provisions like section 5(1)(b)-(e) of the Ontario CPA were met. Some courts, in line with the view that *Hollick* precluded any merits inquiry, seemed to suggest that such overlapping merits assessments were impermissible.<sup>79</sup>

In other cases, however, the *Hollick* prohibition upon merits review did not prevent courts from assessing evidence that overlapped with the merits where that evidence was also relevant to determining whether the statutory certification criteria were satisfied.<sup>80</sup> Thus, in *Williams v. Mutual Life Assurance Co.*,<sup>81</sup> the Ontario Court of Appeal upheld the denial of certification in a proposed class action relating to misrepresentations about “vanishing premiums” for life insurance. It did so based on evidence tendered by the defendant insurers establishing that they did not make systemic representations to the class members, which was a matter that plainly overlapped with the merits of the plaintiff’s misrepresentation claim. The Court relied on this evidence despite the plaintiff’s argument that the certification judge “erred in using the evidentiary record provided by the respondents to determine the merits of the proposed claim”,<sup>82</sup> noting instead that “the respondents’ evidence was adduced to support its position that there was no common issue of fact raised by the pleadings”,<sup>83</sup> and that it “was also relevant to the proposed class definition”,<sup>84</sup> since it showed that “many of those potential class members never received any illustrations and thus that there was no [rational] relationship between the class and the proposed common issue”.<sup>85</sup> The Newfoundland Court of Appeal took a similar approach in *Davis v. Canada (Attorney General)*, where it held that *Hollick* “did not suggest that elements of the substantive issues could not be considered as relevant factors in assessing the question of preferability of proceeding by way of a class action”.<sup>86</sup>

<sup>79</sup> *Quizno’s*, *supra*, note 61, at para. 102.

<sup>80</sup> See, e.g., *Monsanto Canada Inc. v. Hoffman*, [2002] S.J. No. 607, 220 D.L.R. (4th) 542, at para. 15 (Sask. C.A.); and *McCann v. Canada Mortgage and Housing Corp.*, [2012] O.J. No. 1674, 349 D.L.R. (4th) 1, at paras. 121-126 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 286 (S.C.C.) [hereinafter “*McCann*”]. This ability to consider evidence of the statutory certification criteria which overlapped with the merits was also noted by commentators: see “Issues of Evidence”, *supra*, note 51, at 65.

<sup>81</sup> [2003] O.J. No. 1160, 226 D.L.R. (4th) 112 (Ont. C.A.).

<sup>82</sup> *Id.*, at para. 35.

<sup>83</sup> *Id.*, at para. 38.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> [2008] N.J. No. 280, 300 D.L.R. (4th) 293, at para. 27 (N.L.C.A.). Interestingly, at paras. 28-29, the Court went on to approve of the view that it would be “burying one’s head in the sand to

An interesting related line of cases also developed regarding differences in the standard of proof for: (1) evidence relating solely to the statutory certification requirements; and (2) evidence that was directed at those requirements, but which also overlapped with the merits. In *Dumoulin v. Ontario*<sup>87</sup> and *LeFrancois v. Guidant Corp.*,<sup>88</sup> Cullity J. suggested that the procedural requirements of section 5(1)(b)-(e) of the Ontario CPA had to be established on a balance of probabilities, save insofar as they necessitated resolving a factual dispute that was also directed to the merits, in which case the plaintiff only needed to meet the lower threshold of “some basis in fact”.<sup>89</sup> However, other courts seemed to reject the requirement to establish any factual issues relating to the certification requirements on a balance of probabilities, even if they did not engage the merits of the claim, suggesting that the only applicable standard was some basis in fact.<sup>90</sup>

Perhaps the most divisive matter in the post-*Hollick* jurisprudence was the scope of the certification judge’s power to weigh the evidence.<sup>91</sup> One line of cases, taking the view that the plaintiff’s evidentiary burden was “not an onerous one” and required only a “minimum evidentiary

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ignore — even at the certification stage — the fact that much of the underlying relief sought by the plaintiff cannot be granted by a court”.

<sup>87</sup> [2005] O.J. No. 3961, 19 C.P.C. (6th) 234, at paras. 27 and 51 (Ont. S.C.J.), additional reasons [2006] O.J. No. 1233, 23 C.P.C. (6th) 207 (Ont. S.C.J.).

<sup>88</sup> [2009] O.J. No. 2481, at paras. 13-14 (Ont. S.C.J.), leave to appeal refused [2009] O.J. No. 4129 (Ont. Div. Ct.).

<sup>89</sup> See also Cullity, *supra*, note 1, at 411, 416-17 and 421-22. A similar point was made in *McCracken v. Canadian National Railway Co.*, [2010] O.J. No. 3466, 3 C.P.C. (7th) 81, at paras. 291-303 (Ont. S.C.J.), revd [2012] O.J. No. 2884, 111 O.R. (3d) 745, at para. 81 (Ont. C.A.), where Perell J. suggested that, with respect to issues relating to s. 5(1)(b)-(e) of the Ontario CPA, which are not purely factual but involve questions of mixed fact and law, the applicable standard is not “some basis in fact” but one on which the plaintiff and defendant are on a “level playing field”. On appeal from Perell J.’s ruling, the Court of Appeal expressed confusion about what this comment meant.

<sup>90</sup> *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107, 297 Nfld. & P.E.I.R. 86, at paras. 12-14 (N.L.C.A.), leave to appeal refused [2010] S.C.C.A. No. 187 (S.C.C.) [hereinafter “*Ring*”].

<sup>91</sup> An example of the judicial confusion in this area is provided by *Jones v. Zimmer GMBH*, [2013] B.C.J. No. 81, 358 D.L.R. (4th) 499, at paras. 41-43 (B.C.C.A.), where the Court held that merely “circumstantial” evidence could afford some basis in fact for certification, noting that “[r]elevance is not to be confused with weight” and that “[t]he weight to be afforded relevant evidence is for the trial judge to consider in adjudging the merits of the case”. Paradoxically, the Court then went on at para. 51 of the same judgment to state that “[a]ssessing the weight of the evidence was within the province of the certification judge”.

basis”,<sup>92</sup> is exemplified by the Ontario Court of Appeal’s approach in *Cloud*:

*Hollick* also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.<sup>93</sup>

Thus, in *Pearson*,<sup>94</sup> the Ontario Court of Appeal certified a class action alleging that the disclosure of nickel contamination in an area around the defendant’s refinery caused a drop in the class members’ property values. Although the defendants led expert evidence that the disclosure did not cause the decline in values, and argued that any decline would depend upon a large number of variables specific to each class member, the plaintiffs led expert evidence to show a link between the disclosure and the property value decline for the area in question. The Court refused to weigh the plaintiff’s evidence against the defendant’s, noting that “[w]hile Inco disputes the value of this evidence, the certification motion is not the place for resolving that controversy”.<sup>95</sup>

A similar approach was taken in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,<sup>96</sup> where the B.C. Court of Appeal found the lower court erred in refusing to certify a price-fixing class action relating to the DRAM microchip. The Court of Appeal found the certification judge set the evidentiary bar “too high”<sup>97</sup> when he held that the plaintiff’s expert evidence was not sufficiently grounded in industry and empirical data to

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<sup>92</sup> *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands)*, [2012] B.C.J. No. 851, 351 D.L.R. (4th) 24, at paras. 20, 52 (B.C.C.A.), leave to appeal refused [2012] S.C.C.A. No. 336 (S.C.C.).

<sup>93</sup> *Cloud*, *supra*, note 59, at para. 50. See also *Quizno’s*, *supra*, note 61, at para. 102; and *Bartram (Litigation guardian of) v. GlaxoSmithKline Inc.*, [2013] B.C.J. No. 2333, 369 D.L.R. (4th) 111, at paras. 27-34 (B.C.C.A.).

<sup>94</sup> *Supra*, note 60.

<sup>95</sup> *Id.*, at para. 76. See also para. 52.

<sup>96</sup> [2009] B.C.J. No. 2239, 312 D.L.R. (4th) 419 (B.C.C.A.), leave to appeal refused [2010] S.C.C.A. No. 32 (S.C.C.) [hereinafter “*DRAM*”]. See also *Steele v. Toyota Canada Inc.*, [2011] B.C.J. No. 352, [2011] 6 W.W.R. 40, at paras. 60-69 (B.C.C.A.), leave to appeal refused [2011] S.C.C.A. No. 200 (S.C.C.) (noting that “the task on the certification application was not to weigh the evidence of the experts, or to prefer one or more of the experts to the others, but only to assess whether, at this early stage of the process there was some evidence”); and *Stanway v. Wyeth Canada Inc.*, [2012] B.C.J. No. 1198, 351 D.L.R. (4th) 107, at paras. 47, 49, 55 (B.C.C.A.) (stating that the certification judge “was not to compare or weigh the differing expert opinions”, “engage in weighing evidence that is clearly contradictory” or “weigh the competing evidence”).

<sup>97</sup> *DRAM*, *id.*, at para. 63.

disclose a workable methodology for establishing loss on a class-wide basis (which required proving, *inter alia*, that an overcharge resulted from the defendants' conduct which was passed on from direct DRAM purchasers, like computer manufacturers, to indirect purchasers, like consumers).<sup>98</sup> Noting that *Hollick* established that "the evidentiary burden is not an onerous one — it requires only a 'minimum evidentiary basis'",<sup>99</sup> and therefore that "where expert opinion evidence is adduced at the certification hearing ... it should not be subjected to the exacting scrutiny required at a trial",<sup>100</sup> the Court of Appeal held the certification judge fell into error when he "weighed" the plaintiff's expert evidence "against" that of the defendants.<sup>101</sup> Justice Smith concluded that "this approach was fundamentally unfair at this stage of the proceeding, when the [plaintiff] has not had discoveries and an adequate opportunity to marshal the evidence required by [the expert] for his analysis",<sup>102</sup> and cautioned that "[t]he close examination to which [the certification judge] 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."<sup>103</sup>

Other courts took a more aggressive approach.<sup>104</sup> In *Chadha v. Bayer Inc.*,<sup>105</sup> the Ontario Court of Appeal overturned certification of a price-fixing class action relating to the cost of iron oxide pigments used in construction materials, which was brought on behalf of the direct and indirect purchasers of those materials. The Court found that the expert opinion filed by the plaintiffs was inadequate to justify the certification of loss as a common issue, since "[t]he evidence of the appellants' expert assumes the pass-through of the illegal increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time."<sup>106</sup> Justice

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<sup>98</sup> *Id.*, at paras. 48-52 and 58-62.

<sup>99</sup> *Id.*, at para. 65.

<sup>100</sup> *Id.*, at para. 66.

<sup>101</sup> *Id.*, at para. 67.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, at para. 68.

<sup>104</sup> See, e.g., *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299, 236 D.L.R. (4th) 348, at para. 51 (Ont. S.C.J.), where Winkler J. (as he then was) observed that "cogent evidence" of the ability to determine liability as a common issue was a "prerequisite" to certifying the common issue.

<sup>105</sup> [2003] O.J. No. 27, 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal refused [2003] S.C.C.A. No. 106 (S.C.C.) [hereinafter "*Chadha*"].

<sup>106</sup> *Id.*, at para. 52. See also paras. 30-31 and 46. The existence of this expert assumption was the reason given by the Court in *Pearson*, *supra*, note 60, at paras. 75-76, for distinguishing *Chadha*,

Feldman observed that “that assumption ... is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such”,<sup>107</sup> and rejected the certification judge’s “reservations about the need for the appellants’ expert evidence at this stage of the proceedings”,<sup>108</sup> finding that “it is only on the basis of that evidence that any determination can be made as to whether loss can be proved on a class-wide or an individual basis”.<sup>109</sup> As an example of the record necessary to justify certification of loss-based common issues in competition cases, Feldman J.A. referred to a U.S. decision in which the plaintiff led evidence of both economic theory and “extensive empirical investigations that had been undertaken by the plaintiffs’ experts” into industry data which formed the basis for their opinions.<sup>110</sup> She then contrasted this with the expert affidavit filed by the plaintiffs in *Chadha*, which did not suggest that the expert “consulted any industry records or other data which would substantiate a pass-through analysis”.<sup>111</sup> Based on these observations, Feldman J.A. concluded that “[t]he evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification.”<sup>112</sup>

While *Chadha* pre-dated both *Pearson* and *DRAM*, later certification decisions also displayed a tendency to undertake “careful scrutiny”<sup>113</sup> of the plaintiff’s evidence. One such judgment is *Alves*,<sup>114</sup> where in upholding an order denying certification of a class action brought on behalf of persons who purchased vacation packages from the defendants, the Saskatchewan Court of Appeal found the proposed class definition was overly broad given the affidavit evidence filed by the plaintiffs. As in the *Caputo* case cited with approval in *Hollick*,<sup>115</sup> much of the plaintiff’s evidence was based on hearsay, meaning that it was admissible

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noting that “[u]nlike *Chadha*, however, the appellant has adduced expert evidence to show a link between the 2000 [MOE] announcement and the negative impact on property values”.

<sup>107</sup> *Chadha, id.*, at para. 30. For a contrary approach, see *Quizno’s, supra*, note 61, at paras. 102, 104.

<sup>108</sup> *Chadha, id.*, at para. 28.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, at paras. 36 and 39.

<sup>111</sup> *Id.*, at para. 40.

<sup>112</sup> *Id.*, at para. 52.

<sup>113</sup> *McLaine v. London Life Insurance Co.*, [2007] O.J. No. 5035, 233 O.A.C. 275, at para. 18 (Ont. Div. Ct.).

<sup>114</sup> *Supra*, note 65.

<sup>115</sup> See the text accompanying footnote 52, *supra*.

under the old Saskatchewan Queen’s Bench Rules provided it disclosed the source of the affiant’s information and belief. However, Richards J.A. disregarded much of this evidence, not only because parts of it failed to contain statements of the affiant’s information and belief, but also because other parts — even though admissible — contained statements which were too “broad and general”<sup>116</sup> and “vague”<sup>117</sup> to establish some basis in fact for the existence of the proposed class. In doing so, Richards J.A. held that “the question of the *admissibility* of ‘hearsay’ evidence is not the only one facing the certification judge”,<sup>118</sup> and that “[i]f such evidence is introduced, he or she must also consider the *weight* or significance to be attached to it”.<sup>119</sup> The Court then went on to note that “not all evidence provided on information and belief is equally compelling or of equal quality”, and that “[a]lthough a certification application generally requires an applicant to put forward only ‘some basis in fact’ for the order being sought, a certification judge must nonetheless give careful consideration to the question of whether the admissible evidence meets this burden”.<sup>120</sup>

The Ontario Court of Appeal’s ruling in *McCracken*<sup>121</sup> strikes a similar tone. In that case, the Court refused to certify a class action alleging that the defendant employer misclassified the class member employees as managers, thereby depriving them of statutory overtime pay. Although the plaintiff tendered 14 affidavits to show that the class members were uniformly not managerial employees,<sup>122</sup> Winkler C.J.O. found this evidence was insufficient to establish that the misclassification issue was a common one. In doing so, he observed that the affiant’s assertions were “not evidence that a court could rely on as establishing a basis in fact”, since they were “vague”, “anecdotal” and “unhelpful”, consisting of “simply bald, sweeping and conclusory assertions”.<sup>123</sup> As in *Alves*, Winkler C.J.O. did so despite acknowledging that affidavits

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<sup>116</sup> *Alves, supra*, note 65, at para. 70.

<sup>117</sup> *Id.*, at para. 72.

<sup>118</sup> *Id.*, at para. 68 (emphasis added). Questions of evidentiary admissibility (as opposed to weight) in certification motions are generally held subject to the same principles as in any other context: *Ernewein v. General Motors of Canada Ltd.*, [2005] B.C.J. No. 2370, 260 D.L.R. (4th) 488, at para. 33 (B.C.C.A.), leave to appeal refused [2005] S.C.C.A. No. 545 (S.C.C.) [hereinafter “*Ernewein*”]; *Ring, supra*, note 90, at para. 21; *Williams, supra*, note 77, at paras. 10-12.

<sup>119</sup> *Alves, id.*, at para. 68 (emphasis added).

<sup>120</sup> *Id.*

<sup>121</sup> *Supra*, note 60.

<sup>122</sup> *Id.*, at paras. 59-64.

<sup>123</sup> *Id.*, at paras. 106, 108 and 110.

containing statements of a deponent's information and belief were admissible on certification motions under the Ontario Rules.<sup>124</sup>

In some cases, the judicial willingness to weigh the plaintiff's evidence also extended beyond the face of the affidavits themselves, to cross-examinations. This can be seen in *McCann*,<sup>125</sup> where the plaintiffs sought to certify a pension class action involving a misrepresentation common issue. Despite asserting that the misrepresentation in question was a "common" one and that "class wide" reliance upon it could be inferred, a proposed representative plaintiff admitted during cross-examination that he did not share the same understanding of the representation as that advanced on behalf of the class, and did not personally rely upon it.<sup>126</sup> Based partly on this cross-examination, the Court of Appeal held that the certification judge was justified in refusing to certify the misrepresentation common issue "on the record before him".<sup>127</sup> Other courts also denied certification where the commonality evidence of the plaintiff or the plaintiff's expert was undermined on cross-examination,<sup>128</sup> finding this to be relevant to whether the plaintiff's evidence "on its own" satisfied the "some basis in fact" test.<sup>129</sup>

Finally, and notwithstanding the apparent prohibition upon weighing plaintiff and defence evidence in cases like *Pearson* and *DRAM*, certification motions were occasionally dismissed based on evidence from the defendants showing a lack of commonality or preferability. In most situations, this occurred where the defendant's evidence was uncontradicted by the plaintiff, and merely supplemented gaps in the certification record.<sup>130</sup> A good example is *Ernewein v. General Motors of Canada Ltd.*,<sup>131</sup> where the B.C. Court of Appeal overturned certification of a class action relating to alleged defects in the design of pick-up truck fuel tanks, since the only admissible evidence were reports by the defendants' expert establishing that the multiple truck models had

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<sup>124</sup> *Id.*, at para. 110. It is unclear whether Winkler C.J.O. also found the affidavits inadmissible under the Ontario Rules, since he suggested that they failed to meet the requirement therein of specifying the source of the affiant's information and belief.

<sup>125</sup> *Supra*, note 80, at paras. 121-126.

<sup>126</sup> *Id.*, at paras. 122-123.

<sup>127</sup> *Id.*, at para. 124.

<sup>128</sup> See, e.g., *Williams*, *supra*, note 77, at para. 24.

<sup>129</sup> *Martin v. Astrazeneca Pharmaceuticals PLC*, [2013] O.J. No. 1182, 2013 ONSC 1169, at para. 9 (Ont. Div. Ct.).

<sup>130</sup> See, e.g., *Williams v. Mutual Life Assurance Co.*, [2003] O.J. No. 1160, 226 D.L.R. (4th) 112, at paras. 37-39 (Ont. C.A.).

<sup>131</sup> *Supra*, note 118.

different designs. Justice Newbury noted that “there is no (admissible) evidence to counter the opinion of the defendants’ expert that one cannot generalize, or ‘extrapolate’, from an allegation of negligent design of the fuel system of one model of vehicle manufactured by the defendants, to any other model of vehicle”.<sup>132</sup>

Where the plaintiff and defence evidence did conflict, courts would generally refuse to deny certification based on the latter, particularly where to do so would require the certification judge to assess the credibility of the plaintiff’s witness.<sup>133</sup> However, even in cases involving such conflicts, some courts still displayed a willingness to resolve the impasse in favour of the defence. In *McCracken*, discussed above, the Ontario Court of Appeal refused to certify the employee misclassification common issue based partly on evidence from the defendant that the employees did not have uniform job duties and responsibilities.<sup>134</sup> Chief Justice Winkler did so even though the plaintiffs tendered competing evidence in reply. Rather than decline to “weigh” this competing plaintiff evidence, Winkler C.J.O. addressed it head on. Noting the importance of “considering as a whole the evidence”,<sup>135</sup> he found that the plaintiffs’ affidavits contained “several inaccuracies and limitations”,<sup>136</sup> such as starting from false premises, ignoring important facts and having a narrow focus.<sup>137</sup> In effect, therefore, Winkler C.J.O. weighed the plaintiff’s and defendant’s evidence on commonality, and preferred the latter.<sup>138</sup>

### III. THE 2013-2014 DECISIONS AND “SOME BASIS IN FACT”: REVIEW AND CRITIQUE

#### 1. The Context of the Decisions

As the preceding review illustrates, the 2001 Trilogy did not unambiguously settle the standard of proof at certification, but instead

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<sup>132</sup> *Id.*, at para. 2. See also paras. 25, 32 and 34.

<sup>133</sup> *Fresco v. Canadian Imperial Bank of Commerce*, [2012] O.J. No. 2883, 111 O.R. (3d) 501, at para. 97 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 379 (S.C.C.).

<sup>134</sup> *McCracken*, *supra*, note 60, at paras. 111 and 118.

<sup>135</sup> *Id.*, at para. 118.

<sup>136</sup> *Id.*, at para. 114.

<sup>137</sup> *Id.*, at paras. 114-116.

<sup>138</sup> See also *Brown v. Canadian Imperial Bank of Commerce*, [2013] O.J. No. 1837, 307 O.A.C. 90, at para. 26 (Ont. Div. Ct.), *affd* [2014] O.J. No. 4712, 2014 ONCA 677 (Ont. C.A.).

gave rise to a proliferation of approaches that could each be justified by reference to different aspects of *Hollick*. It was against this backdrop that the issue of the standard of proof on certification returned to the Supreme Court with the 2013-2014 Decisions.

The first group of 2013-2014 Decisions comprise the “Indirect Purchaser Trilogy” of *Microsoft*, *Sun-Rype* and *Infineon*. The *Microsoft* and *Sun-Rype* cases arose on appeal from British Columbia, while *Infineon* came out of Quebec. All three were competition class actions alleging unlawful conspiracies by producers of, respectively, computer software, high fructose corn syrup (“HFCS”) and DRAM microchips, which were said to have resulted in overcharges to the proposed class members for the products. In each case, the class included persons (e.g., consumers) who did not purchase the product directly from the defendants, but “indirectly” through an intermediary, such as a retailer, distributor or equipment manufacturer (though *Sun-Rype* and *Infineon* included direct purchasers in the class definitions as well). The principal issue for the Supreme Court was whether claims by indirect purchasers disclosed a cause of action at law, given that the Court’s earlier rejection of the “passing on” defence in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*<sup>139</sup> made it possible for there to be double recovery against the defendants by direct purchasers should indirect purchasers be recognized to have their own cause of action as well. However, the Court also devoted considerable attention to the standard of proof at certification, particularly in *Microsoft*. In three sets of reasons, authored by Rothstein J. (*Microsoft* and *Sun-Rype*) and LeBel and Wagner JJ. (*Infineon*), the Court unanimously granted certification and authorization in *Microsoft* and *Infineon*, but denied certification by a majority in *Sun-Rype* (partly on the basis that the indirect purchaser class members would not be able to self-identify as HFCS purchasers).<sup>140</sup>

The second major 2013-2014 Decision is *AIC*, a certification judgment on appeal from Ontario. It concerned a claim by investors against mutual fund managers for permitting “market timing” to occur in relation to their managed funds, which allegedly reduced the value of the class members’ investments. The focus of the appeal was on the preferable procedure requirement, and specifically, whether a class action was the preferable procedure for achieving access to justice in circumstances where the defendants had already entered into a regulatory

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<sup>139</sup> [2007] S.C.J. No. 1, [2007] 1 S.C.R. 3 (S.C.C.).

<sup>140</sup> Justice Karakatsanis (Cromwell J. concurring) delivered dissenting reasons in *Sun-Rype*.

settlement with the Ontario Securities Commission that paid the investors millions. Justice Cromwell for the unanimous Court held that a class action was the preferable procedure, since the claim faced barriers to both procedural and substantive access to justice that remained even when the settlement was considered. As a result, the claim was certified.

The final 2013-2014 Decision is *Vivendi*, a class action arising out of Quebec. The claim involved a challenge by the defendant employer's retirees and their surviving spouses to a unilateral amendment that the defendant made to a health insurance plan of which the class members were beneficiaries. The focus of the appeal was on whether the claim raised "identical, similar or related questions of law or fact" as required by article 1003(b) of the CCP, in circumstances where different class members' rights to the insurance benefits were subject to different rules. Justices LeBel and Wagner, on behalf of a unanimous Court, upheld authorization on the basis that the claim raised common questions, even if those questions would not give rise to common answers.

As discussed below, the 2013-2014 Decisions do not eliminate the confusion surrounding the standard of proof. Instead, while the rulings go some way towards clarifying the meaning of *Hollick*, they raise several new questions of their own, and ultimately provide a framework for certification that is difficult to apply and that appears to be driven more by policy goals than legal principle. Four aspects of the Decisions are noteworthy here: (a) evidence of the merits at certification; (b) the content of the standard of proof; (c) the weighing of evidence; and (d) the uniformity of the standard of proof.

## 2. Evidence of the Merits at Certification

One of the main issues that remained unclear after *Hollick* was the precise role that evidence of the merits was to play during the certification motion. While it was apparent from *Hollick* that certification was not a merits inquiry,<sup>141</sup> and that no evidence was admissible to establish the existence of a cause of action for the purpose of provisions like section 5(1)(a) of the Ontario CPA, the "some basis in fact" necessary to support the remaining certification criteria could easily involve matters which overlapped with the merits (*e.g.*, that there was a "colourable claim" or "rational relationship" between the class members

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<sup>141</sup> See, on this point, *AIC*, *supra*, note 5, at paras. 39 and 42.

and common issues, or that common issues “existed”). Perhaps because of this, some post-*Hollick* courts suggested that plaintiffs were required to lead evidence of an “arguable” or “triable” case and establish an “air of reality” to their claims.<sup>142</sup>

The 2013-2014 Decisions reject this view, at least with respect to the provinces outside Quebec.<sup>143</sup> In *Microsoft*, Rothstein J. held that plaintiffs are under no obligation to adduce evidence in support of the acts which underlie the common issues, even for what he called “common issues related to scope and existence of the causes of action”<sup>144</sup> (in *Microsoft* itself, issues such as “Did the Defendants, or either [of] them, conspire to harm the Class” or “Did the conspiracy involve unlawful acts”):

The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. ...

...

... The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; “rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding” (*Infineon*, at para. 65).

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The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. *In order to establish commonality, evidence that the acts alleged actually occurred is not required.* Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.<sup>145</sup>

In other words, Rothstein J. held that the requirement for evidence at certification relates solely to whether a claim for acts which are assumed to have occurred can meet the procedural criteria in provisions like

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<sup>142</sup> See the text accompanying footnotes 63-78, above.

<sup>143</sup> This aspect of the 2013-2014 Decisions was presaged by an interesting article in which Cromwell J., writing extra-judicially, criticized the OLRRC’s preliminary merits test: T.A. Cromwell, “An Examination of the Ontario Law Reform Commission Report on Class Actions” (1983) U. Ottawa L. Rev. 587 at 594-95.

<sup>144</sup> *Microsoft*, *supra*, note 2, at paras. 113 and 139-140.

<sup>145</sup> *Id.*, at paras. 100, 102 and 110 (emphasis added).

section 4(1)(b)-(e) of the B.C. CPA; *e.g.*, whether such notional acts raise issues that can be dealt with in common. The plaintiff is under no evidentiary obligation to establish that the alleged grounds of liability are in fact anchored in reality.

At the same time, the Court's treatment of this issue is complicated by its implicit recognition that evidence supportive of liability may overlap with, and thus be required to establish, the procedural certification criteria. In *Microsoft*, for instance, Rothstein J. held that even though no evidence was required to meet section 4(1)(c) of the B.C. CPA for "common issues relating to scope and existence of the causes of action pleaded",<sup>146</sup> evidence was required to demonstrate that "loss-related common issues" — *i.e.*, "whether loss to the class members can be established on a class-wide basis" — met section 4(1)(c).<sup>147</sup> It seems clear that Rothstein J. intended for this evidence to relate to the commonality rather than to just the fact of loss.<sup>148</sup> Nevertheless, evidence that loss to the class members can be established in common must logically include a methodology for demonstrating that a loss in fact occurred, as was the case with the class-wide evidence of loss tendered in *Microsoft* itself (which purported to show how an overcharge arose, and how it was passed on to the class members, all on a common basis).<sup>149</sup> Otherwise, there would be no evidence that any loss, including a class-wide one, could be made out at trial.<sup>150</sup> In this limited sense, *Microsoft* suggests that the plaintiff may still be required to lead evidence in support of a substantive allegation in his or claim, though the larger purpose of that evidence remains one of satisfying the procedural certification criteria.<sup>151</sup>

It is interesting to compare this approach to the one that the Court took in the Quebec case of *Infineon*. As noted previously, one of the

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<sup>146</sup> *Id.*, at para. 113.

<sup>147</sup> *Id.*, at para. 114.

<sup>148</sup> *Id.*, at para. 118.

<sup>149</sup> *Id.*, at paras. 121-123.

<sup>150</sup> *Id.*, at para. 115.

<sup>151</sup> See also *Sun-Rype*, *supra*, note 3, at para. 76, where in refusing certification of the indirect purchaser class because of the plaintiffs' failure to establish some basis in fact that such class members could self-identify as part of the class and thereby satisfy s. 4(1)(b) of the B.C. CPA, the Court observed that "where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss". For a case decided after the 2013-2014 Decisions that seems to recognize the requirement for evidence of procedural certification criteria even where it overlaps with the merits, see *Brown v. Canadian Imperial Bank of Commerce*, [2014] O.J. No. 4712, 2014 ONCA 677, at paras. 57-58 (Ont. C.A.).

criteria for obtaining authorization under the CCP is the requirement in article 1003(b) to establish that “the facts alleged seem to justify the conclusions sought”. In contrast to the similar requirement in provisions like section 4(1)(a) of the B.C. CPA that the pleadings disclose a cause of action, the Court in *Infineon* held that article 1003(b) required the plaintiffs to establish, through *evidence*,<sup>152</sup> an “arguable case”, “*prima facie* case” or “good colour of right”<sup>153</sup> with respect to each of the substantive elements of the claim alleged (*i.e.*, fault, injury and causation pursuant to article 1457 of the *Civil Code of Québec*<sup>154</sup>). As a result, unlike in *Microsoft*, where Rothstein J. held there was no need for the plaintiff to lead evidence establishing that the conspiratorial acts at the heart of the common issues ever took place, the Court in *Infineon* carefully reviewed the exhibits attached to the plaintiffs’ motion and concluded that they “demonstrate that the appellants participated in a price-fixing conspiracy”,<sup>155</sup> such that the plaintiffs “presented an arguable case that the appellants committed a civil fault”.<sup>156</sup>

The *Infineon* Court was at pains to emphasize that this burden on plaintiffs is a “low one”,<sup>157</sup> which is supposedly “less demanding than the one that applies in other parts of Canada”<sup>158</sup> (an observation influenced by the fact that the CCP had been amended to remove the requirement for affidavit evidence on the authorization motion in 2003<sup>159</sup>). However, the Court also held that the burden could not be met through the allegations in the motion alone — which are assumed to be true<sup>160</sup> — but also requires some evidence, such as the exhibits attached to the plaintiffs’ motion in *Infineon* itself. Thus, in finding the *Infineon* plaintiffs had established an arguable case of injury, the Court stated:

On their own, these bare allegations [in the motion] would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, *mere assertions are*

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<sup>152</sup> *Infineon*, *supra*, note 4, at paras. 76-79.

<sup>153</sup> *Id.*, at paras. 62-65.

<sup>154</sup> CCQ-1991.

<sup>155</sup> *Infineon*, *supra*, note 4, at para. 90. See also paras. 90-94 (finding that the exhibits coupled with the allegations also disclosed an arguable case of other substantive allegations, *e.g.*, that the conspiracy was “international” in nature, and caused an “undue” economic impact as was required to show a violation of the *Competition Act*).

<sup>156</sup> *Id.*, at para. 100.

<sup>157</sup> *Id.*, at para. 59. See also *Vivendi*, *supra*, note 6, at para. 37.

<sup>158</sup> *Infineon*, *id.*, at para. 128. See also *Vivendi*, *supra*, note 6, at para. 57.

<sup>159</sup> *Infineon*, *id.*, at paras. 66 and 128.

<sup>160</sup> *Id.*, at para. 67.

*insufficient without some form of factual underpinning.* As we mentioned above, an applicant's allegations of fact are assumed to be true. But *they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence*, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants' alleged anti-competitive conduct is *sufficient to support an inference that the members of the group did, arguably, suffer the alleged injury.*<sup>161</sup>

It is important to note that the Court in *Infineon* imposed this evidentiary obligation to establish an arguable case of the substantive elements of the plaintiffs' claim despite at the same time repeatedly cautioning that the authorization motion does not involve an assessment of the "merits",<sup>162</sup> but is only "procedural"<sup>163</sup> in nature. Indeed, in the later Quebec case of *Vivendi*, the Court held that the authorization judge erred when he "ruled on the merits of the case"<sup>164</sup> in considering whether the recourses of the members raised identical, similar or related questions of law or fact pursuant to article 1003(a) of the CCP, thereby "overstepping the bounds of the function of screening motions to which he should have limited himself".<sup>165</sup>

In short, the *Infineon* Court did not see any inconsistency between, on the one hand, requiring the plaintiff to lead some minimal evidence in support of their substantive allegations in order to "screen out frivolous claims",<sup>166</sup> and on the other, refraining from engaging in a merits inquiry. As stated by LeBel and Wagner JJ.:

... [T]he authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his

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<sup>161</sup> *Id.*, at para. 134 (emphasis added). See also paras. 125 ("[T]he evidentiary burden applicants must discharge at the authorization stage is that of establishing an arguable case. This means that the respondent must show that the members of the group suffered an injury."); and 127 ("The threshold requirement for art. 1003 is that the applicants present an arguable case that an injury was suffered. Although more than bare allegations are required, this threshold falls comfortably below the civil standard of proof on a balance of probabilities.").

<sup>162</sup> *Infineon*, *supra*, note 4, at paras. 58, 60, 65, 68 and 125-126. See also *Vivendi*, *supra*, note 6, at para. 37.

<sup>163</sup> *Infineon*, *supra*, note 4, at para. 59; *Vivendi*, *supra*, note 6, at paras. 37 and 71.

<sup>164</sup> *Vivendi*, *supra*, note 6, at paras. 69-70.

<sup>165</sup> *Id.*, at para. 70.

<sup>166</sup> *Infineon*, *supra*, note 4, at para. 150 (and paras. 59 and 61-62). See also *Vivendi*, *supra*, note 6, at paras. 37 and 71.

claim will probably succeed. Also, the requirement that the applicant demonstrate a “good colour of right”, an “*apparence sérieuse de droit*”, or a “*prima facie* case” implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law.<sup>167</sup>

In light of this approach under the Quebec CCP, it is open to question why the Court in *Microsoft* rejected the requirement for any evidence whatsoever of the acts that ground the common issues and thereby establish a colourable claim. To the extent that the Court’s approach reflects a concern that such a requirement would be contrary to the legislative rejection of a preliminary merits test emphasized in *Hollick*, the *Infineon* ruling demonstrates that this concern is misplaced. Further, it is important to recall the actual merits test that the OLRC proposed would have required “more than simple proof that a triable issue exists”.<sup>168</sup> In the words of *Hollick*, “[t]he proposed test would have required the putative class representative to show that ‘there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class’”.<sup>169</sup> Therefore, what the legislature rejected was not a requirement to lead evidence of a “triable” or “arguable” issue, similar to the one that the *Infineon* Court held could exist concurrently with the absence of a merits test. Instead, it was a test that would have required the certification judge to make a preliminary finding of the likelihood of success of the plaintiff’s claim. Applying the former test in the context of the common law class actions statutes would not be contrary to the legislative rejection of the preliminary merits test proposed by the OLRC.<sup>170</sup>

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<sup>167</sup> *Infineon*, *supra*, note 4, at para. 65 (emphasis added). Similar comments are found in *Vivendi*, *supra*, note 6, at para. 71 (“[T]he motion judge performs a function of screening motions; this is a procedural stage that does not involve consideration of the questions on the merits”).

<sup>168</sup> As discussed at footnote 28, *supra*, the “triable issue” test which the OLRC was referring to here was the evidence-based test imposed upon defendants responding to a summary judgment motion brought under Rule 58 of the old Ontario Rules. That test was less stringent than the pre-2010 summary judgment test that replaced it in 1985, under Rule 20 of the Ontario Rules, pursuant to which “the court now has the duty to take a hard look at the merits of an action at this preliminary stage”: *Vaughan v. Warner Communications, Inc.*, [1986] O.J. No. 752, at para. 16, 56 O.R. (2d) 242 (Ont. H.C.J.).

<sup>169</sup> *Hollick*, *supra*, note 7, at para. 16.

<sup>170</sup> The distinction between the two concepts is captured in *Round v. MacDonald, Dettwiler and Associates Ltd.*, [2011] B.C.J. No. 1980, 2011 BCSC 1416, at paras. 73, 75 (B.C.S.C.), *aff’d* [2012] B.C.J. No. 2545, 2012 BCCA 456 (B.C.C.A.), where in comparing the requirement for a plaintiff to establish a “triable issue” in response to a defendant’s summary judgment motion, and the requirement for a plaintiff to establish “a reasonable possibility that the action will be resolved at

There is also much to be said, at the level of principle, for requiring plaintiffs to establish a triable or arguable issue regarding substantive allegations where they form part of the common issues. As one author has noted, “[e]nhancing access to the court system is not the same as enhancing access to justice; there is no judicial economy in promoting the advancement of unmeritorious claims and there is no need to encourage behaviour modification if there are no wrongdoers”.<sup>171</sup> Further, absent such evidence, it is difficult to understand how a plaintiff can be said to have shown “some basis in fact” that “the claims of the class members *raise* common issues”, as is required by provisions like section 4(1)(c) of the B.C. CPA, particularly if the common issue is of a type which the *Microsoft* Court would characterize as one “related to the existence of the cause of action”. For instance, it does not seem enough to “raise” a common issue like “Did the Defendants, or either [of] them, conspire to harm the Class” merely by showing that it can be resolved on a common basis at trial. That simply demonstrates one component of the statutory requirement, which is that the claim raises a notional issue that can be resolved in “common”; it does not demonstrate the other statutory component, which is that the claim actually raises the “issue” in question, whether common or not. Further, even if the common issues inquiry is to be restricted to asking whether a hypothetical issue can be resolved in common, there is still value in requiring the plaintiff to lead sufficient evidence to at least put the existence of the issue in play. Otherwise, the question of whether the claims raise common issues will be argued in the air.<sup>172</sup> Similar observations apply with respect to the requirement that the plaintiff establish a “colourable claim” or “rational relationship” between the class and the common issues. If the common issues are based entirely on theoretical events, there is nothing

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trial in favour of the plaintiff” to obtain leave to bring a statutory secondary market securities class action (a test derived, incidentally, from that proposed in the OLRC Report), Harris J. said with respect to the latter test that “more is required to grant leave than to identify a triable issue [since] [w]hether there is a triable issue does not typically involve *weighing and assessing*, rather than *identifying*, evidence” (emphasis added).

<sup>171</sup> “Merits of the Merits”, *supra*, note 63, at 13.

<sup>172</sup> See Hon. W.K. Winkler, “Advocacy in Class Proceedings Litigation” (2009) 19:1 *Advocates’ Soc. J.* 6 (“But a court cannot give a purposive interpretation in the abstract while ignoring the factual context, especially since the plaintiff’s ostensible intended result is to use the procedure available under the Act to obtain a decision on the merits. It is vitally important that the court have a picture of what the case is about and what kind of evidence and factual arguments will drive the litigation”).

“colourable” about the class member’s claims and no “relationship” between them and the common issues at all.

In this sense, the 2013-2014 Decisions could have analogized the certification judge’s function to other “gatekeeper” roles, in which a court determines whether there is sufficient evidence of an issue to send it to the trier of fact without at the same time intruding into the merits.<sup>173</sup> This appears to be the view taken of the authorization judge under Quebec law in *Infineon*, and is similar to that recognized in other legal contexts. In such cases, courts have held that a party may bear what is termed the “evidentiary” burden of putting an issue in play, but not the “legal” or “persuasive” burden of proving the matter on the balance of probabilities.<sup>174</sup> The Court addressed the distinction between these two concepts in *R. v. Stone*:

... In *The Law of Evidence in Canada* (1992), J. Sopinka, S. Lederman and A. Bryant distinguish the evidentiary burden from the legal burden as follows, at p. 53:

The term “burden of proof” is used to describe two distinct concepts relating to the obligation of a party to a proceeding in connection with the proof of a case. In its first sense, the term refers to the obligation imposed on a party to prove or disprove a fact or issue. In the second sense, it refers to a party’s obligation to adduce evidence satisfactorily to the judge, in order to raise an issue.

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<sup>173</sup> In fairness, it should be observed that some of these roles (*e.g.*, the judge on civil motion for a non-suit) are not precisely analogous, since they are carried out by a trial judge and thus arise after the respondent has already had discovery or disclosure of the other party’s case. The absence of pre-certification discovery as of right was a factor relied on by the Court in *Microsoft*, *supra*, note 2, at para. 119, in rejecting a “robust or rigorous” standard of proof. However, other such roles (*e.g.*, the judge on a preliminary inquiry) are carried out at a time when the respondent has not received disclosure of the other party’s case. Further, it is unclear why the absence of pre-certification discovery should preclude a plaintiff from having to adduce sufficient evidence to put his or her claims in play, when a plaintiff can be required to establish a genuine issue requiring a trial prior to discovery in response to a summary judgment motion (see Ontario Rule 25.05(2)(a) and (d)), which involves an even more stringent standard of proof (see footnote 176 *infra*). Further, at least under the B.C. CPA at issue in *Microsoft*, the defendant is required to file an affidavit prior to certification setting out “the material facts on which the person intends to rely at the hearing of the application” (s. 5(5)(a)), and “swear[ing] that the person knows of no fact material to the application that has not been disclosed in the person’s affidavit” (s. 5(5)(b)), so the plaintiff should not be bereft of information at the time of the certification motion.

<sup>174</sup> For an extensive review of these cases, see S.N. Lederman *et al.*, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada, 2014), c. 5.

The first sense of the term “burden of proof” suggested by Sopinka, Lederman and Bryant is referred to as the legal or ultimate burden, while the second is known as the evidentiary burden (p. 54).<sup>175</sup>

This requirement to meet an evidentiary as opposed to a legal burden applies in numerous settings,<sup>176</sup> as for instance:

- (a) where a plaintiff must tender sufficient evidence of the existence of their claim to defend against a non-suit;<sup>177</sup>
- (b) where the Crown must tender sufficient evidence of the existence of an offence to progress beyond a preliminary hearing<sup>178</sup> or avoid a

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<sup>175</sup> [1999] S.C.J. No. 27, [1999] 2 S.C.R. 290, at paras. 167-168 (S.C.C.). See also *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 37 (S.C.C.).

<sup>176</sup> Since, as discussed below, the question of whether an evidentiary burden has been met does not involve an assessment of the merits, the evidentiary burden would appear to be a lower one than that which applies to an applicant for an injunction, in which “a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried”: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311, at 334 (S.C.C.) (emphasis added). The evidentiary burden would also appear to be lower than that which applies to a respondent on a summary judgment motion. At least until the amendments to the Ontario Rules in 2010, such a respondent was required to establish the presence of a genuine issue for trial by “establish[ing] his claim as being one with a real chance of success” (*Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] S.C.J. No. 3, [2004] 1 S.C.R. 60, at para. 6 (S.C.C.) (emphasis added)), which involved the Court taking a “hard look at the merits of an action” (*Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] S.C.J. No. 2, [1995] 1 S.C.R. 85, at para. 55 (S.C.C.) (emphasis added)). That is more akin to the “reasonable possibility of success” preliminary merits test proposed by the OLRC than to the evidentiary burden (see, e.g., *Folland v. Reardon*, [2005] O.J. No. 216, 74 O.R. (3d) 688, at paras. 31-32 (Ont. C.A.), referring to summary judgment as a “limited merits-based examination of the material presented on the motion” in which “the motion judge will closely examine the merits” (emphasis added)). And since 2010, it is plain that the summary judgment burden is more rigorous than the evidentiary burden in jurisdictions that follow the amended Ontario procedure of permitting the court to weigh evidence, evaluate credibility and draw inferences. Indeed, the question of whether there is a genuine issue requiring a trial in such jurisdictions is one of mixed fact and law (see *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, [2014] 1 S.C.R. 87, at para. 81 (S.C.C.) [hereinafter “*Hryniak*”]), whereas the question of whether the evidentiary burden has been met (as, for instance, on a motion for a non-suit) is one of law alone (see *Johansson v. General Motors of Canada Ltd.*, [2012] N.S.J. No. 631, 324 N.S.R. (2d) 252, at paras. 19-22 (N.S.C.A.) [hereinafter “*Johansson*”]). Further, the very issue for the summary judgment judge in such cases is whether they can “reach a fair and just determination on the merits” (*Hryniak, id.*, at para. 49 (emphasis added)).

<sup>177</sup> *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] S.C.J. No. 2297, 85 O.R. (3d) 561, at paras. 12-15 and 35-36 (Ont. C.A.) [hereinafter “*Prudential*”]; *Capital Estate Planning Corp. v. Lynch*, [2011] A.J. No. 820, 337 D.L.R. (4th) 523, at paras. 19-20 (Alta. C.A.) [hereinafter “*Capital*”]; *Johansson, supra*, note 176, at paras. 23-31.

<sup>178</sup> *R. v. Arcuri*, [2001] S.C.J. No. 52, [2001] 2 S.C.R. 828, at paras. 20-24 (S.C.C.) [hereinafter “*Arcuri*”].

directed verdict of acquittal,<sup>179</sup> or where a foreign state must do so to justify an extradition order;<sup>180</sup> and

- (c) where an accused must tender sufficient evidence of the existence of a defence to justify its consideration by the trier of fact.<sup>181</sup>

The Supreme Court's decision in *Cinous*<sup>182</sup> is illuminating here. In that case, the Court held the evidentiary burden which an accused must meet to "put in play" a defence requires the accused to establish an "air of reality" to that defence, by pointing to "(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true".<sup>183</sup> At the same time, and similar to *Infineon*, the Court held that this air of reality analysis does not involve an assessment of the defence's "substantive merits":

The principle that a defence should be put to a jury if and only if there is an evidential foundation for it has long been recognized by the common law. ...

... Where there is an air of reality to a defence, it should go to the jury. ... *A defence that lacks an air of reality should be kept from the jury.* ...

... The air of reality test is concerned only with whether or not a putative defence should be "put in play", that is, submitted to the jury for consideration. ...

...

*The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence.* That question is reserved for the jury. ... The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. ... Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. *The question for*

<sup>179</sup> *R. v. Charemski*, [1998] S.C.J. No. 23, [1998] 1 S.C.R. 679, at paras. 2-3 (S.C.C.) [hereinafter "*Charemski*"].

<sup>180</sup> *United States of America v. Shephard*, [1976] S.C.J. No. 106, [1977] 2 S.C.R. 1067, at 1078-80 (S.C.C.); *United States of America v. Ferras*, [2006] S.C.J. No. 33, [2006] 2 S.C.R. 77, at para. 9 (S.C.C.).

<sup>181</sup> *R. v. Cinous*, [2002] S.C.J. No. 28, [2002] 2 S.C.R. 3, at para. 52 (S.C.C.) [hereinafter "*Cinous*"]; *R. v. Fontaine*, [2004] S.C.J. No. 23, [2004] 1 S.C.R. 702, at paras. 10-12 (S.C.C.) [hereinafter "*Fontaine*"].

<sup>182</sup> *Cinous*, *id.*

<sup>183</sup> *Id.*, at para. 65 (and paras. 49 and 60-61).

*the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.*

...

The considerations discussed above have led this Court to reject unequivocally the argument that the air of reality test licenses an encroachment by trial judges on the jury's traditional function as arbiter of fact. ... Indeed, the air of reality inquiry has been found not only to be consistent with the traditional division of labour as between judge and jury, but actually to enhance the jury's ability to carry out its task. ...

...

Once again, we wish to stress that *the conclusion that there is an air of reality to the second prong of this defence does not involve an appraisal of the substantive merits of the defence.* This conclusion rests upon our assessment that a properly instructed jury acting reasonably could infer the reasonableness of the accused's perception that he faced a deadly attack. *Whether a jury should come to such a conclusion is an entirely different question, which is entirely irrelevant to the air of reality analysis.*<sup>184</sup>

In light of these comments, it seems clear that imposing an evidentiary burden or "air of reality" requirement upon plaintiffs at certification would not have involved any inconsistency with the legislative rejection of a preliminary merits test.<sup>185</sup> Indeed, as the Court later noted in *Fontaine*,<sup>186</sup> the judge conducting the air of reality assessment *assumes* the evidence to be true,<sup>187</sup> subject to some "limited weighing" of the evidence in cases where that evidence does not directly

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<sup>184</sup> *Id.*, at paras. 50-52, 54, 56 and 116 (emphasis added).

<sup>185</sup> The fact that provisions like s. 5(7) of the B.C. CPA provide that "[a]n order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding" would have also ensured that any determination by the certification judge respecting the existence of evidence sufficient to put an issue in play would not be binding at trial.

<sup>186</sup> *Supra*, note 181.

<sup>187</sup> The air of reality test does, however, involve an assessment of the sufficiency of the evidence insofar as it requires that the evidence, which is assumed to be true, be sufficient for a properly instructed jury acting reasonably to acquit if it believed the evidence to be true. The mere presence of "some evidence" that does not meet this standard will not suffice: *R. v. Mayuran*, [2012] S.C.J. No. 31, [2012] 2 S.C.R. 162, at para. 21 (S.C.C.) [hereinafter "*Mayuran*"]. A similar assumption as to the truth of the evidence is made in the context of civil non-suit motions: *Prudential*, *supra*, note 177, at para. 35; *Capital*, *supra*, note 177, at paras. 19-20.

address every element of the defence.<sup>188</sup> This does not require any resolution of the issue itself, but merely an identification of evidence sufficient to justify leaving the issue with the trier of fact.<sup>189</sup>

Whatever the value of this approach, it is clear that after the 2013-2014 Decisions, there is no evidence-based “arguable case” or “air of reality” certification test with respect to the substantive allegations of the plaintiff’s claim in the common law provinces.<sup>190</sup> One consequence of this is that courts may become increasingly willing to consider the substantive adequacy of the plaintiff’s claim prior to the common issues trial under the “cause of action” requirement or through summary judgment. An early indication of this can be seen in *Wakelam v. Johnson & Johnson*, a judgment rendered after the 2013-2014 Decisions, where the B.C. Court of Appeal overturned a certification order after engaging in an extensive analysis of the plaintiff’s causes of action under section 4(1)(a) of the B.C. CPA, stating:

... [S]carce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context. Certainly the *Hunt v. Carey* test is an easy one to meet, but it is not surmounted in all cases. As recent decisions of the Supreme Court of Canada discussed below illustrate, it is likely to be beneficial to all concerned, including the justice system, if such questions are directly addressed when raised at an early stage, rather than left for a trial that may never take place, or for another court in another case.<sup>191</sup>

Similarly, in the post-*Microsoft* case of *Windsor v. Canadian Pacific Railway Ltd.*,<sup>192</sup> the Alberta Court of Appeal granted summary judgment dismissing part of a certified class action. In doing so, the Court referred to the “culture change” in favour of a broader application of the summary

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<sup>188</sup> *R. v. Pappas*, [2013] S.C.J. No. 56, [2013] 3 S.C.R. 452, at para. 22 (S.C.C.) [hereinafter “*Pappas*”].

<sup>189</sup> *Id.*, at para. 11. See also paras. 12, 14 and 71-72.

<sup>190</sup> See: *Canada (Attorney General) v. MacQueen*, [2013] N.S.J. No. 640, 369 D.L.R. (4th) 1, at para. 122 (N.S.C.A.) (see also para. 110), reconsideration refused [2014] N.S.J. No. 383, 2014 NSCA 73 (N.S.C.A.), leave to appeal filed [2014] S.C.C.A. No. 51 (S.C.C.) [hereinafter “*MacQueen*”]; *Keatley Surveying Ltd. v. Teranet Inc.*, [2014] O.J. No. 1450, 369 D.L.R. (4th) 497, at para. 110 (Ont. Div. Ct.); and *Good v. Toronto (City) Police Services Board*, [2014] O.J. No. 3643, 2014 ONSC 4583, at paras. 50-59 (Ont. Div. Ct.) [hereinafter “*Good*”].

<sup>191</sup> [2014] B.C.J. No. 167, [2014] 5 W.W.R. 7, at para. 64 (B.C.C.A.), leave to appeal refused [2014] S.C.C.A. No. 125 (S.C.C.); cf. *Jer v. Samji*, [2014] B.C.J. No. 535, [2014] 7 W.W.R. 251, at paras. 67-68 (B.C.C.A.).

<sup>192</sup> [2014] A.J. No. 256, 371 D.L.R. (4th) 339 (Alta. C.A.) [hereinafter “*Windsor*”].

judgment rule brought about by the Supreme Court of Canada's recent judgment in *Hryniak*,<sup>193</sup> and said:

... Since one of the objectives of class proceedings is to provide affordable access to justice, these principles relating to summary judgment are applicable to the class procedure as well.<sup>194</sup>

Given these developments, class action defendants wishing to challenge the substantive adequacy of the plaintiff's claims should consider doing so through summary judgment motions rather than at the certification hearing itself.<sup>195</sup>

### 3. The Content of the Standard of Proof

Another issue that the 2013-2014 Decisions addressed is the content of the standard of proof on procedural certification matters, *i.e.*, those for which evidence is required. As discussed previously, there was some debate prior to the Decisions regarding whether the applicable standard was one requiring proof on a balance of probabilities where the issue in question did not overlap with the merits of the claim. There was also uncertainty as to what, precisely, the "some basis in fact" threshold entailed.

In *Microsoft*, the Court emphatically rejected the existence of a balance of probabilities threshold. While the respondents relied on Cullity J.'s article opining that the statutory certification criteria should be assessed on a balance of probabilities, since they do not involve the merits of the claim,<sup>196</sup> as well as U.S. case law holding that factual disputes regarding the certification criteria should be resolved on a balance of probabilities even where they overlap with the merits,<sup>197</sup> Rothstein J. stated:

I cannot agree with Microsoft's submissions on this issue. Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. *The Hollick standard has never been judicially interpreted to require evidence on a*

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<sup>193</sup> *Hryniak*, *supra*, note 176. The author was co-counsel to the Appellant in *Hryniak*.

<sup>194</sup> *Windsor*, *supra*, note 192, at para. 14. See also paras. 12-13 and 15.

<sup>195</sup> The same point is made by Hoaken & Matthews, *supra*, note 44.

<sup>196</sup> *Microsoft*, *supra*, note 2, at para. 101.

<sup>197</sup> *Id.* For a helpful review of the U.S. case law from a Canadian perspective, see Hoaken & Matthews, *supra*, note 44.

*balance of probabilities*. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard.<sup>198</sup>

This rejection of a balance of probabilities test for the statutory certification criteria was reiterated in *Sun-Rype*<sup>199</sup> and also, for the purposes of Quebec law, in *Infineon*.<sup>200</sup>

The Court's rejection of a balance of probabilities threshold for the procedural certification criteria is significant. In effect, the Court:

- (a) rejected even an evidentiary burden for substantive allegations at certification, as already discussed; but
- (b) imposed a quasi-evidentiary burden, though not a legal one, for the procedural certification criteria (at least insofar as they concern purely factual questions rather than questions of mixed fact and law).<sup>201</sup>

The latter burden is referred to here as a "quasi-evidentiary" one because it does not appear to share all the features of an evidentiary burden discussed above.<sup>202</sup> In particular, the 2013-2014 Decisions do not go so far as to suggest that the evidence tendered by the plaintiff is assumed to be true. Further, the Court repeatedly refers to "some basis in

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<sup>198</sup> *Microsoft, supra*, note 2, at para. 102 (emphasis added). The Court's statement that the "some basis in fact" test had "never" been judicially interpreted to require proof on a balance of probabilities is inaccurate. See the cases cited at footnotes 87-88 above.

<sup>199</sup> *Sun-Rype, supra*, note 3, at para. 48.

<sup>200</sup> *Infineon, supra*, note 4, at paras. 89, 94, 99 and 127.

<sup>201</sup> There is some subtlety to this. As noted by Cullity, *supra*, note 1, at 415-16, all of the certification criteria also involve questions of mixed fact and law, since they require the application of a legal standard to the evidence. It cannot therefore be enough to establish a certification criterion for a plaintiff to merely lead some evidence that is relevant to it. Presumably, the Court's comments in *Microsoft* rejecting the balance of probabilities threshold relate only to the factual matters that a plaintiff must establish to demonstrate that the relevant certification criterion is met. They should not relate to the issue of whether the certification criterion itself is satisfied as a matter of mixed fact and law (*e.g.*, in the sense that a common issue is a substantial ingredient of each class member's claim, having regard to the factual evidence tendered by the plaintiff). Unfortunately, the Court does not address this point in the 2013-2014 Decisions, and the reader may be left with the impression that "some basis in fact" is the sole standard for meeting the certification criteria, not merely the standard for establishing the facts necessary to meet the further mixed fact and law assessment involved in the certification criteria. This is one of many issues arising out of the Decisions that would benefit from further clarification by the Supreme Court.

<sup>202</sup> The lack of precise correspondence between the criminal "air of reality" evidentiary burden, and the "some basis in fact" test in class certification, has been noted by other commentators: C. Dafoe, R.L. Hayley & J. Samson, "Evidence on Certification/Authorization Motions: est-ce qu'il y a vraiment 'deux solitudes'?", in *Développements récents en recours collectifs 2007* (Cowansville, QC: Éditions Yvon Blais, 2007) 127, at 138-39.

fact” as involving a “standard of proof”,<sup>203</sup> but “[a]n ‘evidential burden’ is not a burden of proof”,<sup>204</sup> only an obligation to identify sufficient evidence to justify the consideration of an issue by the trier of fact. The 2013-2014 Decisions also suggest that the certification judge’s application of the “some basis in fact” test requires deference on appeal,<sup>205</sup> whereas the evidentiary burden is a question of law that attracts a standard of correctness.<sup>206</sup> That being said, the “some basis in fact” test is still similar to the “air of reality” and other evidentiary burden tests outlined above, since it requires that the plaintiff merely lead “some evidence” of the statutory certification criteria (or the facts necessary to establish them), not proof of those criteria on a preponderance of the evidence.<sup>207</sup>

The application of this quasi-evidentiary burden would have perhaps been appropriate had the Court chosen to limit it to evidence directed at the procedural certification criteria that overlap with the merits. Such evidence is likely to be reviewed again at trial, so its ability to satisfy a balance of probabilities test should arguably be reserved for the common issues judge. However, it is incongruous to apply this standard to non-merits evidence that is relevant solely to the procedural certification criteria.<sup>208</sup> The issue of whether those statutory criteria are satisfied is unlike the issues decided in other interlocutory motions where a standard

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<sup>203</sup> *Microsoft*, *supra*, note 2, at paras. 99-102; *Sun-Rype*, *supra*, note 3, at paras. 48-49.

<sup>204</sup> *Supra*, note 188, at para. 11. See also S.N. Lederman *et al.*, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada, 2014), at 90 (“[T]o satisfy an evidential burden a party is not required to prove anything”).

<sup>205</sup> *Microsoft*, *supra*, note 2, at paras. 111 and 126; *AIC*, *supra*, note 5, at para. 65.

<sup>206</sup> *Fontaine*, *supra*, note 181, at para. 12; *Johansson*, *supra*, note 176, at paras. 19-22.

<sup>207</sup> The “air of reality” test has itself been referred to as a requirement for the accused to tender “some evidence” of a defence: *Cinous*, *supra*, note 181, at paras. 62, 64-67, 74-77, 79, 83 and 96; *R. v. Cairney*, [2013] S.C.J. No. 55, [2013] 3 S.C.R. 420, at para. 23 (S.C.C.) [hereinafter “*Cairney*”]. See also *Charemski*, *supra*, note 179, at para. 3 (expressing the test to avoid a directed verdict of acquittal as requiring that the Crown lead “some evidence” of the offence); *R. v. Deschamplain*, [2004] S.C.J. No. 73, [2004] 3 S.C.R. 601, at para. 13 (S.C.C.) (referring to the test to survive a preliminary inquiry as requiring “some basis in the evidence”); and *Prudential*, *supra*, note 177, at para. 35 (stating that to avoid a non-suit, the plaintiff must adduce “some evidence” of the claim). It is true that, in *Pappas*, *supra*, note 188, at para. 22, the Court held that the “air of reality” test required “more than ‘some’ or ‘any’ evidence of the elements of a defence”, but the Court’s comments were directed toward the requirement that there be “(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true”: *supra*, note 187, at para. 21. In other words, the mere presence of “some evidence” will not be sufficient if it does not support the second proposition in this test, which is similar to the “some basis in fact” test insofar as the plaintiff on certification must not just tender “some evidence”, but evidence which supports the conclusion that the relevant certification criteria have been satisfied.

<sup>208</sup> See *Cullity*, *supra*, note 1, at 411, 416-17 and 421-22.

below the balance of probabilities is applied (*e.g.*, in injunctions or on summary judgment), since it bears no relationship to the merits of the claim, which will be decided at trial, and it will not be addressed by any court other than the certification judge absent a decertification motion. Rather, it is similar to the non-merits issues decided in interlocutory proceedings where a balance of probabilities standard has been held to be appropriate (*e.g.*, an application for a confidentiality order,<sup>209</sup> or to modify or relieve against an implied undertaking<sup>210</sup>).

If a plaintiff need only establish some basis in fact that their claims raise common issues, in the sense of a 15 per cent or 25 per cent chance, it would mean that certification could be granted even though there is no definitive finding that the statutory criteria (or at least the evidentiary requirement underlying them) are satisfied. As Cullity J. puts it, “a proceeding can be certified on the basis of facts that a defendant could demonstrate did probably not occur”.<sup>211</sup> This is inconsistent with the fact that class actions legislation requires plaintiffs to affirmatively *prove* the satisfaction of the certification criteria, not merely put the issue in play. For instance, section 5(4) of the Alberta CPA provides that “[t]he Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e)”. And as Rothstein J. himself noted in *H. (F.) v. McDougall*, “there is only one civil standard of proof at common law and that is proof on a balance of probabilities”.<sup>212</sup> There is no clear justification for the Court’s refusal to apply this standard to the purely procedural issues in *Microsoft*.<sup>213</sup>

The impression one takes away from the 2013-2014 Decisions is that the Court’s rejection of a more rigorous, “balance of probabilities” standard was not driven by logic, but by the perceived policy advantages

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<sup>209</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522, at paras. 60-61 (S.C.C.).

<sup>210</sup> *Juman v. Doucette*, [2008] S.C.J. No. 8, [2008] 1 S.C.R. 157, at para. 32 (S.C.C.).

<sup>211</sup> Cullity, *supra*, note 1, at 416.

<sup>212</sup> [2008] S.C.J. No. 54, [2008] 3 S.C.R. 41, at paras. 40, 49 (S.C.C.). See also *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] S.C.J. No. 90, [1996] 3 S.C.R. 211, at paras. 31-36 (S.C.C.) (observing that the “normal evidentiary rules” apply to class actions).

<sup>213</sup> The standard cannot be justified on the basis that the “purely procedural” certification issues result in “purely procedural” consequences. As pointed out by Cullity, *supra*, note 1, at 417, “[t]he consequences [of certification] may be procedural in form but they also affect the economic interests of defendants and the substantive rights of class members who will be bound by subsequent decisions in the proceeding if they do not opt out”. Indeed, the Court recognized in *AIC*, *supra*, note 5, at para. 34, that “[e]ven though a class action is a procedural tool, achieving substantive results is one of its underlying goals”.

that a flexible approach to certification might provide. And yet even here, one might question whether the Court adequately canvassed the various policy arguments in favour of a more robust standard of proof. The 2013-2014 Decisions freely reference the benefits which increased access to class actions may achieve.<sup>214</sup> However, they contain no discussion of the class action's potential for abuse, despite the fact that this has been recognized by several courts,<sup>215</sup> including the Supreme Court itself.<sup>216</sup> The reality is that certification of a class action imposes immense settlement pressures upon defendants, most of whom are corporate entities that are required to minimize financial risks for the benefit of their shareholders. As the U.S. Supreme Court recently observed in *AT&T Mobility LLC v. Concepcion*:

... [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of “*in terrorem*” settlements that class actions entail ...<sup>217</sup>

This is not to suggest that these policy concerns necessarily outweigh those that favour easier access to class actions for plaintiffs.<sup>218</sup> However, the Court might at least have been expected to engage in a full and open

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<sup>214</sup> See, e.g., *Infineon*, *supra*, note 4, at para. 60 (“[T]he tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation”).

<sup>215</sup> *Abdool v. Anaheim Management Ltd.*, [1995] O.J. No. 16, 21 O.R. (3d) 453, at para. 42 (Ont. Div. Ct.), *per* O’Brien J. (“While access to the courts is obviously a worthwhile aim of the Act, it is to be noted the Law Reform Report commented on the concern that frivolous claims might be advanced and defendants ‘blackmailed’ into settling them because of potential legal costs”); *Ernewein*, *supra*, note 118, at para. 31 (“A relaxation of the usual rules would not seem consonant with the policy implicit in the Act that some judicial scrutiny of certification applications is desirable, presumably in view of the special features of class actions and the potential for abuse”); *MacKinnon v. National Money Mart Co.*, [2006] B.C.J. No. 635, 265 D.L.R. (4th) 214, at para. 20 (B.C.C.A.) (“Some of the features of class actions — in particular the inability of a successful litigant in a certification application to claim costs — might provide opportunities for abuse or unfairness”).

<sup>216</sup> *Kerr v. Danier Leather Inc.*, [2007] S.C.J. No. 44, [2007] 3 S.C.R. 331, at para. 68 (S.C.C.) (“If anything, converting an ordinary piece of commercial litigation into a class proceeding may be seen by some observers simply as an *in terrorem* strategy to try to force a settlement”). See also *Marcotte*, *supra*, note 8, at para. 43.

<sup>217</sup> 131 S. Ct. 1740, at 1752 (2011).

<sup>218</sup> For a good discussion of the contrary views, see I.C. Matthews, “Preliminary Merits Review for Class Actions in Ontario: Thanks, But No Thanks!” (2010) 6 *Can. Class Action Rev.* 119.

discussion of both sides of the debate.<sup>219</sup> As has been noted before, “[t]he principle which guarantees access to justice does not distinguish between different types of claim, nor does it distinguish between different classes of litigant”.<sup>220</sup> The comments of Cullity J. are relevant here:

On the other side of the scales there are concerns of fairness to defendants who may be compelled to defend, or settle, class actions where the statutory preconditions had been satisfied on the basis of factual assumptions made without regard — and possibly contrary — to the balance of probabilities. There is a question whether, in an attempt to preserve the procedural purity of certification motions, these concerns have been given sufficient weight.<sup>221</sup>

The 2013-2014 Decisions are also unclear as to the specific content of the “some basis in fact test”. Apart from holding that the test does not require proof on a balance of probabilities, the Court offers very little guidance regarding the standard which must be met, other than rejecting the American approach of a “rigorous” or “robust” approach on certification,<sup>222</sup> and observing that some basis in fact is a “relatively low evidentiary standard”<sup>223</sup> which does not require an “exhaustive” evidentiary record<sup>224</sup> nor “an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial”,<sup>225</sup>

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<sup>219</sup> That is particularly so given that the issue was canvassed in the courts below. See *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2010] B.C.J. No. 1308, 2010 BCSC 922, at paras. 18, 20 (B.C.S.C.), revd [2011] B.C.J. No. 689, 331 D.L.R. (4th) 631 (B.C.C.A.), var'd [2013] S.C.J. No. 58, [2013] 3 S.C.R. 545 (S.C.C.):

Certification ... creates significant risks such that a defendant who has committed no wrong may find itself obliged to pay tremendous amounts in settlement to escape liability and possible bankruptcy. From the standpoint of a defendant, the process may be seen as an extortion through the exercise of the power of strength in numbers. ...

...

Most class actions never proceed to trial on the merits. ... The reason is that the stakes are too high for the parties to gamble on a desirable outcome. By the same token, however, the process creates a significant risk that an innocent defendant will be obliged to join in the settlement to avoid the risk of tremendous damages that a case on the merits entails.

<sup>220</sup> *Polanski v. Conde Nast Publications Ltd.*, [2005] 1 W.L.R. 637, at para. 62 (H.L.), *per* Lord Hope of Craighead.

<sup>221</sup> Cullity, *supra*, note 1, at 423.

<sup>222</sup> *Microsoft*, *supra*, note 2, at paras. 105, 117 and 119.

<sup>223</sup> *Sun-Rype*, *supra*, note 3, at para. 61.

<sup>224</sup> *AIC*, *supra*, note 5, at para. 41 (and 46).

<sup>225</sup> *Microsoft*, *supra*, note 2, at para. 105. See also *AIC*, *supra*, note 5, at paras. 44 and 46.

but which does require more than “no evidence”<sup>226</sup> and “mere speculation”.<sup>227</sup> Indeed, the Court even asserts that “[t]here is limited utility in an attempt to define ‘some basis in fact’ in the abstract. Each case must be decided on its own facts.”<sup>228</sup>

The closest the Court comes to articulating the essence of the some basis in fact standard are the following comments of Rothstein J. in *Microsoft*:

Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to “a determination of the merits of the proceeding” (CPA, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

... There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the CPA not having been met.<sup>229</sup>

It is clear that the Court is struggling here to strike an appropriate balance between an overly lenient certification test, and what it perceives to be the unduly rigorous approach taken by U.S. courts.<sup>230</sup> However, while the Court is to be commended for seeking a balanced solution to the certification dilemma, it is unlikely that the one it provides will contain sufficient guidance to serve as a workable standard for lower courts. Asking whether “the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage” begs the question. At what point, precisely, will the record before the certification judge fail to meet this threshold? Is there an intermediate standard between no evidence at all and “some basis in fact”, in which the plaintiff can fail to meet the threshold where it has tendered some evidence, but that evidence lacks cogency. And if so, when? Moreover, why should the concern of

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<sup>226</sup> *Sun-Rype, supra*, note 3, at para. 70; *AIC, supra*, note 5, at para. 43.

<sup>227</sup> *Sun-Rype, supra*, note 3, at para. 70.

<sup>228</sup> *Microsoft, supra*, note 2, at para. 104.

<sup>229</sup> *Id.*, at paras. 103-104.

<sup>230</sup> This aspect of the 2013-2014 Decisions calls to mind McLachlin C.J.C.’s memorable comment in *Dutton, supra*, note 9, at para. 44 that “[i]n the end, the court must strike a balance between efficiency and fairness”.

“foundering at the merits” govern the certification inquiry at all, given the Court’s often-repeated admonition that “[i]f material differences emerge, the court can deal with them when the time comes”?<sup>231</sup>

In light of these uncertainties, the Court’s assertion that “[t]here is nothing obscure here”<sup>232</sup> is troubling, particularly given the many directions which courts took on certification in the wake of *Hollick* summarized above. The consequence of an unclear evidentiary standard will be to exponentially increase the amount of discretion that judges possess in deciding whether to certify claims. Indeed, *Microsoft* itself directs that “[e]ach case must be decided on its own facts”. One might ask why such an overtly flexible regime is desirable given the difficulties courts faced when confronted with a similar abundance of power at the time of *Naken*. Surely a more structured form of discretion is desirable, similar to that which the Court crafted for the assumption of territorial jurisdiction in *Club Resorts Ltd. v. Van Breda*.<sup>233</sup> If courts are free to determine the evidentiary standard on the facts of each case, the only limit on certification will be the judge’s own personal views as to the equities and social value of the claim. This will invite the type of results-oriented reasoning that undermines public confidence in the rule of law, which some already perceive in the different outcomes in *Hollick* and *Rumley*.<sup>234</sup>

A notable exception to this lack of guidance regarding the standard of proof is, however, found in the Court’s treatment of the expert evidence filed by the plaintiffs to establish the commonality of loss-related issues in *Microsoft*. As discussed earlier, *Microsoft* was a case in which the defendants were alleged to have overcharged for their software products, resulting in financial losses to the class members, who were the

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<sup>231</sup> *Microsoft*, *supra*, note 2, at para. 112. Similar sentiments are expressed in *Vivendi*, *supra*, note 6, at para. 77.

<sup>232</sup> *Id.*, at para. 102.

<sup>233</sup> [2012] S.C.J. No. 17, [2012] 1 S.C.R. 572 (S.C.C.) [hereinafter “*Van Breda*”]. This is not to suggest that the *Van Breda* framework is itself entirely satisfactory. See B. Kain, E. Marques & B.D. Shaw, “Developments in Private International Law: The 2011-2012 Term: The Unfinished Project of the *Van Breda* Trilogy” (2012) 59 S.C.L.R. (2d) 277. Nonetheless, it is submitted that the Court was correct to recognize at paras. 70, 75 and 93 of *Van Breda* that, while “[j]udicial discretion has an honourable history”, a “regime based on an exercise of almost pure and individualized judicial discretion” would “undermine the objectives of order, certainty and predictability”.

<sup>234</sup> C. Marafioti-Mazza, “The Post-Trilogy Class Action Certification Regime: A More Onerous Threshold for Plaintiffs to Meet” (2004) 1 Can. Class Action Rev. 235, at 258-59 (“As Garry Watson suggests, it is obvious ‘that a group ... of abused deaf and blind students is more vulnerable ... than an anonymous group of 30,000 people living in a vast geographical area who have suffered from varying inconveniences caused by a dump’”).

ultimate consumers of those products. The causes of action in *Microsoft* required the class members to prove that the defendants' conduct caused them to suffer a loss. However, doing so on a class-wide basis was difficult since the defendants did not sell the products directly to the class members, but to direct purchasers who in turn resold them to class members (or who resold them to still other intermediate purchasers, who themselves resold to the class members). Since each of these intermediate parties may have passed on different portions of the alleged overcharge when reselling the products down their supply chains, the Court required expert evidence that a methodology existed which could show pass-on of the overcharges to the class as a whole:

In addition to the common issues relating to scope and existence of the causes of action pleaded, the remaining common issues certified by Myers J. relate to the alleged loss suffered by the class members and as to whether damages can be calculated on an aggregate basis. The loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established. ...

One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.<sup>235</sup>

After making these comments, Rothstein J. proceeded to offer the following description of the standard of proof which expert evidence of loss-related commonality must meet:

In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (*i.e.*, that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the

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<sup>235</sup> *Microsoft*, *supra*, note 2, at paras. 113-114.

particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.<sup>236</sup>

Accordingly, the 2013-2014 Decisions establish that, at least for “loss-related common issues” like causation,<sup>237</sup> plaintiffs will be required to lead expert evidence of a credible or plausible methodology for resolving the issues on a class-wide basis. Such evidence must be grounded in the facts, and there must be some assurance that the data to which it will be applied at trial is available.

It should be noted that, although Rothstein J. made these remarks in the context of indirect purchaser class actions, he did not restrict them to class actions of that type. Instead, Rothstein J. went on to explain the refusal to certify *Hollick*, which was an *environmental* class action, on the basis that unlike *Microsoft* it did not involve “an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis”.<sup>238</sup> This indicates that Rothstein J. did not intend to limit the workable methodology requirement to the indirect purchaser context. That is confirmed by post-*Microsoft* cases dealing with other types of class actions (*e.g.*, claim by investors), which hold that the same requirement of a credible or plausible methodology for proving loss-related issues on a class-wide basis is equally applicable to them.<sup>239</sup> Therefore, the extent to which plaintiff’s evidence discloses a credible or

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<sup>236</sup> *Id.*, at para. 118.

<sup>237</sup> It is important not to confuse the “loss-related” common issues with ones relating to the quantification of damages. As the Court made clear at para. 115 of *Microsoft, id.*, “[t]he requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability ... to prove antitrust impact common to all the members of the class”. Therefore, the “loss-related” issues in *Microsoft* were really causation ones, along with the issues regarding the suitability of an aggregate damages assessment.

<sup>238</sup> *Microsoft, supra*, note 2, at para. 140 (and para. 139). See also *MacQueen, supra*, note 190, at paras. 177-180.

<sup>239</sup> *Andriuk v. Merrill Lynch Canada Inc.*, [2014] A.J. No. 555, 2014 ABCA 177, at paras. 10-11 (Alta. C.A.). See also the pre-*Microsoft* case of *Dennis v. Ontario Lottery and Gaming Corp.*, [2013] O.J. No. 3468, 116 O.R. (3d) 321, at paras. 66, 68 (Ont. C.A.), leave to appeal refused [2013] S.C.C.A. No. 373 (S.C.C.). The requirement for an expert methodology to prove loss-related issues on a class-wide basis was also referred to by the Supreme Court in the investor class action of *AIC, supra*, note 5, at para. 43. Additionally, it reflects the general certification requirement in provisions like s. 4(1)(e)(ii) of the B.C. CPA, which require the representative plaintiff to file a litigation plan “that sets out a *workable method* of advancing the proceeding on behalf of the class” (emphasis added).

plausible methodology for loss-related common issues is likely to be a major battleground in future certification motions.<sup>240</sup>

#### 4. The Weighing of Evidence

The post-*Hollick* case law was particularly divided over the judicial power to weigh evidence. Some decisions, like *Cloud*, *Pearson* and *DRAM*, suggested that the weighing of evidence at certification was inappropriate. Other cases, like *Chadha*, *Alves* and *McCracken*, recognized the court's ability to assess the cogency of the plaintiff's evidence, and even placed reliance on defence evidence in the face of plaintiff evidence to the contrary.

In general, the 2013-2014 Decisions adopt the former view, and caution lower courts to refrain from undertaking detailed assessments of the evidence at certification. The most extensive statement to this effect is found in Cromwell J.'s reasons in *AIC*:

... In his discussion of the standard of proof with regard to the commonality and preferability requirements (para. 101), Rothstein J. indicated that the “‘some basis in fact’ standard does not require that the court resolve conflicting facts and evidence at the certification stage” (para. 102). This reflects the fact that a certification court “is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight”: *Pro-Sys*, at para. 102, citing *Cloud*, at para. 50 ...

...

The jurisprudence emphasizes the importance of not allowing the requirement to establish “some basis in fact” to lead to a more fulsome assessment of contested facts going to the merits of the case. For example, in *Cloud*, the Ontario Court of Appeal indicated that the “some basis in fact” standard “does not entail any assessment of the merits at the certification stage” (para. 50). Similarly, in *Pearson*, the Ontario Court of Appeal, having concluded that the representative plaintiff had adduced evidence to show a negative impact on property values concluded that the “some basis in fact” standard with regard to the commonality of the issues had been met. *The court pointed out that*

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<sup>240</sup> A notable exception here is in Quebec, where the *Infineon* Court held that in contrast to the common law provinces, a plaintiff was “not required to produce expert testimony and advance a methodology capable of demonstrating an aggregate loss” given art. 1003 of the CCP: *Infineon*, *supra*, note 4, at paras. 128 and 137.

while the defendant disputed the plaintiff's evidence, "the certification motion is not the place for resolving that controversy" (para. 76). These evidentiary principles equally apply to the preferability criterion ... .

The standard of proof on a motion for certification was at the heart of the appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal refused ... [2003] 2 S.C.R. vi. The decision makes clear that at the certification stage, the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements.<sup>241</sup>

There are at least three principles at play here, and it is important to distinguish between them. The first concerns the degree to which a court may "weigh" the plaintiff's evidence in its own right, that is, whether it may assess the cogency of the plaintiff's evidence without regard to the evidence of the defence. The second is whether the court may "weigh" the plaintiff's evidence having regard to non-conflicting evidence tendered by the defendants, which merely supplements the record before the court. The third is whether the court may "weigh" the plaintiffs' evidence against directly contradictory evidence from the defence, and resolve conflicts in that evidence in favour of the latter. While the foregoing comments in *AIC* could superficially be taken to preclude all three types of behaviour, a closer reading of the 2013-2014 Decisions suggests that only the final one is proscribed.

First, as to the ability to weigh the plaintiff's evidence in its own right, the Court's judgment in *Sun-Rype* affirms that this remains a real possibility. While the plaintiffs in *Sun-Rype* led expert evidence that the amount of HFCS used by the defendants and the specific products containing it were identifiable,<sup>242</sup> the Court found this was insufficient to establish "some basis in fact" for the existence of an identifiable class, since it did not demonstrate that indirect purchasers would be able to self-identify as HFCS consumers. Among the reasons the Court gave for this was that the individual representative plaintiff in *Sun-Rype* testified on cross-examination that she did not know whether any of the products she purchased actually contained HFCS.<sup>243</sup> In other words, the Court found that the plaintiffs' evidence in *Sun-Rype* was inadequate even

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<sup>241</sup> *AIC*, *supra*, note 5, at paras. 40 and 42-43 (emphasis added).

<sup>242</sup> *Sun-Rype*, *supra*, note 3, at para. 64.

<sup>243</sup> *Id.*, at paras. 55 and 66.

standing on its own.<sup>244</sup> This suggests that defendants should give careful consideration to cross-examining plaintiffs and their experts in future certification disputes where possible, since it is one of the few ways through which to undermine the plaintiff's evidence on its own terms.

The Court's treatment of the expert evidence tendered with respect to loss-related common issues in *Microsoft* is also instructive. While the Court ultimately found that the plaintiffs' evidence established some basis in fact for those issues, it nonetheless reviewed that evidence to determine whether it disclosed a "sufficiently credible or plausible" methodology that offered a "realistic prospect" of establishing loss on a class-wide basis, not one that was "purely theoretical or hypothetical" with no "ground[ing] in the facts".<sup>245</sup> Therefore, the 2013-2014 Decisions demonstrate that courts may actively evaluate the cogency of expert evidence at certification, at least where that evidence is tendered in support of the commonality of loss-related issues.

Second, as to the ability to weigh the plaintiff's evidence in light of non-conflicting defence evidence, the Court in *AIC* confirms that a defendant is entitled to lead evidence in response to the motion:

The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. ... *A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence"*: M. Cullity, "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 417.

With regard to the second aspect of the preferability requirement — that is, the comparative analysis — the representative plaintiff will necessarily have to show some basis in fact for concluding that a class action would be preferable to other litigation options. However, the representative plaintiff cannot be expected to address every conceivable non-litigation option in order to establish that there is some basis in fact to think that a class action would be preferable. *Where the defendant relies on a specific non-litigation alternative, he or she has an*

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<sup>244</sup> The Court made a similar finding later in its judgment, where it held that even if the plaintiff's expert evidence contained a credible and plausible method for establishing loss on a class-wide basis, it still did not provide some basis in fact for the proposition that two or more persons could self-identify as members of the class (*id.*, at paras. 70-72).

<sup>245</sup> *Microsoft*, *supra*, note 2, at para. 118. The Court's comments here call to mind its earlier ruling regarding summary judgment motions in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S.C.J. No. 60, [1999] 3 S.C.R. 423, at para. 31 (S.C.C.) ("[A] self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence"). See also *Good*, *supra*, note 190, at para. 63.

*evidentiary burden to raise it.* As Winkler J. (as he then was) put it in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.): "... the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis ... . It must be supported by some evidence" (para. 67). *However, once there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff.*<sup>246</sup>

A good example of this can be found in *Sun-Rype*. There, the defendants led evidence that HFCS and liquid sugar had been used interchangeably by direct purchasers during the class period, and that Canadian labelling requirements during the class period did not require them to specify which of the two sweeteners was used in their product.<sup>247</sup> Noting that the "class certification framework ... allow[s] the opposing party to respond with its own evidence",<sup>248</sup> the *Sun-Rype* Court relied heavily on this defence evidence in finding there was no basis in fact for an identifiable class, only "speculation".<sup>249</sup> For instance, in holding that the evidence of the plaintiff's expert as to the ability to identify the amount of HFCS and the specific products in which it was used did not amount to some basis in fact of an identifiable class, Rothstein J. said:

The question, however, is not one of whether the identified products contained HFCS, or even whether the overcharge would have reached the indirect purchaser level (*i.e.*, whether passing on had occurred). The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. *The appellants have not offered evidence that could help to overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably.*<sup>250</sup>

Similarly, in addressing the representative plaintiff's admission on cross-examination, he held:

Even Ms. Bredin testified that she is unable to state whether the products she purchased contained HFCS. This fact will remain unchanged because, as noted above, *liquid sugar and HFCS were used interchangeably and a generic label indicating only "sugar/glucose-*

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<sup>246</sup> *AIC*, *supra*, note 5, at paras. 48-49 (emphasis added).

<sup>247</sup> *Sun-Rype*, *supra*, note 3, at paras. 55 and 63.

<sup>248</sup> *Id.*, at para. 68.

<sup>249</sup> *Id.*, at para. 70.

<sup>250</sup> *Id.*, at para. 65 (emphasis added).

*fructose” could be used for either type of sweetener. Ms. Bredin presented no evidence to show that there is some basis in fact that she would be able to answer this question. On the evidence presented on the application for certification, it appears impossible to determine class membership.*<sup>251</sup>

Therefore, the 2013-2014 Decisions establish that defence evidence may be used to supplement or fill gaps in the evidentiary record with respect to matters that are not directly addressed by the evidence of the plaintiff. Where that occurs, and the defence evidence undermines the plaintiff’s litigation position, the court may be justified in relying on the defence evidence to find that the plaintiff has not established “some basis in fact”.

Third, however, where the defence evidence directly conflicts with the evidence of the plaintiff, the 2013-2014 Decisions suggest that the certification judge should decline to resolve that conflict and permit the issue to proceed to trial. This is illustrated by *Microsoft*, where the plaintiffs and defendants tendered competing expert evidence concerning the ability to establish class-wide loss. The expert defence evidence in *Microsoft* identified several flaws in the plaintiffs’ evidence, *e.g.*, the failure to take the Canadian context into account, the absence of an evidentiary basis, and the lack of workability in the proposed methodology showing class-wide loss.<sup>252</sup> However, despite the defendants’ argument that the certification judge “was under an obligation to weigh the evidence of both parties where a conflict arises”,<sup>253</sup> Rothstein J. declined to do so:

It is indeed possible that at trial the expert evidence presented by Microsoft will prove to be stronger and more credible than the evidence of Dr. Netz and Professor Brander. However, *resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification* (see *Infineon*, at para. 68; *Irving*, at para. 143). The trial judge will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology. For the purposes of certification and having regard to the deference due the applications

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<sup>251</sup> *Id.*, at para. 66 (emphasis added).

<sup>252</sup> *Microsoft*, *supra*, note 2, at para. 125.

<sup>253</sup> *Id.*, at para. 117.

judge on this issue, I would not interfere with the findings of Myers J. as to the commonality of the loss-related issues.<sup>254</sup>

Based on the foregoing, the impact of the 2013-2014 Decisions on the judicial power to weigh evidence may be summarized as follows. The certification judge should not engage in “finely calibrated assessments of evidentiary weight”<sup>255</sup> or a “detailed weighing of the evidence”,<sup>256</sup> in the sense of “resolv[ing] conflicting facts and evidence”.<sup>257</sup> Nonetheless, a limited weighing of the evidence is possible.<sup>258</sup> This includes assessing the cogency of the plaintiff’s evidence in its own right (*e.g.*, where it is contradicted by the plaintiff’s other evidence, or is speculative rather than grounded in the facts), particularly where it takes the form of expert evidence regarding loss-related common issues, in which case the court may actively assess whether it is credible, plausible and realistic. It also includes considering whether the plaintiff’s evidence adequately responds to problems raised by the non-conflicting evidence of the defendant.

## 5. The Uniformity of the Standard of Proof

A final issue in the 2013-2014 Decisions that bears examination is whether the Court viewed the standard of proof as being the same across different contexts. In particular, does the standard of proof vary as between the different certification criteria? And to what extent is the standard of proof the same across the country?

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<sup>254</sup> *Id.*, at para. 126 (emphasis added). Compare *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, at 323 (3rd Cir. 2008) (“[N]eglecting to resolve disputes between experts ‘amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert’”). This was one of the U.S. cases cited by the respondents in *Microsoft* that Rothstein J. refused to follow.

<sup>255</sup> *Microsoft*, *supra*, note 2, at para. 102; *AIC*, *supra*, note 5, at para. 40.

<sup>256</sup> *AIC*, *supra*, note 5, at para. 43.

<sup>257</sup> *Microsoft*, *supra*, note 2, at para. 102 (and 126); *AIC*, *supra*, note 5, at para. 40.

<sup>258</sup> In this respect, the ability to weigh evidence as part of the “some basis in fact” test bears some resemblance to the “limited weighing” which a court may conduct when determining whether an evidentiary burden has been met: see *Arcuri*, *supra*, note 178, at paras. 22-23, 29-30, 33-34; *Prudential*, *supra*, note 177, at paras. 35-36; *Johansson*, *supra*, note 176, at paras. 27, 29, 125, 129; *Cairney*, *supra*, note 207, at para. 21; and *Pappas*, *supra*, note 188, at paras. 22-26. The existence of a limited power to weigh evidence is also consistent with the principle stated in cases like *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, [2005] 2 S.C.R. 473, at para. 50 (S.C.C.) (“The primary role of the judiciary ... is to hear and weigh, in accordance with the law, evidence that is relevant to the legal issues confronted by it ...”).

As a general matter, it would seem that the “some basis in fact” test involves the same standard of proof and judicial powers regardless of which evidence-based statutory certification criteria it is applied to (subject to the special test for expert evidence of loss-related common issues outlined above). In *AIC*, for instance, Cromwell J., after setting out the “some basis in fact” principles which *Microsoft* and other courts had articulated in the context of the common issues requirement, stated that “[t]hese evidentiary principles equally apply to the preferability criterion”.<sup>259</sup> This approach is also reflected in *Sun-Rype*, where the Court relied on both the *Hollick* and *Microsoft* principles in framing the “some basis in fact” test for the purpose of the identifiable class requirement.<sup>260</sup>

However, this uniformity does not appear to exist throughout Canada, at least insofar as Quebec is concerned. As noted previously, the Court in *Infineon* held that the evidentiary burden under the Quebec CCP was “less demanding than the one that applies in other parts of Canada”,<sup>261</sup> and specifically disclaimed any requirement for the plaintiff to lead evidence of a plausible or credible methodology for proving loss-related issues on a class-wide basis.<sup>262</sup>

This distinction between the Quebec and common law approaches is understandable given the differences in their legislation. By parity of reasoning, however, it is unclear why the Court did not also recognize the legislative differences among the common law provinces themselves. The Court in *Microsoft* and *Sun-Rype* seemed to assume that the applicable standard of proof was the one set out in *Hollick*. However, unlike the first two decisions, *Hollick* involved the Ontario rather than B.C. CPA.<sup>263</sup> Further, in *Rumley* — which was the only previous certification decision under the B.C. CPA to be substantively reviewed by the Court — there was no issue as to the standard of proof, and the

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<sup>259</sup> *AIC*, *supra*, note 5, at para. 42.

<sup>260</sup> *Sun-Rype*, *supra*, note 3, at para. 68.

<sup>261</sup> *Infineon*, *supra*, note 4, at para. 128.

<sup>262</sup> *Id.*, at paras. 128 and 137. The Court took a similar position in *Vivendi*, albeit with respect to a different issue than the standard of proof, *i.e.*, the requirement for “identical, similar or related questions of law or fact” under art. 1003(a) of the CCP and the “common issues” criterion existing elsewhere in Canada, noting that “the Quebec approach to authorization is more flexible than the one taken in the common law provinces”: see *Vivendi*, *supra*, note 6, at para. 57 (and paras. 48 and 53-54).

<sup>263</sup> Similarly, in *AIC*, the Court applied the principles from the *Microsoft* and *Sun-Rype* B.C. CPA rulings to the Ontario CPA without any consideration of the differences between the legislation.

Court acknowledged that differences between the British Columbia and Ontario statutes exist.<sup>264</sup>

As discussed earlier, the B.C. CPA is materially different from the Ontario CPA in requiring both the plaintiff and the defendant to file material fact affidavits on certification. By contrast, the Ontario CPA merely requires the parties to file affidavits setting forth their best estimates as to the size of the class. This feature of the B.C. CPA has been noted by the courts,<sup>265</sup> who have contrasted it to the legislation in other common law provinces.<sup>266</sup> Given that the B.C. CPA requires material fact affidavits from both parties, it is at least arguable that the B.C. certification test should involve a more rigorous weighing of evidence than Ontario. After all, what purpose could be served by compelling defendants to file material fact affidavits unless that evidence is to be weighed against the similar affidavits of the plaintiff? Unfortunately, the Court in *Microsoft* did not address this inter-jurisdictional point, beyond obliquely observing that it was raised by the defendants.<sup>267</sup> In view of the Court's dismissive treatment of this issue, it seems unlikely that it will recognize significant variations in the standard of proof across the common law provinces in the near future.

#### IV. CONCLUSION

The 2013-2014 Decisions are best understood as a reflection of the Supreme Court's "evolving mission to confront barriers to access to justice".<sup>268</sup> As the Court recently emphasized in *Hryniak*, it views

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<sup>264</sup> *Rumley*, *supra*, note 39, at paras. 25, 33, and 35. See also British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, Vol. 20, No. 19 (June 6, 1995), at 14991 (Hon. C. Gabelmann) ("Other jurisdictions have class action legislation ... We have studied the experiences of these other jurisdictions ... The result is state-of-the-art *legislation especially tailored for our province.*") (emphasis added).

<sup>265</sup> *Boliden*, *supra*, note 78, at para. 38. See also *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 295, at para. 8 (B.C.S.C.); *Richard v. British Columbia*, [2004] B.C.J. No. 2416, 2004 BCSC 1541, at paras. 3-4, 18, 29 (B.C.S.C.); and *Antoniali v. Coquitlam (City)*, [2005] B.C.J. No. 1999, 2005 BCSC 1310, at para. 6 (B.C.S.C.).

<sup>266</sup> *James*, *supra*, note 78, at para. 60.

<sup>267</sup> *Microsoft*, *supra*, note 2, at para. 117. Even then, the Court did not expressly refer to the differences between the Ontario and B.C. CPA, but merely noted that "[Microsoft] argues that under s. 5(4) of the CPA, the parties are required to file affidavits containing all material facts upon which they intend to rely, and as such Myers J. was under an obligation to weigh the evidence of both parties where a conflict arises."

<sup>268</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] S.C.J. No. 37, [2013] 2 S.C.R. 623, at para. 1 (S.C.C.).

“[e]nsuring access to justice [as] the greatest challenge to the rule of law in Canada today”.<sup>269</sup> Since “access to justice is an important goal of class proceedings”,<sup>270</sup> it is obvious why the Court favoured a liberal interpretation of the standard of proof.<sup>271</sup>

Nevertheless, the Court’s reasoning in the 2013-2014 Decisions demonstrates the problems with taking an overly teleological approach. In its quest to ensure access to justice, the Court has produced a standard of proof that is at times inconsistent, illogical and vague. This can be seen from its dismissal of an “arguable case” test despite its simultaneous endorsement of one under the “less demanding” Quebec legislation, its rejection of a balance of probabilities threshold for purely procedural certification criteria, and its refusal to “define ‘some basis in fact’ in the abstract” on the ground that “[e]ach case must be decided on its own facts”. It is difficult to resist the conclusion, expressed by one commentator in relation to the 2001 Trilogy, that here again “the Court is taking a preconceived, result-oriented approach to certification, and is using the process as a ‘lever to turn certification on or off’ depending on its belief as to the social utility of the action”.<sup>272</sup>

There would seem to be a problem with access to justice as a legal objective when it begins to deprive litigants of clear and principled rules of law. While improving access to justice is indisputably important, “the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application”.<sup>273</sup> It is not to provide lower courts with an unstructured discretion to pursue abstract and subjective policy goals. As the Supreme Court has stated before, “[i]t is fundamental to the

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<sup>269</sup> *Hryniak*, *supra*, note 176, at para. 1. Indeed, the Court recently recognized that access to justice has constitutional status in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] S.C.J. No. 59, 2014 SCC 59 (S.C.C.).

<sup>270</sup> *AIC*, *supra*, note 5, at para. 24. See also M. Good, “Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions” (2009) 47 *Alta. L. Rev.* 185; and Hon. F. Iacobucci, “What is Access to Justice in the Context of Class Actions?” in J. Kalajdzic, ed. (2011) 53 S.C.L.R. (2d) 17.

<sup>271</sup> The significance of access to justice to the 2013-2014 Decisions is also noted by Hoaken & Matthews, *supra*, note 44.

<sup>272</sup> C. Marafioti-Mazza, “The Post-Trilogy Class Action Certification Regime: A More Onerous Threshold for Plaintiffs to Meet” (2004) 1 *Can. Class Action Rev.* 235, at 236. See also 258-59. It is perhaps because of such concerns that the Ontario Law Reform Commission has announced it is undertaking a comprehensive review of the Ontario CPA, in which it will consider among other things “the test for certification, burden of proof and evidentiary requirements”: see Law Commission of Ontario, *Review of Class Actions in Ontario: Issues to be Considered* (Ontario: Law Commission of Ontario, 2013), at 6, online at: <<http://www.lco-cdo.org/class-actions-issues-to-be-considered.pdf>>.

<sup>273</sup> *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, [2002] 2 S.C.R. 235, at para. 9 (S.C.C.).

rule of law that ‘the law must be accessible *and so far as possible intelligible, clear and predictable*’<sup>274</sup>. A focus upon accessibility to the exclusion of intelligibility, clarity and predictability cannot be the right approach.

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<sup>274</sup> *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96, at para. 69 (S.C.C.) (emphasis added).