SUMMARY JUDGMENT PRIOR TO CERTIFICATION IN CLASS ACTIONS: HOW MICROSOFT AND HRYNIAK HAVE CHANGED THE LANDSCAPE

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Introduction

Historically, summary judgment motions in class actions prior to certification have been rare. It has been said that "[a]s a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined".[1] The Supreme Court of Canada's decisions in *Pro-Sys Consultants Ltd. v. Microsoft*[2] and *Hryniak v. Mauldin*[3] provide cause for counsel and the judiciary to re-evaluate this convention. *Microsoft* rejected a call for a more rigorous analysis of the merits at the certification stage. The court held that certification is focused on "form" and "is not intended to be a pronouncement on the viability or strength of the action".[4] At the same time, *Hryniak* called for a "culture shift" involving a move away from "the conventional trial" and a "broad interpretation" of the summary judgment rules in recognition of the need for proportionality in the civil justice system.[5] We submit that the combined effect of *Microsoft* and *Hryniak* will be, in many cases, to make summary judgment a more proportionate and effective tool for the resolution of class proceedings than certification and that the historical convention that certification should be the first motion should no longer be the norm.

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1. *Attis v. Canada (Minister of Health)* (2005), 28 C.P.C. (6th) 209, 75 O.R. (3d) 302, [2005] O.J. No. 1337 (Ont. S.C.J.) at para. 7 (*Attis*).
2. [2013] 3 S.C.R. 477, 2013 SCC 57, 364 D.L.R. (4th) 573 (S.C.C.).
3. 2014 SCC 7, [2014] 1 S.C.R. 87, 366 D.L.R. (4th) 641 (S.C.C.).
4. *Microsoft*, *supra*, footnote 2 at paras. 99 and 102.
5. *Hryniak*, *supra*, footnote 3 at paras. 2-5.

The Legislative Framework

There are a number of provisions of the *Class Proceedings Act, 1992*[6] (the "*CPA*") and the *Rules of Civil Procedure*[7] (the "*Rules*") that bear on the order of motions in a class proceeding. Section 2(2) of the *CPA* provides that a person who commences an action on behalf of a proposed class "shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff".[8] Section 2(3) of the *CPA* provides time limits regarding the certification motion. While honoured more in the breach than in practice,[9] these time limits have historically been used as justification for the notion that certification should receive priority over other motions. Section 2(3) provides that the certification motion shall be made:

> (a) within ninety days after the later of,
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> (i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and
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> (ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or
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> (b) subsequently, with leave of the court.[10]

Section 5 of the *CPA* sets out the requirements for certifying a class action which are well known and will not be reproduced here in full. In brief, the court shall certify the action if the pleadings disclose a cause of action (s. 5(1)(a)), there is an identifiable class of two or more persons (s. 5(1)(b)), the claims of the class members raise common issues (s. 5(1)(c)), a class proceeding is the preferable procedure for the resolution of the common issues (s. 5(1)(d)), and there is an appropriate representative plaintiff (s. 5(1)(e)).[11]

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6. S.O. 1992, c. 6, s. 35.
7. R.R.O. 1990, Reg. 194.
8. *CPA*, s. 2(2).
9. The rule is honoured in the breach in two ways. First, in many cases statements of defence are not filed by defendants before certification. Second, when they are delivered, the certification motion is almost never heard within ninety days of their delivery. One Ontario class action judge has ordered statements of defence to be delivered prior to certification in two cases: see *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257, 107 O.R. (3d) 201, [2011] O.J. No. 3286 (Ont. S.C.J.) at paras. 37-38; and *Smith v. Sino-Forest Corp.*, 2012 ONSC 1924, (*sub nom. Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.)* 110 O.R. (3d) 173, [2012] O.J. No. 1331 (Ont. S.C.J.) at para. 36, Perell J.
10. *CPA*, s. 2(3).
11. *CPA*, s. 5.

By virtue of s. 35 of the *CPA*, "[t]he rules of court apply to class proceedings".[12] Rules 20.01 and 20.02 provide that a plaintiff or a defendant may move with supporting affidavit material or other evidence after the defendant has delivered a statement of defence.[13] As well, the proportionality principles in rules 1.04(1) and 1.1, which animate the *Rules* more generally, should be considered. Rules 1.04(1) and (1.1) provide:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
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> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.[14]

Finally, s. 12 of the *CPA* provides motion judges in class proceedings with broad authority to determine the order of motions in a class proceeding or a putative class proceeding:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.[15]

The Historical Preference for Certification as the First Motion

Several decisions have indicated a judicial preference for certification as the first motion in a proposed class proceeding. In *Moyes v. Fortune Financial Corp.*,[16] Nordheimer J. held that:

> The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that that reality detracts from the intent to be drawn from the section.
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> The rationale for having the certification motion determined first is that it fulfils the objective of having an early determination of whether the action is going to move forward as a class proceeding, with the consequent binding effect on the members of the class, or whether the action will constitute and determine only the claim of the named plaintiff.

12. *CPA*, s. 35.
13. *Rules*, rr. 20.01 and 20.02.
14. *Rules*, rr. 1.04(1) and (1.1).
15. *CPA*, s. 12.
16. (2001), 13 C.P.C. (5th) 147, 109 A.C.W.S. (3d) 556, [2001] O.J. No. 4455 (Ont. S.C.J.) (*Moyes*).

. . . . .

> . . . I am of the general view that the first order of business in a proposed class proceeding ought, in the normal course, to be the hearing and determination of the certification motion.[17]

Similarly, in *Attis*,[18] Winkler R.S.J., as he then was, stated that "[a]s a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined".[19] In *Baxter v. Canada (Attorney General)*,[20] Winkler R.S.J. held that "[a]lthough the *CPA* does not expressly require the certification motion to be the first order of business, the 90-day time-frame imposed by s. 2(3) provides a clear indication that the certification motion should be heard promptly and normally be given priority over other motions".[21]

In *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*,[22] the Ontario Court of Appeal held that it was appropriate to grant a declaration regarding the representative plaintiff's rights under an insurance policy prior to certification. However, Sharpe J.A. for the court cautioned as follows:

> In the present case both parties were content to have the substantive issue of the interpretation and the effect of the statutory condition resolved before certification. I see no reason why we should not grant declaratory relief determining the appellant's rights. However, we must also exercise a measure of restraint lest we put the substantive cart before the procedural horse. While I think it appropriate to give a declaration as to the effect of the statutory condition, it would be inappropriate to go any further before there has been an order certifying the matter as a class proceeding. In particular, we should avoid attempting to resolve the many controversial issues that flow from the declaration of right.[23]

In *Martin v. Astrazeneca Pharmaceuticals PLC*,[24] a case decided a year before the 2010 amendments to the Ontario Rules, Cullity J. reviewed the jurisprudence and concluded:

17. *Ibid.* at paras. 8-9. See also: *Gariepy v. Shell Oil Co.* (2003), 29 C.P.C. (5th) 305, 63 O.R. (3d) 91, [2003] O.J. No. 33 (Ont. S.C.J.) at para. 8 (*Gariepy*); *Patel v. Groupon Inc.*, 2012 ONSC 1799, 40 C.P.C. (7th) 29, [2012] O.J. No. 1226 (Ont. S.C.J.) at para. 4 (*Groupon*).
18. *Supra*, footnote 1.
19. *Ibid.* at para. 7.
20. (2005), 139 A.C.W.S. (3d) 627, [2005] O.T.C. 391, [2005] O.J. No. 2165 (Ont. S.C.J.) (*Baxter*).
21. *Ibid.* at para. 9.
22. (2001), 200 D.L.R. (4th) 449, 33 C.C.L.I. (3d) 165, [2001] O.J. No. 2312 (Ont. C.A.), leave to appeal refused (2002), 163 O.A.C. 398 (note), [2001] S.C.C.A. No. 451 (S.C.C.).
23. *Ibid.* at para. 36.

> I believe it must now be taken as settled in this jurisdiction, that the first step in a proceeding commenced under the *CPA* will normally be to determine whether it can properly be conducted as a class proceeding – a question that turns on whether the requirements for certification in section 5 of the *Act* are satisfied.[25]

Cullity J. held that this result was supported by the structure of the *CPA*, which contemplated that class proceedings would culminate in conventional common and individual issue trials:

> An application of the general rule that a certification motion should be given priority in a case like this is supported by the structure of the *CPA* and what must be regarded as a deliberate omission of the preliminary merits test that was recommended by the Law Reform Commission in its Report on Class Actions. See the discussion in *Hollick v. City of Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.) at para. 16. The four stages of the procedure under the *CPA* are certification; a trial of common issues; a determination of individual issues; and a distribution of damages, if any. Certification is not a test of the merits of a proceeding. It is sufficient that a cause of action be disclosed in the plaintiff's pleading. If that is so and the other requirements in section 5(1) are satisfied, sections 11 and 25 of the statute contemplate that there will then be a trial of common issues and, only subsequently, a determination of the individual issues in, if appropriate, a summary manner. The defendants seek to reverse this procedure to the extent that the plaintiffs would be required, at the outset, to withstand a motion for summary judgment on the merits of individual issues affecting their claims.[26]

The Historical Exceptions to the General Rule

Despite the foregoing, it has been recognized that in some circumstances, preliminary merits-based motions should precede certification. In *Stone v. Wellington*,[27] the defendants moved for summary judgment to dismiss a putative class action against them on the basis that the representative plaintiff's claim was statute-barred pursuant to the applicable limitation period. The plaintiff sought to adjourn the defendants' summary judgment motion to await certification. The Court of Appeal upheld the motion judge's

24. (2009), 83 C.P.C. (6th) 79, 180 A.C.W.S. (3d) 378, [2009] O.J. No. 3847 (Ont. S.C.J.), leave to appeal refused (2009), 259 O.A.C. 155, [2009] O.J. No. 5265 (Ont. Div. Ct.) (*AstraZeneca*).
25. *Ibid.* at para. 13.
26. *Ibid.* at para. 14.
27. *Stone v. Wellington (County) Board of Education* (1999), 29 C.P.C. (4th) 320, 120 O.A.C. 296, [1999] O.J. No. 1298 (Ont. C.A.), leave to appeal refused (2000), 134 O.A.C. 400 (note), [1999] S.C.C.A. No. 336 (S.C.C.) (*Stone*).

decision granting summary judgment in favour of the defendants and refusing the adjournment. The court noted that the *Rules* apply to class proceedings and the defendants were permitted to move for summary judgment after delivery of a statement of defence.[28] Where the representative plaintiff "is definitively shown as having no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class".[29] Accordingly, there was no bar to bringing the motions, "even at the pre-certification stage".[30]

In *Moyes*,[31] Nordheimer J., while refusing to permit an individual defendant to move for summary judgment dismissing the action against him, held "that there are some preliminary motions which may necessarily need to be determined in advance of a certification motion".[32] He referred to the example of a Rule 21 motion by which "the defendant can establish there is no reasonable cause of action revealed by the statement of claim at all".[33] Such a motion determines a discrete issue, puts an end (legally or practically) to the litigation and avoids the substantial costs that a certification motion entails.[34]

In *Attis*,[35] Winkler R.S.J. held that:

> . . . there are circumstances where it is useful, indeed in some cases necessary, that preliminary motions be heard in advance of the certification motion.
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> . . . . .
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> A class proceeding is complex litigation. As a practical matter, a certification motion is often hotly contested, involving significant expense and commitment of resources. In addition, the necessity for the certification motion is a burden placed on plaintiffs that is peculiar to a class proceeding. However, the expense of defending the motion, and the stigma that may be attached to the fact of a pending class proceeding from the defendants' perspective, create an interest on its part in resolving the matter in an efficient and timely manner. Therefore, interests of both plaintiffs and defendants are advanced where a particular preliminary motion can serve the goal of litigation efficiency by reducing or eliminating expenditures of resources and time, if heard before the certification motion . . . [T]here are preliminary motions that can greatly reduce time and expense in a certification motion. It is similarly import-

28. *Ibid.* at para. 8.
29. *Ibid.* at para. 9.
30. *Ibid.* at para. 11.
31. *Supra*, footnote 16.
32. *Ibid.* at para. 12.
33. *Ibid.*
34. *Ibid.*
35. *Supra* footnote 1.

ant to consider the costs that follow a certification including the costs of the notices required under the *CPA* and any appeals that may be taken.[36]

In *Baxter*,[37] Winkler R.S.J. stated:

> . . . there are instances where . . . there can be exceptions to the rule that the certification motion ought to be the first procedural matter to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly.
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> . . . In many cases, Rule 20 and 21 motions brought by the defendant have the potential to render the certification motion unnecessary if they are determined prior to certification, thereby furthering the objective of judicial economy.[38]

In *AstraZeneca*,[39] Cullity J. held that the common thread running through the decisions permitting summary judgment or motions to strike prior to certification was that they "raised discrete issues of law that potentially affected the claims of all class members and, although not strictly binding on anyone other than the plaintiffs, were likely to have had the practical effect of leading to an abandonment of the claims of the other class members, an early settlement or a narrowing of the issues to be tried".[40]

Thus, courts have held or assumed that summary judgment motions may precede certification where:

- the action is statute-barred;[41]
- an essential element of the cause of action asserted is absent;[42]

36. *Ibid.* at para. 9.
37. *Supra*, footnote 20.
38. *Ibid.* at paras. 14-15.
39. *Supra*, footnote 24.
40. *Ibid.* at para. 17.
41. *Stone*, *supra* footnote 27; *Segnitz v. Royal & SunAlliance Insurance Co. of Canada* (December 21, 2001), Jenkins J., [2001] O.J. No. 6016 (Ont. S.C.J.) at paras. 2-4; *Veley v. CGU Insurance Co. of Canada* (2004), 7 C.C.L.I. (4th) 128, 43 C.P.C. (5th) 400, [2004] O.J. No. 143 (Ont. S.C.J.) at paras. 13-14; *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2015 ONSC 2046, 2015 CarswellOnt 4690 (Ont. S.C.J.) at paras. 7-8, leave to appeal refused 2015 ONSC 3414 (Ont. S.C.J.).

- the central issue in the proceeding involves the interpretation of a statutory provision;[43] and
- the putative class proceeding is *res judicata* and/or an abuse of process.[44]

Conversely, courts have held that summary judgment should await certification where:

- an appeal of the certification motion is pending;[45]
- an individual defendant's motion would not obviate the need for a certification motion on the claims against the remaining defendants and would raise uncertainty as to the effect of the rights of other members of the putative class against the individual defendant;[46]
- the motion is premised on individual issues unique to each class member, such as reliance on an allegedly misleading document in a case involving common law misrepresentation claims[47] or specific causation in a claim based on an allegation of failure to warn;[48] and
- the motion will not dispose of all claims and the representative plaintiff may be able to represent other class members in asserting the claims sought to be dismissed.[49]

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42. *Ciano v. York University* (2000), 94 A.C.W.S. (3d) 489, [2000] O.T.C. 37, [2000] O.J. No. 183 (Ont. S.C.J.) at paras. 18-19, Winkler J. (as he then was) (no proof of compensable damages flowing from the alleged contractual breach); *KRP Enterprises Inc. v. Haldimand (County)* (2007), 159 A.C.W.S. (3d) 203, 2007 CarswellOnt 4846, [2007] O.J. No. 2967 (Ont. S.C.J.) (no evidence of nuisance committed by city as city had not permitted or acquiesced in a blockage of the street as alleged); *Punit v. Wawanesa Mutual Insurance Co.* (2007), 61 C.C.L.I. (4th) 79, 166 A.C.W.S. (3d) 436, [2007] O.J. No. 5412 (Ont. S.C.J.) at paras. 10-11 and 20-26 (representative plaintiff asserting action on behalf of persons whose cars were repaired with non OEM parts; representative plaintiff's car was repaired with an OEM part).
43. *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, 237 D.L.R. (4th) 385 (S.C.C.) at para. 10; *Hamilton Kilty Hockey Club Inc. v. Ontario (Attorney General)* (2003), 64 O.R. (3d) 328, 122 A.C.W.S. (3d) 664, [2003] O.J. No. 1163 (Ont. C.A.) at para. 19.
44. *Soderstrom v. Hoffmann-La Roche Ltd.* (2008), 58 C.P.C. (6th) 160, 166 A.C.W.S. (3d) 433, [2008] O.J. No. 1405 (Ont. S.C.J.) at paras. 5 and 78, Perell J.
45. *Gariepy*, *supra*, footnote 17 at paras. 8-16.
46. *Moyes*, *supra*, footnote 16 at paras. 10-11.
47. *McKenna v. Gammon Gold Inc.* (2009), 84 C.P.C. (6th) 148, 183 A.C.W.S. (3d) 90, [2009] O.J. No. 5151 (Ont. S.C.J.) at para. 20 (*Gammon Gold*).
48. *Astrazeneca*, *supra*, footnote 24 at paras. 19-20.
49. *Groupon*, *supra*, footnote 17 at paras. 6-7.

Furthermore, in some cases, judges have exercised their discretion under s. 12 of the *CPA* to either permit[50] or deny[51] requests for certification and motions under rule 20 or 21 to proceed concurrently.

Microsoft[52]

Given the "general rule" that certification motions should be heard with priority and the common standard for challenging a pleading under s. 5(1)(a) of the *CPA* and in a motion to strike under rule 21.01(1)(b),[53] it is not surprising that defendants have often elected to simply challenge claims at the certification stage. The practical problem with this approach is the low threshold on certification. Section 5(1)(a) merely requires the plaintiff to demonstrate that the pleading discloses a cause of action. No evidence is admissible[54] and the plaintiff will satisfy the s. 5(1)(a) requirement unless, assuming the facts proven are true, it is plain and obvious that the plaintiff's claim cannot succeed.[55]

In *Hollick*,[56] the Supreme Court held that the remaining criteria for certification in s. 5(1)(b)-(e) of the *CPA* require no more than "some basis in fact". McLachlin C.J. held that certification "is

50. *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146, 184 A.C.W.S. (3d) 608, [2010] O.J. No. 314 (Ont. S.C.J.) at paras. 16-21 (*Cannon*) (ordering that a motion to strike by certain defendants should proceed concurrently with the certification motion). Certain of the defendants brought motions for summary judgment returnable at the same time as the certification motion: see *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, 13 C.P.C. (7th) 250, [2012] O.J. No. 168 (Ont. S.C.J.). See also: *Fairview Donut Inc. v. TDL Group Corp.*, 2010 ONSC 2845, 97 C.P.C. (6th) 198, [2010] O.J. No. 2094 (Ont. S.C.J.) at paras. 23-24 (*Fairview Donuts*); *Fehr v. Sun Life Assurance Co. of Canada*, 2014 ONSC 2183, 240 A.C.W.S. (3d) 324, 2014 CarswellOnt 4659 (Ont. S.C.J.) at para. 57.
51. *Gammon Gold*, *supra*, footnote 47 at paras. 19-24.
52. *Supra*, footnote 2.
53. *Anderson v. Wilson* (1999), 175 D.L.R. (4th) 409, 36 C.P.C. (4th) 17, 44 O.R. (3d) 673 at p. 679 (Ont. C.A.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 28 C.P.C. (5th) 135, 62 O.R. (3d) 535, [2002] O.J. No. 4781 (Ont. S.C.J.) at para. 19, affirmed (2004), 50 C.P.C. (5th) 25, 70 O.R. (3d) 182, [2004] O.J. No. 865 (Ont. Div. Ct.); *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261, 331 D.L.R. (4th) 257 (S.C.C.) at para. 21 (*Elder Advocates*); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19 (S.C.C.) at para. 25 (*Hollick*).
54. See *e.g. Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165, 360 D.L.R. (4th) 577, 31 C.P.C. (7th) 128 (Ont. C.A.) at para. 87.
55. *Microsoft*, *supra*, footnote 2 at para. 63; *Elder Advocates*, *supra*, footnote 53 at para. 20; *Hollick*, *supra*, footnote 53 at para. 25.
56. *Supra*, footnote 53.

concerned with form and whether the action can properly proceed as a class action" and is "decidedly not meant to be a test of the merits of the action".[57]

In *Microsoft*, the Supreme Court was asked to raise the standard of proof on certification. The case involved claims against Microsoft by a proposed class of purchasers of Intel-compatible PC operating systems and applications. The putative class alleged that Microsoft had breached s. 36 of the *Competition Act*[58] by overcharging for the products. The putative class consisted of "indirect purchasers" who had acquired Microsoft's products from re-sellers. The B.C. Court of Appeal allowed an appeal from the motion judge's decision permitting the action to be certified, concluding that indirect purchaser actions were not available as a matter of law and that the class members had no cause of action within the meaning of s. 4(1)(a) of the B.C. *Class Proceedings Act*.[59] The Supreme Court reversed the Court of Appeal's decision, determining that indirect purchasers have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain.

One of the arguments raised by Microsoft was that the claims did not meet the common issue and preferable procedure requirements. Microsoft argued that the plaintiffs alleged multiple separate instances of overcharges occurring over a period of many years involving many different products and involving many co-conspirators and countless licences. Furthermore, it argued that the fact that the overcharge has been passed on to the class members through the chain of distribution made it unfeasible to prove loss to each of the class members for the purposes of establishing common issues.[60] Microsoft contended that the action would inevitably break down into numerous individual trials and that the proceedings by the Competition Commissioner were a preferable forum in which to deal with certain of the wrongs alleged.[61]

In support of these arguments, Microsoft argued that the "some basis in fact" standard in *Hollick* required the plaintiffs to establish that the "proposed class action raises common issues and is the preferable procedure *on a balance of probabilities*".[62] Microsoft pointed to the American approach of making factual determinations

57. *Ibid.* at para. 16. See also: *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667, 27 C.C.L.T. (3d) 50, 2 C.P.C. (6th) 199 (Ont. C.A.) at para. 50.
58. R.S.C. 1985, c. C-34.
59. R.S.B.C. 1996, c. C.50, s. 4(1)(a).
60. *Microsoft*, *supra*, footnote 2 at para. 109.
61. *Ibid.* at para. 138.
62. *Ibid.* at para. 101.

at the certification stage on a preponderance of evidence and argued that certification judges should be required to weigh the evidence to resolve factual and legal disputes.[63]

The Supreme Court rejected these arguments, affirming the "some basis in fact" standard in *Hollick*. The court acknowledged that *Hollick* reinforced "the importance of certification as a meaningful screening device" and required more than "such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".[64] However, the court rejected the notion that proof on a balance of probabilities was required and eschewed the idea that certification judges should engage in a robust analysis of the merits:

> 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 balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). 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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> . . . Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for

63. *Ibid.* at para. 101, citing *Hydrogen Peroxide Antitrust Litigation, Re*, 552 F.3d 305 (U.S. C.A. 3rd Cir., 2008) at p. 307.

64. *Ibid.* at para. 103.

this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).[65]

The *Microsoft* court's articulation of the standard of proof on a certification motion has led one Ontario class action judge to characterize s. 5(1)(b)-(e) of the *CPA* as setting "a low evidentiary threshold for plaintiffs".[66] *Microsoft* raises the question of whether pre-certification summary judgment motions may be a more effective mechanism of challenging a proposed class proceeding at an early stage.

Hryniak[67] and the Amendments to Rule 20

The 2010 amendments to the Ontario *Rules* and the Supreme Court's decision in *Hryniak* provide additional reason for courts and counsel to reconsider the propriety and wisdom of early summary judgment motions in class proceedings.

As a result of the 2010 amendments to rule 20, the moving party on a summary judgment motion must demonstrate that there is no genuine issue "requiring a trial", as opposed to a genuine issue "for trial".[68] Further, the amendments bestow motion judges with the power to weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence,[69] and order that oral evidence be presented by one or more parties,[70] reversing a line of Ontario Court of Appeal decisions that had severely restricted the use of the rule.[71]

In *Hryniak*, the Supreme Court called for a "culture shift" in how courts approach summary judgment.[72] The court endorsed an "emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case".[73] The summary judgment rules "must be interpreted broadly, favouring

65. *Ibid.* at paras. 102 and 105.
66. *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628, 2015 CarswellOnt 5769 (Ont. S.C.J.) at para. 68, Perell J.; *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470, 2015 CarswellOnt 5377 (Ont. S.C.J.) at para. 90 (*Bard*).
67. *Supra*, footnote 3.
68. Rule 20.04(2)(a).
69. Rule 20.04(2.1).
70. *Rules*, r. 20.04(2.2).
71. See *e.g. Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222, 38 O.R. (3d) 161 at p. 173, [1998] O.J. No. 459 (Ont. C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257, 26 C.P.C. (4th) 1, [1998] O.J. No. 3240 (Ont. C.A.) at paras. 20 and 28.
72. *Hryniak*, *supra*, footnote 3 at para. 2.
73. *Ibid.*

proportionality and fair access to the affordable, timely and just adjudication of claims".[74] Referring to rules 1.04(1) and 1.04(1.1), the court noted that "[t]he proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure".[75]

The *Hryniak* court held that on a motion for summary judgment, the motion judge should first determine if there is a genuine issue requiring a trial based on the evidence presented. "There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a)."[76] That is, there will be no genuine issue requiring a trial "where the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result".[77] Even if there appears to be a genuine issue on the record before the court, the motion judge should then go on to determine if the need for a trial can be avoided using the powers under rules 20.04(2.1) and (2.2), which may be used at the motion judge's discretion provided that their use is not against the interest of justice; *i.e.* that their use "will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole".[78]

The clear message from the *Hryniak* court is that a conventional trial is no longer the default procedure and summary judgment is a legitimate alternative to the resolution of disputes.[79] As Finkelstein et al. observed in "A New Paradigm Shift for Summary Judgment: *Hryniak v. Mauldin*":

> The effect of the decision, however, may be more akin to a seismic shift in the number of cases eligible for summary judgment and the manner in which they are resolved. A full trial on the merits has been knocked off its perch as the default procedure for resolving disputes. The Court has not only made it easier to grant summary judgment, it has encouraged – and perhaps even required – lawyers and judges to use the full panoply of procedural options available to resolve disputes in a fair, just, and proportionate manner. Counsel and the judiciary are no longer faced with a binary choice between a summary judgment motion on one hand and a

74. *Ibid.* at para. 5.
75. *Ibid.* at para. 28.
76. *Hryniak*, *supra*, footnote 3 at para. 66.
77. *Ibid.* at para. 49.
78. *Ibid.*
79. *Ibid.* at para. 43.

> full trial with *viva voce* evidence on the other. Mini-trials, hybrid trials, summary trials, and other variations on the traditional model are now not only available but expected. Judges have been tasked with actively managing the conduct of motions and any subsequent trials, and they have been given wide discretion to craft appropriate procedures that reflect the circumstances of each case. Put simply, the Supreme Court's decision transforms Rule 20 from a narrow procedural option available in a limited number of cases into a procedural tool-kit which judges can use to resolve a variety of disputes.[80]

In light of the low bar for certification under s. 5 of the *CPA*, and the Supreme Court's endorsement of summary judgment as a legitimate alternative to the resolution of disputes, in our view, counsel and the judiciary should reconsider the general practice of certification preceding other motions. As discussed above, the rationale for this convention is based at least in part on the idea that class proceedings will culminate in a conventional trial on the common issues, followed by conventional trials on the individual issues.[81] Following *Hryniak*, summary judgment can no longer be seen as reversing a "default procedure" whereby the merits of the action are necessarily resolved by way of a conventional trial.[82] As the Supreme Court of Canada held in *Hryniak*, counsel and the judiciary must recognize processes "can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate".[83]

There is some evidence that class action judges are beginning to embrace the culture shift. In *Player Estate v. Janssen-Ortho Inc.*,[84] the British Columbia Supreme Court dismissed a failure to warn class action against certain defendants who manufactured, marketed and distributed fentanyl patches in Canada. The court held that the matter was suitable for determination under the summary trial rule in the B.C. Supreme Court Civil Rules.[85] The court relied on *Hryniak* to explain the efficiency rationale for allowing a summary trial to

80. Neil Finkelstein, Eric S. Block, Awanish Sinha and Anu Koshal, "A New Paradigm for Summary Judgment: *Hryniak v. Mauldin*" (2014), 42 Adv. Q. 489.
81. *AstraZeneca*, *supra*, footnote 24 at para. 14.
82. *Ibid.*, dismissing the defendants' motion seeking summary judgment to precede certification in part on the basis that the defendants were seeking "to reverse [the conventional] procedure to the extent that the plaintiffs would be required, at the outset, to withstand a motion for summary judgment on the merits of individual issues affecting their claims".
83. *Hryniak*, *supra*, footnote 3 at para. 27.
84. 2014 BCSC 1122, 11 C.C.L.T. (4th) 104, 242 A.C.W.S. (3d) 792 (B.C. S.C.).
85. B.C. Reg. 168/2009, r. 9-7 (formerly r. 18A).

proceed before a certification that is "likely to be long and expensive":

> Further, if the matter has no merit, allowing it to continue to certification will undoubtedly cause prejudice to Teva and Sandoz. Where the court can find the necessary facts through the summary process, it promotes efficiency to issue judgment at the pre-certification stage.
>
> I am bolstered in this conclusion by the recent decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7.
>
> . . . . .
>
> While the court acknowledged that the inappropriate use of summary procedures will likely result in delays and increased costs, the view expressed resonates in an action like this one where the process is likely to be long and expensive.[86]

Similarly, in *Windsor v. Canadian Pacific Railway Ltd.*,[87] the Alberta Court of Appeal relied upon *Hryniak* in an appeal from a summary judgment motion in a class proceeding, noting that:

> *Hryniak v. Mauldin* refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication.

CONCLUSION

As Winkler R.S.J. observed in *Attis*, certification motions are time-consuming, protracted and expensive.[88] It often takes years

86. *Player Estate v. Janssen-Ortho Inc.*, *supra* footnote 84 at paras. 181-83.
87. 2014 ABCA 108, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107 (Alta. C.A.) at para. 15. See also: *McDonald v. Brookfield Asset Management Inc.*, 2015 ABQB 281, 2015 CarswellAlta 864 (Alta. Q.B.) at para. 22; *Zwaniga v. Johnvince Foods Distribution L.P.*, 2012 ONSC 5234, 8 B.L.R. (5th) 323, [2012] O.J. No. 4345 (Ont. S.C.J.) at paras. 60-61, Perell J. (granting summary judgment motion in a franchise case based on the Ontario Court of Appeal's decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 344 D.L.R. (4th) 193, 93 B.L.R. (4th) 1 (Ont. C.A.). It should also be noted that some courts have considered the *Hryniak* "culture shift" in the context of the preferable procedural analysis on certification: see *Bard*, *supra*, footnote 66 at para. 220 ("one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures").
88. See *e.g. Attis*, *supra*, footnote 1 at paras. 8-9.

from service of the statement of claim for the certification motion to be heard. While *Microsoft* has made clear that certification is a procedural step only and is not a means to resolve a class proceeding on its merits,[89] in practice, certification motions are typically lengthy and protracted hearings with voluminous records that frequently take a week or more to argue and which involve considerable costs for the parties. Decisions on certification are frequently appealed. In Ontario, the parties are subject to a complex appeal route; denial of certification results in an appeal as of right to the Divisional Court,[90] while an order certifying an action may be appealed to the Divisional Court with leave.[91] Further appeals to the Court of Appeal are not uncommon and in some cases certification is appealed all the way to the Supreme Court. The result is that there is often many years of litigation at considerable expense to the parties before any resolution or even any analysis of the merits of the action beyond a review of the pleading.

Furthermore, as the Alberta Court of Appeal observed in *Windsor Raceway*, in class actions and in civil litigation more generally, the "end goal" of a trial is often no more than a fiction. Most cases settle and few cases proceed to common issues trials.

In our view, the class action bar and judiciary should carefully consider in each case whether a pre-certification summary judgment motion is a more proportionate and effective tool of resolving a proposed class proceeding on its merits than the traditional route of certification followed by a trial on common issues.

Of course, the circumstances in which it will be appropriate for summary judgment motions to precede certification will be highly fact-specific. The decided cases reviewed above will continue to serve as a guide, although the pre-*Hryniak* decisions should be viewed with caution in light of the Supreme Court's recent pronouncement calling for a culture shift and enhanced use of the summary judgment rules.

In *Cannon*[92] and *Fairview Donut*,[93] Strathy J. (as he then was) set out a list of non-exhaustive factors that should be considered by motion judges in exercising discretion under s. 12 of the *CPA* regarding the order of certification motions and motions for summary judgment or motions to strike:

89. *Microsoft*, *supra*, footnote 2 at para. 99, citing *Hollick*, *supra*, footnote 53 at para. 16.
90. *CPA*, s. 30(1).
91. *CPA*, s. 30(2).
92. *Supra*, footnote 50.
93. *Supra*, footnote 50.

- whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
- the likelihood of delays and costs associated with the motion;
- whether the outcome of the motion will promote settlement;
- whether the motion could give rise to interlocutory appeals and delays that would affect certification;
- the interests of economy and judicial efficiency; and
- generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding (s. 12).[94]

In our view, this list is a useful starting point.

Read together, *Microsoft* and *Hryniak* demand that courts and counsel revisit the so-called general principle of certification being the first motion to be heard and determined. Given the lengthy route of complex certification motions followed by appeals and common issue trials, our view is that early summary judgment motions will in many cases be the most efficient way to achieve a just resolution of class proceedings on their merits.

94. *Cannon*, *ibid.* at para. 15; *Fairview Donut*, *ibid.* at para. 23.