

Case In Point

SCC establishes framework for “preferability” analysis under CPA s. 5(1)(d)

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The Supreme Court of Canada released a significant decision with respect to the s. 5(1)(d) “preferable procedure” criterion for certification of a proposed class action under the *Class Proceedings Act, 1992* (“CPA”).

The OSC investigated allegations that the appellant implemented measures that reduced, but failed to negate, harm associated with certain market timing activities engaged in by third party investors. It ultimately entered into settlement agreements under which investors received over \$100 million, but were not expressly barred from commencing civil proceedings relating to the same alleged conduct. Subsequently, the investors brought an application to certify a class action against the fund managers on that basis. At issue was whether the proposed class proceeding, compared to the non-litigation Ontario Securities Commission (“OSC”) proceeding, was preferable from an access to justice perspective.

The motion judge denied certification, focusing his preferability analysis on access to justice. He concluded that the OSC proceedings were a “genuine alternative” that served the purposes of a class proceeding. The Divisional Court reversed the decision and granted certification, focusing on substance, and in particular, the fact that the investors were potentially entitled to significantly more than what they had received from the OSC proceedings. The Court of Appeal upheld this result, but conversely, focused on process, including participation rights and remedial jurisdiction issues. In dismissing the appeal, Cromwell J. for the Supreme Court revisited the s. 5(1)(d) criterion and established a new analytic framework for conducting a “preferability” analysis in class action proceedings. With respect to access to justice in particular, the Court found that the correct approach must include both a substantive and a procedural aspect, and that these two dimensions are “interconnected.” [24]

Adopting its earlier reasoning in *Hollick*, it found that a class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered. In order to determine whether this threshold is met, courts must address the following series of questions.

1. What Are the Barriers to Access to Justice?
2. What Is the Potential of the Class Proceedings to Address Those Barriers?
3. What Are the Alternatives to Class Proceedings?

4. To What Extent Do the Alternatives Address the Relevant Barriers?
5. How Do the Two Proceedings Compare?

The Court reaffirmed that the party seeking certification of a class bears the evidentiary burden of showing “some basis in fact” for every certification criterion [48]. In regard to the preferability requirement, the representative plaintiff must show that a class proceeding would be fair, efficient and manageable, and that it would be preferable to any other reasonably available means of resolving the class members’ claims. A defendant can rebut the inference of some basis in fact raised by the plaintiff’s evidence by leading evidence on these points.

[*AIC Limited v. Fischer, 2013 SCC 69 \(CanLII\)*](#)