Predominance: Classless, even the Canadian Makeover

Predominance – Plaintiffs Misplaced Their Silver Stake

1. *Harmegnies c. Toyota Canada inc.* [2008] J.Q. 1446 held that it is not enough for class action plaintiffs to establish an alleged infringement of the Competition Act. Rather it must be demonstrated *prima facie* that the plaintiff and those he intends to represent also suffered a loss due to the alleged infringement. The Quebec Court of Appeal also held that it is essential to demonstrate the collective nature of the damages suffered, pointing out that a class action is not appropriate where it would give rise to a multiple of small trials: *Harmegnies* is part of the trend - The revival of predominance.

2. *Harmegnies* resurrects the old class killer: the individual trials issue, or predominance. In Quebec authorization in 2009 and 2010 is only running at 50%, and in common law jurisdictions all certifications are listed showing wide statistical variations.

3. These thoughts begin with *Harmegnies* discuss the 2011 decision of *Billette v. Toyota* and refocus *Option Consommateurs c. Novpharm* and *Bouchard c. Agropur*.

4. Selon l'arrêt *Harmegnies c. Toyota Canada Inc., précité*, la Cour d'appel a énoncé qu'il «est, en effet, essentiel de démontrer le caractère collectif du dommage subi et le recours collectif n'est pas approprié lorsqu'il donnerait naissance, lors de l'audition au fond, à une multitude de petits procès». Il était également question de la notion de prédominance de sujets communs aux membres du groupe proposé versus des sujets individuels. Or, la prédominance serait ravivée.

5. *Harmegnies* was widely perceived in Quebec as heightening the bar for authorization; it is important all across Canada because it resonates with the successful defence initiatives of rejuvenating predominance under the guise of consideration of preferable method. In the United States the common issues trial must predominate over the potential individual issues trial. Think of an American defence lawyer saying that to justify certification the court must hold that the common issues trial will move the ball to the 51 yard line. But, predominance was explicitly and specifically rejected by Canadian legislation[1] in all common law provinces other than Ontario; and implicitly rejected in Ontario. And before *Harmegnies* Quebec courts accepted the obvious - the class action reality is that there are many individual issues.

6. In the earliest Ontario cases, defence lawyers argued American precedent in attempting to import predominance and typicality into Canadian law, relying in part on S1

[1] *Class Proceedings Act*, R.S.B.C. 1996 c.C-50, s.7. *Class Proceedings Act*, R.S.A. 2003, c.C-16.5, s.8. *Class Actions Act*, R.S.S. 2007, c.C-12.01, s. 9. *Class Proceedings Act*, C.C.S.M. c.C130, s.7. *Class Proceedings Act*, R.S.O. 1992, c.6, s.6. *Class Proceedings Act*, R.S.N.B. 2006, c.C-5.15, s.9. *Class Proceedings Act*, R.S.N.S. 2007 c.28, s.10. *Class Actions Act*, R.S.N.L. 2001, c.C-18.1, s. 8., *Federal Courts Rules* SOR/98-106, s. 334.18

of the Ontario *Class Proceedings Act*, S.O. 1992, c. 6. Both of these concepts were rejected. Section 1 in Ontario reads:

> S.1 Definitions
> In this Act,
> "common issues" means,
> (a) common **but not necessarily identical** issues of fact, or
> (b) common **but not necessarily identical** issues of law that arise from common **but not necessarily identical** facts;

7. The legislatures in other common law jurisdictions followed with identical definitions of "not necessarily identical" and all explicitly added a no predominance section. For example, from the Saskatchewan *Class Actions Act*, S.S. 2001, c. C-12.01.

> s6(1) (c) The claims of the class members raise common issues, **whether or not the common issues predominate** over other issues affecting individual members:
> s6(1) (e) There is a person willing to be appointed as a representative plaintiff who:
> (i) would fairly and adequately represent the interests of the class;
> (ii) has produced a plan for the class action that sets out a **workable method of advancing the action on behalf of the class** and of notifying class members of the action; and

8. When in the preferable procedure analysis is undertaken, a judge begins to significantly emphasize judicial economy; it will invariably lead to the beginning of a misdirected focus on predominance. Notwithstanding that there has never, not once in Canada been one individual trial, never mind the 451 AD barbarians at the gates of Rome demanding thousands of individual trials and defence lawyers crying wolf about fictitious monsters of complexity.

9. While predominance has been rejected by Canadian Courts, its ugly image remains under the guise of the *individual issues resolution*[2]. The fear of a multitude of individual trials, or that there are too many individual issues, allows the re-emergence of predominance thinking.

10. When engaging in a common issues analysis; counsel throw out a judicially invented term "commonality." This is a stealthy new term loaded with predominance and deployed as a way to skirt legislative intent under the guise of the common issues criteria. "Commonality" is not in any statute; nor is it the same thing as a common claim.

[2] Cases frequently cited by Defence in the individual issues resolution argument include: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158, 2001 SCC 46, *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, *Merck Frosst Canada Ltd. v. Wuttunee*, [2009] S.J. No. 179 (C.A.), *Pearson v. Inco Ltd*, [2002] O.J. No. 2764,

11. Once a Judge wrongly is persuaded that "common issue" means "commonality" and it is embraced by the court; individual differences between plaintiffs start to matter. Yet, they shouldn't; there will always be different common circumstances amongst a class of plaintiffs; and that is why legislation everywhere, such as s9 in the Saskatchewan *Class Actions Act* explicitly say that different class members may seek different relief, and moreover that certification is not precluded by reason of individual differences.

12. *Harmegnies c. Toyota* is the high water mark with an Appeal Court finding that "a multitude of small trials" trumps the common issue intent of the Quebec legislature.

13. *Goyette v. GlaxoSmithKline* released at the end of January, 2011 [2010] J.O. No. 1644. Translated on a "specifically [the Judge] concluded that the appellants had not demonstrated the at the use of the class members raise common issues, since the harm alleged by them was capable of infinite variations. The Court finds no palpable and overriding error in this conclusion".

14. In *Dow Chemical v. Ring, Sr*.[3] The Newfoundland & Labrador, Court of Appeal, overturned a previous Merchant Law Group certification granted by the Trial Division with respect to the use of Agent Orange and other defoliants. Revisiting the individual issues the Court of Appeal held:

> ... in light of the time frame involved, the large number of people, the size of the base, and the different chemicals used, the proposed common issues are insignificant when compared to the large number of individual inquiries which would be needed to resolve this claim. I must conclude that judicial economy, if any, would be minimal.

15. Typical of these attempts to revitalize predominance is reliance upon the following types of cases, all of which skirt the issue of individual matters while considering preferable procedure. The arguments are that the determination of whether a class action constitutes preferable procedure depends on the number, complexity, and significance of individual and common issues. If the remaining individual issues after a class trial will be important and complex, then, defendants argue, a class action is not the preferable procedure that will result in judicial economy[4].

16. The sense among plaintiffs' counsel was that predominance was dead when the Supreme Court refused leave from *Cloud*[5] holding at paragraph 58 that the:

> fact that there are numerous individual issues to be determined in addition to the common issues does not undermine the commonality conclusion, but it is a matter to be considered in the assessment of whether a class action would be the preferable procedure.

17. Arguments against certification generally fall within one or two categories: those

3 2010 NLCA 20.

4 *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158, 2001 SCC 46 at para 29, *Hoffman v. Monsanto* 2005 SKQB 225 paras 316-328, *Jameson Livestock Ltd. v. Toms Grain and Cattle Co.*, 2006 SKCA 20 at paras 36-37,

5 *Cloud v. Canada (Attorney General)* (2003), 73 O.R. (3d) 401 (C.A.)

that are merits based, and those that are predominance based.

- **Merits based arguments** seek to persuade that plaintiffs can not win. In defence arguments about the class definition – "the class includes those who have no claim". Regarding common issues, defence lawyers argue – "there is no issue here that answers the claim of all class members." Those arguments violoate the 'certification is not a merits determination' rule.

- **Predominance based arguments** highlight the presence or predominance of individual issues that mark most class actions.

18. Less obvious are the many distinct species of predominance.

(i) existentialism
(ii) differentialities
(iii) captivism

19. Class action legislation answers each of these arguments.

(i) existentialism

20. "Existentialism" refers to the presence of individual issues. In short, they exist.

21. The presence of predominance of individual issues should not be determinative at the preferable procedure stage. It is a single express factor in only five provinces. It is nowhere a requirement. The trilogy's reference to judicial economy is not an invitation to incorporate a predominance requirement. That would be improperly adding words to the legislation that are not there, and taking away those that are.

(ii) differentialties

22. This is the easiest species of predominance to identify. Look for the words "unique", "different", "not identical", "various" and the plethora of synonyms. Defence lawyers seek to emphasize the obvious – that different class members had different experiences. That is an inescapable fact of every class action.

23. Every claimant has a unique claim. But class actions may be certified amidst such diversity. Provincial legislation has a high tolerance for claims diversity. The many "differentalities" should not defeat certification. Provincial legislation calls for "common" not "same" issues and "common but not necessarily identical" facts. Even the judge-made "commonality" falls short of "identically".

(iii) captivism

24. Another species of predominance is the "captive theory" of class actions. Examples are:

- "Individual inquiry of each member of the class would be required".
- "It will be necessary to have an inquiry into ... each individual plaintiff".
- "Certification will result in a multitude of individual trials".
- "Individual determinations will be required of each individual plaintiff".
- "All are Individual issues in the sense that they will have to be examined

> in the context of each and every class member's claim".
> - "This will require an inquiry of each individual member of the class based upon facts and circumstances uniquely applicable to them and not applicable in common with any or all other members of the class".
> - "These issues require inquiry into all the circumstances of each claimant's personal circumstances..."

25. Captivism refers to the phony assumption that certifying a class action would require each class member to prove their individual issues, and whether the class has 100 or 1,000,000 members and whether they elect to pursue the 'hearings, inquiries, and other determinations' procedures or not. These are the words for example from s28 of the Saskatchewan Legislation which is almost identical to the legislation in all the common law provinces except Ontario. Legislatures have not enacted that there will be individual trials. To the contrary, legislatures have enacted a process of inquiries and determinations often involving paper proof and affidavits.

26. No case in Canadian history, decades into the class action process, has ever resulted in a series of individual trials, even from Ontario which lacks the explicit helpful provisions like s28 in Saskatchewan.

27. Notwithstanding the fact that there are no individual trials, *ever,* flowing from a class action; defence lawyers succeed in many instances by persuading judges that they should fear a reality which can not flow from the legislation, and a reality that has never emerged in our entire judicial history.

28. Under this species it is argued that even when legal transactions share many common elements, the Court would inevitably have to try each non-common element for every claimant, whether the claimants want their individual issues resolved or not. On that thinking the more class members and individual issues there are, the more cumbersome, unmanageable, and uneconomical the class action will be. In short, if there are a million class members and one individual issue, there will be one million individual trials with or without a class action, so why bother at all. It has never happened in history, it is unsupported by the legislation, but defence lawyers increasingly prevail with this argument, and *Harmegnies and Dow Chemical v. Ring* are examples of their success.

29. Thus if a wrong is visited upon a thousand people, certify, but if you do injury to 100,000, then justice will elude the class. What defendants are really arguing is that the largest and worst offenders ought to be allowed to avoid the judgement seat.

30. The poster child of the "captive theory" is *Mouhteros v. DeVry Canada Inc. (1998). 41 O.R. (3d) 83 (Gen. Div),* where Winker, R.S.J. stated at paragraph 31:

> what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member.

31. The case is quoted ubiquitously by defence lawyers. First, the word "trial" is never

used in relation to individual issues in any statute. Second, "virtually" is an advert of 15th century origins and now colloquially means "almost" or "nearly". In philosophy, "virtually" has been defined as "that which is not real". The latter definition is more apt to characterize this passage from *Mouhteros* because it frankly lacks reality vis a vis provisions throughout Canada that parallel the following from Saskatchewan's legislation.

> 29(4) The court shall set a reasonable time within which individual members of the class or subclass may make claims pursuant to the section respecting the individual issues.
>
> (5) A member of the class or subclass who fails to make a claim within the time set pursuant to subsection (4) may not make a claim pursuant to this section respecting the issues applicable only to that member except with leave of the court.

32. Class actions have been around for decades in Canada. There has not been a single class member strong-armed into a mandatory trial against his or her will. The "captive theory" is a myth.

33. Unfortunately, the courts have always left open the opportunity for defendants to argue predominance under the cloaks of preferable procedure and common issues. Even *Cloud*, and the important paragraph 58 quoted earlier states:

> the fact that there are numerous individual issues to be determined in addition to the common issues does not undermine the commonality conclusion, **but it is a matter to be considered in the assessment of whether a class action would be the preferable procedure.**

34. The conflict continues because the issue is ignored.

35. In *May v. Saskatchewan* [2006] 9 W.W.R. 89, 277 Sask. R. 21, Dawson J. followed *Cloud's* rejection of predominance at para. 112 and certified. She correctly refused to submit to "presence of individual issues" arguments:

> [106] ... The plaintiffs claim a systemic breach of duty, that is that the Government breached their lawful duties to all members of the class. **There may be issues beyond the common issues** that **require individual resolution**, but that does not undermine the commonality conclusion. ...
>
> [107] The Government argues that the damage suffered by each claimant would be individual; that the loss to each is different. It argues this underlines the individual nature of the claims and negates commonality. While **the causation of harm may have to be decided individually**, if and when it is found that the Government owed the legal duties to all class members and that such duties were breached, that does not undermine the conclusion that whether such duties were owed, and whether the Government breached those duties and whether there were collective damages, constitute common issues.

36. In *Sorotski v. CNH Global N.V.*, 2006 SKQB 168, 281 Sask. R. 212, on behalf of a class of purchasers of Case Quadtrac 9370 tractors, Michael Sorotski sued CNH Global N.V. and the Case Corporation in negligence and for breach of statutory warranties after the tracks on his tractor prematurely wore out in comparison to tires on standard tractors and contrary to what had been represented to him when he purchased it. Allbright J. found

that the plaintiff had not met the common issues and preferable procedure criteria for the following reasons:

> (a) in the context of her common issues analysis: "there are **numerous individual issues** that will have to be addressed before making any determination on liability" and "there will be **numerous individual issues** which must be resolved in order to fairly adjudicate the claims of individual parties",
>
> (b) and in the context of preferability, "there will be **numerous individual issues** that need to be litigated prior to the resolution of the claim".

37. In *Sorotski v. CNH Global N.V.*, 2007 SKCA 104, Richards J.A. overturned that reasoning and certified.

> [54] The reasoning of the certification judge in this case with respect to commonality does not comply with the notion that **common issues need not predominate over individual issues** and it does not follow the approach reflected in *Hollick*. The judge focused on the various matters that might have to be considered in order to finally resolve questions of liability and damages as they relate to each member of the proposed class. He did not give adequate consideration to the issues *common* to each member of the class. This was an error of legal principle.
>
> [56] . . . . As *Hollick* illustrates, the fact there may be **numerous individual issues** to consider after the common issues have been resolved does not mean the commonality criterion is not satisfied. McLachlin C.J. underscored this point in *Rumley* . . . by observing that the "predominance [of the common issues] should not be a factor at the commonality stage".

38. *Cloud* is increasingly ignored. *Sorotski* is ignored. The *Harmegnies* and *Dow Chemical v. Ring* thinking is re-emerging.

39. Notwithstanding that section 5(1)(c) of the Ontario Act does not include the no predominance language; even in other provinces the comparable section fails to receive appropriate reliance. The legislative intent first, to allow opt outs; and second of sections like s1 in Ontario and the even more definitive legislative mandate elsewhere, provide the principled justification for *Cloud*. The accepted view that individual trials and individual differences were not to block certification seems to have again come under attack.

40. *Harmegnies*, *Dow Chemicals v. Ring, Sorotsky*, and *Cloud*, can not all be correct. *Cloud* had individual abuse experiences – both physical and sexual abuse in an Indian Residential School. The occasions of abuse were spread over many decades and committed by hundreds of individual wrongdoers.

41. *Dow Chemicals v. Ring* rejected before Barry, J., but nibbled at the concept in the Court of Appeal, the notion that the klieg lights should intensively be directed towards the views of the experts. Traditionally in Canada where reasonable credible experts take opposing views, that is considered to be a matter for resolution at trial.

42. Different from Canada, the American direction is to permit a merits trial where defendants challenge the legitimacy of the experts and go into the issues in detail:

In *re: I Peel* 471 F (3d) 24, ¶ 41
Teamsters v. Bombardair, 546 F.3d 196, ¶ 202
Lee Hodrogen, 552 F.3d 305, ¶ 320, 321, 307
Duke v. Wallmart, 603 F.3d 571, ¶ 580, 594
Honda 600 F.3d 871, pg 871, ¶ 861

43. Predominance and expert analysis attacks the emerging fighting grounds over certification.

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