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Let Me See You 1, 2 Step: The Federal Court of Appeal Affirms the â€œTwo-Stepâ€• Approach to the Common Issues Requirement

A few years after the Supreme Court of Canada released *Hollick v Toronto (City)*, which provided a detailed articulation of the common issues requirement under s. 5(1)(c) of the *Class Proceedings Act, 1992*, Ciara released her chart-topping single, “1, 2 Step”. While we would not go so far as to say that her single was one of the most succinct summaries of the common issues test from the early 2000s, she may have been on to something.

Over the last few years, there has been debate over the test to satisfy the common issues criterion of the certification test. That debate is whether it is necessary for the proposed representative plaintiff to only adduce some basis in fact that the common issue can be answered in common across the class (i.e. the “one-step” test) or whether it is also necessary to show that the proposed common issue actually exists (i.e. the “two-step” test). While it is largely settled that the two-step test applies in Ontario, in British Columbia, this debate was fueled by the timely release of *Nissan Canada Inc v Mueller* by the British Columbia Court of Appeal. Many interpret *Nissan* to say that the BCCA affirmed the use of the one-step test. We note that leave to appeal the *Nissan* decision was denied on May 4, 2023.

Recently, the Federal Court of Appeal in *Jensen v Samsung Electronics Co Ltd* reviewed the jurisprudence on the approach to satisfying the common issues requirement. The FCA found the two-step approach to be correct.

Background

Jensen is a competition class action arising from the alleged conspiracy to suppress the supply of Dynamic Random Access Memory chips (“DRAM Chips”), a kind of semiconductor memory chip that is used in most computer products. The Plaintiffs alleged that the suppression of the supply resulted in a price increase of the DRAM Chips. The Plaintiffs further alleged that as a result of the price-fixing, they suffered damages in the form of the increased cost of the DRAM Chips.

At the certification motion, Justice Gascon found that the Plaintiffs had not met all five criteria of the certification test. Specifically, Justice Gascon found that the Plaintiffs had not proven "some basis in fact" to support that the common issues (1) actually exist in fact; and (2) can be answered in common across the entire class. For that and other reasons, Justice Gascon dismissed the certification motion.

The Federal Court of Appeal Decision

On appeal, the Plaintiffs argued, among other things, that Justice Gascon applied the wrong legal test in respect of the common issues criterion. In their view, by requiring them to also prove "some basis in fact" that the common issues exist, Justice Gascon was improperly delving into the merits of the case. In support, they argued that undertaking a merits analysis was explicitly prohibited by the Supreme Court of Canada in *Pro-Sys* and *Sun-Rype Products Ltd v Archer Daniels Midland Company*. Specifically, they relied heavily on one sentence in *Pro-Sys* at para. 110: "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."

Writing for the Court, Justice de Montigny began by stating "I fail to see how it can seriously be argued that a judge could determine whether the claims of the class members raise common questions of law or fact *without first deciding* whether there is some basis in fact for the very existence of each common issue" (emphasis added).

From a policy perspective, the two-step test was "the only one consistent with the underlying rationale and the purpose of the certification process". Indeed, Justice de Montigny agreed that "[a] cause of action with no factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or millions." As support for the requirement to show some basis in fact for the existence of a proposed common issue, Justice de Montigny cited to over twenty cases across Canada (including Ontario, British Columbia, Alberta, and Saskatchewan) and spanning from 2015 to 2023, which had applied the two-step approach.

Finally, the Plaintiffs' assertion that *Pro-Sys* and *Nissan* support the one-step test was rejected. As to *Pro-Sys*, Justice de Montigny stated:

> [83] ...Justice Rothstein's comments [in *Pro-Sys*] were

> not meant to do away with the first step of the requirement that the proposed common issue exists in fact. […] His statement in paragraph 110 is merely a reaffirmation that the same basis in fact standard does not equate with a balance of probabilities test.

With respect to *Nissan*:

> [90] …As for the recent decision of the British Columbia Court of Appeal in *Nissan*, it clearly does not stand for the proposition that the two-step approach has been abandoned, as suggested by the appellants. While the Court does not explicitly address that issue, it is clear from a careful reading of its reasons (and in particular from paragraphs 140 and 143) that it was not endorsing the one-step approach advocated by the appellants.

As a result, the FCA found that Justice Gascon stated the correct legal standard and did not err in applying the two-step approach to assessing commonality.

Implications

We can expect that this decision will be cited frequently by the class action defence bar in light of the analysis of the historical jurisprudence on this issue. We anticipate that litigation will continue over this issue in British Columbia.

Time will tell whether there will be an appeal. Until then, we leave you with Ciara's lyrics:

"Let me see you 1, 2 step
I love it when you 1, 2 step
Everybody 1, 2 step."