The Decertification Motion: A Paper Tiger?

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The recent proceedings in *Smith v Inco* have shed light on a relatively new tactic by defendants in defending class proceedings: The decertification motion. In reviewing decertification case law, it has be noted that since the decision in *Peppiatt v. Royal Bank of Canada*,[2] one of the first decertification decisions in Ontario, decertification motions have been on the rise in Ontario since 2001.[3] Given its seeming increased usage in the last 10 years, has decertification become the new rule 21 or summary judgment motion for defendants?

This paper will examine the difficult burden defendants bear in having an action decertified and discuss the strategic timing and effects in bringing such motion at various stages in the proceedings. In doing so, the decertification motion in *Pearson v Inco*[4] and the motion for directions relating to the timing of the decertification motion at trial in *Smith v Inco*[5] will be discussed.

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[2] *Peppiatt v. Royal Bank of Canada*, [1996] O.J. No. 118 (Ont. Gen. Div.).

[3] In Ontario - *Lacroix v. Canada Mortgage and Housing Corp.*, [2001] O.J. No. 6251, *Ward-Price v. Mariners Haven Inc.* (2004), 71O.R. (3d) 664, *Webb v. 3584747 Canada Inc.*, [2005] O.J. No. 449, *Smith v Inco*, 2009 O.J. No. 5439, *Pearson v Inco* 2009 OJ No 780.

Decertification motions have been even more prevalent in B.C. Decertification case law in B.C. will be discussed in this paper. In B.C. decertification motion decisions include - *Barbour v. University of British Columbia*, [2007] B.C.J. No. 1216, *Collette v. Cartier Partners Securities Inc.*, [2005] B.C.J. No. 2753, *Gregg v. Freightliner Ltd.*, [2004] B.C.J. No. 2501, *Harrington v. Dow Corning Corp.* (2002), 100 B.C L.R. (3d) 307, *Rumley. v. British Columbia* (2003), 12 B.C.L.R. (4th) 121, [2003] B.C.J. No. 313.

This paper will only discuss decertification in the common law provinces, whose decertification provisions in their respective class proceedings legislation are similar. The provision for decertification in Quebec (Article 1022 of the *Code of Civil Procedure*, R.S.Q. c. C-25) will not be discussed in this paper.

[4] *Pearson v Inco*, [2009] O.J. No. 780 (O.S.C.J.).

[5] *Smith v Inco*, [2009] O.J. No. 5439 (O.S.C.J.). After the decertification motion in February 2009, the style of cause in *Pearson v Inco* changed to *Smith v Inco* to reflect a change in the representative plaintiff.

What these authors have noted is that, while courts often point out at certification that a class proceeding may always be decertified at any point up to and including trial,[6] decertification is not as easy as it may first be believed. In fact, there has not yet been a successful decertification motion on a substantive basis in the common law provinces.[7] Given the fairly high burden to overcome and the alternate remedies available to trial management judges, decertification is effectively a paper tiger only reserved for the most extreme cases. As one questions, if one believes the class action is so doomed to fail, why bring a decertification motion when a determination of the common issues will bind the entire class in the defendants' favour?

Decertification: the Test

In Ontario, section 10 of the *Class Proceedings Act, 1992* (the "*CPA*") provides as follows:

> **"Where it appears conditions for certification not satisfied**
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> **10.** (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate. 1992, c. 6, s. 10 (1).
>
> **Proceeding may continue in altered form**
>
> (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties. 1992, c. 6, s. 10 (2).
>
> **Powers of court**
>
> (3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c). 1992, c. 6, s. 10 (3).[8]

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[6] For example see *Pearson v Inco*, [2005] O.J. No. 4918 (O.C.A.) at para. 70, *Sauer v Canada (AG)*, [2008] O.J. No. 3419 (O S.C.J.) at para. 66 and *Bendall v McGhan Medical Corp.*, [1993] O.J. No. 1948 (Ont. Gen. Div.), among others.

[7] To note that while decertification of a sub class did occur as part of settlement approval in *Bouchanskaia v. Bayer* Inc., [2004] B.C.J. No. 2101, the authors have not located a substantive decertification decision in the common law provinces.

[8] S.O. 1992, CHAPTER 6. Section 10 of B.C.'s *Class Proceedings Act*, R.S.B.C. 1996, c. 50, section 11 of Alberta's *Class Proceedings Act*, S.A. 2003, c. C-16.5 and section 12 of Saskatchewan's *Class Action Act*, S.S. 2001, c. C-12.01 are similar to that in Ontario.

In *Peppiatt*, one of the first decertification decisions in Ontario, the court stated that the analysis of section 10 is effectively the mirror image of certification.[9] The court there found that the same conditions relate to certification and decertification and the question that governs section 10 is whether those conditions are satisfied or not.[10]

That being said, a decertification motion must be more than a review of the certification criteria as it would simply be a re-hearing of the certification motion. What the courts have determined with respect to the appropriateness and timing of a decertification motion is whether there has been a fundamental change in the action, in fact or law, such that the action ought to be decertified.[11]

In *Collette v. Cartier Partners Securities Inc.*, in dealing with a similar decertification provision in the B.C. *Class Proceedings Act*, the court framed the issue on decertification as:

> "Has the evidentiary foundation of the proceeding changed fundamentally since the action was certified by the Court of Appeal such that the action ought to be decertified?"[12]

Justice Cullity recently seemed to echo that formulation in *Pearson v Inco* by stating:

> "I believe it is implicit in the section that, even after an order certifying a proceeding has been entered, the court has authority to reopen the question whether the requirements for certification in section 5 are satisfied. It was recognized by the Court of Appeal in this case that a decertification order can even be made at a trial of the common issues.
>
> Obviously the intention cannot be that a decision to entertain a motion to decertify before that time is entirely dependent on the whim of a defendant or class member. Section 10(1) does not contemplate that the motion judge is to hear what would be, in effect, an appeal from an earlier decision to certify a proceeding. The moving party has, in my opinion, the burden of showing that the earlier decision would not have been made in the light of new evidence - including evidence of facts that have subsequently occurred. Subsequent facts - consisting, for example, of developments that occur as the proceeding moves towards trial - may demonstrate that, contrary to the original finding, it is not manageable as a class action. Motions for decertification on this ground were made in *Webb v 35847747 Canada Inc*, [2005] O.J. No. 449 (S.C.J.) and *L.R. v. British Columbia*, [2003] B.C.J. No. 313 (S.C.), although neither was successful on the facts relied upon."[13]

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[9] *Peppiatt v. Royal Bank of Canada*, [1996] O.J. No. 118 (Ont. Gen. Div.) at para. 45.
[10] *Peppiatt v. Royal Bank of Canada*, [1996] O.J. No. 118 (Ont. Gen. Div.) at para. 45. The same approach was taken in *Lacroix v. Canada Mortgage and Housing Corp.*, [2001] O.J. No. 6251 at para. 30.
[11] See *Maxwell v. MLG Ventures Ltd.*, [1995] O.J. No. 2698, *Collette v. Cartier Partners Securities Inc.*, [2005] B.C.J. No. 2753, and *Pearson v Inco*, [2009] O.J. No. 780 at para 24.
[12] *Collette v. Cartier Partners Securities Inc.*, [2005] B C.J No. 2753 at para. 5.
[13] *Pearson v Inco*, [2009] O.J. No. 780 at paras. 23-24

The implicit requirement therefore in decertification motions is that something must have changed since certification to entertain the idea of decertification, otherwise a decertification would simply be another appeal or re-hearing of the same motion.

Despite the fact that the court in *Peppiatt* dismissed the decertification motion before it, defendants often rely on the following statement by the court in that decision to suggest that the court should not adhere to its certification order if the action turns out to be unmanageable:

> "One of the main goals of the Act is to promote judicial economy; however that cannot override the ultimate goal of a just determination between the parties."[14]

With this background, the following sections discuss how the courts have dealt with this 'fundamental' change requirement.

Fundamental Change: Issue Estoppel

Without the implicit requirement of a fundamental change, section 10 of the *CPA* seems to provide defendants with an unlimited appeal mechanism of a certification decision. Having already decided certification on the materials presented at that time, courts are wary of reconsidering certification, often when the certification decision had already been appealed to a higher court. In this respect, defendants who have brought decertification motions without a truly fundamental change in fact, or law, have been defeated by the doctrine of issue estoppel, either implicitly or explicitly.

The doctrine of issue estoppel precludes a party from re-litigating a legal or factual issue that has been conclusively determined in a prior proceeding and rests upon the principle of finality. The Supreme Court of Canada in *Danyluk v. Ainsworth* confirmed the requirements for the application of issue estoppel that the moving party must establish:

> (i) that the preconditions for the operation of issue estoppel have been met, being:
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> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised,
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> and,
>
> (ii) whether, as a matter of discretion, issue estoppel *ought* to be applied.[15]

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[14] *Peppiatt v. Royal Bank of Canada*, [1996] O.J. No. 118 (Ont. Gen. Div.) at para. 51.

While a certification order is an interlocutory one, issue estoppel nonetheless applies to prohibit a re-litigating of an issue that has already been determined by the courts between the same parties.[16] For example, the court in *Harrington v. Dow Corning Corp.* applied issue estoppel to dismiss a decertification motion stating that issue estoppel bars "a litigant from raising an issue which could have been dealt with on facts and law known or discoverable when an earlier proceeding, including an appeal, could have decided the issue".[17]

In *Harrington,* the defendant moved for decertification after it suggested that it did not actually manufacture the devices at issue in the class proceedings, it was only a controlling shareholder of the companies that did. On decertification, the court noted that the defendant had three opportunities to expressly raise this issue: 1) at certification, 2) at the finalizing of the certification order, and 3) on the appeal of the certification order. In dismissing the decertification motion on the basis of issue estoppel, the court noted:

> "I find issue estoppel operates here to preclude the court from granting Bristol an order decertifying the case against it even if it was not a manufacturer.
>
> Underlying issue estoppel are the principles of finality and avoidance of a multiplicity of proceedings. Issue estoppel prevents parties from litigating in tranches and from raising afresh issues which were or ought to have been decided when all relevant facts and law could have been put before the court."
>
> ...
>
> "...I am of the view that in the absence of any new facts or law (and none were alleged by Bristol) this court should not exercise its authority under ss. 8(3) and 10(1) of the Act to grant the relief sought in light of the doctrine of issue estoppel and the binding effect of the judgment of the Court of Appeal."[18]

A similar decision was made by the court in *Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd.*, where a defendant moved for decertification after its application for leave to appeal

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[15] *Danyluk v. Ainsworth*, [2001] 2 S.C.R. 460 at paras. 19-26, as cited in *Smith Estate v. National Money Mart Co* , [2008] O.J. No. 4327 (O.C.A.) at paras. 33-36,

[16] *Risorto v State Farm Mutual Automobile Insurance Co.*, [2009] O.J. No. 820 (Ont. Div. Crt.) at para. 49 and *Ward v Dana G. Colson Management Ltd.*, [1994] O.J. No. 533 (S.C.J.) at para. 12, affirmed [1994] O.J. No. 2792 (C.A.).

[17] *Harrington v. Dow Corning Corp.*, [2002] B.C.J. No. 691 (B.C.S.C.) at para. 27.

[18] *Harrington v. Dow Corning Corp.*, [2002] B.C.J. No. 691 (B.C.S.C.) at paras. 31-32 and 36-37.

was dismissed, while other similarly situated defendants were permitted to appeal and were successful in setting aside a certification order against them.[19]

Aside from fundamental changes in fact after certification, it is not guaranteed that defendants will receive the benefit of a change in law, as was noted in *Smith Estate v. National Money Mart Co.*[20] In that case, in the months leading to trial, the defendant brought a motion to stay the action[21] as a result of what was perceived to be a change in the law with respect to arbitration clauses by the Supreme Court of Canada.[22] The defendant argued that the change in law effectively eliminated the possibility of a class proceeding as the class members were bound by agreements which required arbitration.

Without determining the applicability of the Supreme Court of Canada's decisions on the law in Ontario, the Ontario Court of Appeal dismissed the defendant's motion by finding that issue estoppel applied barring the defendant from re-litigating the same issue. The Court of Appeal found that the preconditions of issue estoppel were met (the same question was previously decided, it was a final decision, and that the same parties were privy to that decision) and held, in the second stage of the issue estoppel test, that as a matter of discretion the defendant ought not be permitted to rely upon the 'change of law' to stay the class action at that very late stage in the proceeding. It held that it would be manifestly unfair if the defendant were able to rely on a change in law, which did not effect the merits of the action,[23] at such a late stage in the proceeding as it would effectively deny the class members a remedy.[24] In that respect the Court of Appeal held:

> "It would be fundamentally unjust at this late stage of the proceedings to grant the appellants a stay that would not, in fact, send this case to arbitration but rather would have the effect of denying any remedy to borrowers who are subject to arbitration clauses."[25]

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[19] *Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd.*, [2006] S.J. No. 613 (Sask. Q.B.).
[20] *Smith Estate v National Money Mart Co.*, [2008] O.J. No. 4327 (O.C.A.)
[21] The defendant concurrently sought to decertify the proceeding in the same motion. The motions judge dismissed their motions in part on the basis of issue estoppel and the Court of Appeal upheld the dismissal.
[22] To note, the arbitration clause at issue was dealt with a number of times in the long history of this case including a previous motion to stay which was dismissed and the defendant's application for leave to appeal that decision to the Supreme Court of Canada was denied.
[23] *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 4327 (O.C.A.) at para 48.
[24] *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 4327 (O.C.A.) at paras. 48-52.
[25] *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 4327 (O.C.A.) at para. 52.

As the foregoing suggest, the defendant must show that the 'new' issues raised at decertification were not already determined by the court in the same action. They must provide more than the same arguments that were made at certification.

Not Fundamental Enough: Examples of Failed Decertification Motions

As a certification motion is often determined without a full evidentiary basis, i.e. before examinations for discovery, there may be instances where issue estoppel does not, or should not, technically apply. The defendants often raise issues, facts or evidence which the court determining certification may not have had the benefit of, and thus, issue estoppel, in the strictest sense, may not apply. Even if issue estoppel does not strictly apply, the new issues, facts or evidence raised by the defendant must still be of a fundamental nature so as to undermine the certification decision, which, based on the case law, is not an easy task.

No New Issue Raised

For instance, in *Gregg v. Freightliner Ltd.*, a case about wrongful dismissal in a mass termination context, the defendant stated that the evidence gathered suggested that not every employee left their employ at the same time thereby effectively reducing a mass wrongful dismissal action into individual claims that could not be determined on a common basis.[26] Implicitly suggesting that this 'new evidence' was not sufficient to undermine the certification order, the court held that the common issue remained common and that the same issue was already raised by the defendant and decided upon at certification.[27]

In *Barbour v. University of British Columbia*, the court certified the action and invited the defendant to revisit the common issues after it filed its Statement of Defence. In dismissing the defendant's decertification motion that followed, while not explicitly citing the doctrine of issue estoppel, the court held that the defendant's submissions were not materially different than those that the court rejected on certification and that, despite the 'new' arguments raised, a class action remained the preferable procedure.[28]

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[26] *Gregg v. Freightliner Ltd.*, [2004] B.C.J. No. 2501 (B.C.S.C.) at paras. 27-29.
[27] *Gregg v. Freightliner Ltd.*, [2004] B.C.J. No. 2501 (B.C.S.C.) at para. 30.
[28] *Barbour v. University of British Columbia*, [2007] B.C.J. No. 1216 (B.C.S.C.)at para. 34.

Post-Certification Evidence

In *Collette v. Cartier Partners Securities Inc.*, an action was certified on the basis of an allegation that mortgage broker who offered investment units for sale made a negligent misrepresentation by merely offering them for sale. After a review of the defendant's documents, which apparently were not available at certification, there was evidence that many of the class members may have purchased the investment units through intermediaries and not directly through the defendant. The defendant argued at decertification that the documents undermined the commonality of the issues determined at certification. In reviewing the certification decision and subsequent appeal, the court found that the fact that defendant may not have dealt with individual class members did not undermine the common issue certified by the Court of Appeal that the mere offering for sale of the units may be a negligent misrepresentation in and of itself given the defendant's assumption of a duty not to make such units available for sale unless they passed a due diligence assessment. The defendant's decertification motion was dismissed accordingly.[29]

Further, in *Peppiatt,* while the court found that newly discovered (upon examination for discovery) versions of contracts at issue were problematic for the class action, it was not sufficient to warrant decertification. The court found that the new material raised differing claims or defences not shared by other class members which were not before the court at certification. Instead of decertification, the court ordered that subclasses be created to deal with the variations in the contracts at issue.[30]

Manageability

Manageability of the class proceeding may be the gravest concern for plaintiffs and one that may lead to the first decertification, as what was thought at certification to be a manageable process may devolve into something entirely different.

For example, in the infamous case of *Webb v. 3584747 Canada Inc.*, there were 1,000 claimants waiting to participate in the wrongful dismissal resolution process established. However, the process stalled after only 24 hearings due to the inordinate expense and time

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[29] *Collette v. Cartier Partners Securities Inc.*, [2005] B.C.J. No. 2753 (B.C.S.C.) at paras. 78 and 81
[30] *Peppiatt v. Royal Bank of Canada*, [1996] O.J. No. 118 (Ont. Gen Div.) at p. 10-12 (QL).

devoted to each. The plaintiff sought to amend the resolution process to make it more manageable; the defendant resisted and asked that the action be decertified. Despite the delays, expense and lack of progress, the court held that, with some amendment, a class proceeding was still preferable as the court was concerned with 1) the possibility of inconsistent results if the process was not being overseen by one trial management judge, 2) the duplication of litigation and the effect upon judicial economy if 1,000 actions would have to be commenced, and 3) that the administration of justice may be brought into disrepute if 1,000 class members who were waiting for their hearings were now told that they had to commence their own action at such a late stage.[31] The court preferred the class action process, as amended, and maintained that the certification criteria continued to be met.

Another case of apparent manageability issues was *Rumley v. British Columbia.* In that case the defendant and the court were concerned with the plaintiff's apparent insistence on proffering individual evidence of abuse rather than evidence of systemic negligence. While the plaintiff argued that it should be permitted to establish a pattern of abuse through evidence of individual acts, the court's view was that only the defendant's operations and management were at issue and not any individual acts of abuse. The court felt that the plaintiff's approach to the common issues trial was causing the action to become unmanageable. Instead of decertifying the action however, the court held that aggressive case-management would focus the issues and it restricted discovery, suggested that it would likely restrict evidence at the trial of the common issues and amended the common issues to provide direction to the parties and permit the class proceeding to move forward.[32]

Finally, in *Pearson v Inco,* without adducing any new evidence or law, the defendant moved for decertification arguing that an answer to an undertaking suggested that the plaintiff was seeking to rely upon a new theory which did not comply with the certification order or reasons of the Court of Appeal, which certified the action. In obtaining an undertaking from the plaintiff clarifying its position, Justice Cullity dismissed the decertification motion.[33]

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[31] *Webb v. 3584747 Canada Inc.*, [2005] O.J. No. 449 (O.S.C.J.) at paras. 25-32.
[32] *Rumley v. British Columbia* (2003), 12 B.C.L.R. (4th) 121, [2003] B.C.J. No. 313 (B.C.S.C.) at para 74 and 89-91.
[33] *Pearson v Inco*, [2009] O.J. No. 780 (O.S.C.J.) at paras. 27, 31 and 37.

As the foregoing cases note, once the defendant has passed the threshold of issue estoppel, the defendant still must proffer evidence that there has been a fundamental change in the action that undermines the certification decision. In the end, this analysis is simply a review of the certification criteria in light of the defendant's asserted fundamental change. Only the most significant changes will impact a previously determined certification order and no court in Ontario or the other common law provinces has yet found such a change that warrants decertification.

Is There/Should There be a Fresh Evidence Requirement?

If decertification will not be entertained unless there is a fundamental change that undermines the certification order, what then is, or should be, a defendant's evidentiary burden to prove such change? One wonders that, if issue estoppel applies to a certification order, should the defendant not be required to provide "fresh evidence" as per the requirements in *671122 Ontario Limited v Sagaz Industries Canada Inc.*, which requires that 1) the new evidence would probably change the first result and 2) that the new evidence could not previously have been obtained by the exercise of reasonable diligence.[34]

As suggested by Justice Cullity in *Pearson v Inco*, the Ontario Divisional Court decision in *Risorto v State Farm Mutual Automobile Insurance Co.* certainly lends support to that theory. The Divisional Court in that case, in effect, held that, despite the uniqueness of class actions, after a decision is rendered on certification and before the order is issued and entered issue estoppel will apply and only new evidence which satisfies the *Sagaz* test will be permitted to reopen that decision.[35] In particular, the Divisional Court held with respect to putting one's best foot forward on certification that:

> "Parties involved in this sort of litigation understand well the significance of an order granting or refusing certification. Both parties will usually devote substantial amounts of time and resources on the motion. Typically, the magnitude of costs requested, and often awarded, vastly exceeds anything awarded on an ordinary interlocutory motion. Indeed, it is difficult to conceive of an interlocutory proceeding in which the parties would better understand the need to put their best foot forward. In my view, the interests in preventing litigation by instalments; requiring parties to

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[34] *671122 Ontario Limited v Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983.
[35] *Risorto v State Farm Mutual Automobile Insurance Co.*, [2009] O.J. No. 820 (Ont. Div. Crt.) as mentioned in *Pearson v Inco*, [2009] O.J. No. 780 (O.S.C.J.) at para 25.

put their best foot forward; and finality; are just as compelling in certification proceedings as they are in any other proceedings."[36]

Risorto was a case that dealt with an adjournment by the certification judge of the certification motion to permit a change in evidence sought to be proffered in support of certification after the reasons denying certification on that basis were released. What about in the decertification context?

In *Pearson v Inco* Justice Cullity commented that, if decertification is simply the mirror image of certification which requires only 'some basis in fact' and given the "fluid" nature of class actions, then the *Sagaz* test should not be strictly applied on decertification.[37] While there was no change in evidence at issue in the *Pearson v Inco* decision, Justice Cullity commented on the applicability of the *Sagaz* test to decertification as follows:

> "I am not satisfied that this ruling necessarily applies to a motion under section 10(1), even though a distinction for this purpose between an order denying certification and one granting certification might seem to be anomalous. Of more importance, I believe, is that the section recognizes that the case-managed procedure under the CPA is necessarily somewhat fluid and that certification motions are decided at an early stage of the proceeding and before discoveries. In consequence, certification orders are not intended to be cast in stone and, whether or not they have been entered, they can be, in effect, revoked, or amended from time to time. It is not in the public interest - or in that of the litigants or the class - that a case should be permitted to proceed to trial if further evidence demonstrates that the litigation would be unmanageable, or that issues previously held to have commonality cannot in fact be decided on a class-wide basis. The statutory objectives of the CPA - access to justice, judicial economy and behavioural modification - would not be advanced by allowing the action to continue under the CPA in such cases. In consequence, a more flexible approach than that required by a strict application of the *Sagaz* principles may be called for - together with costs sanctions where evidence could previously have been discovered by an exercise of due diligence."[38]

Aside from *Pearson v Inco,* the decertification case law does not seem to apply, nor address, the *Sagaz* test for fresh evidence. For instance, in *Collette v. Cartier Partners Securities Inc.*, the defendants asserted that new documents found in the possession of their former counsel supported decertification.[39] There was no discussion in that case as to why those documents could not have been put forward before with the exercise of reasonable diligence. In *Peppiatt,* the court did not seem to significantly enquire as to why the various versions of the contracts

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[36] *Risorto v State Farm Mutual Automobile Insurance Co.*, [2009] O.J. No. 820 (Ont. Div. Crt.) at para 41.
[37] *Pearson v Inco*, [2009] O.J. No. 780 (O.S.C.J.) at para 26.
[38] *Pearson v Inco*, [2009] O.J. No. 780 (O.S.C.J.) at para 26.
[39] *Collette v. Cartier Partners Securities Inc.*, [2005] B.C.J. No. 2753 (B.C.S.C.) at para. 41.

relied upon by the defendant for decertification and produced during examinations for discovery, could not have been located by the defendant in preparation for certification.[40]

If, as suggested by the Divisional Court in *Risorto*, the parties expend significant efforts in advance of certification, and if most class actions are based upon the conduct of the defendants, not the class, why then should the defendants not be required to satisfy the test set out in *Sagaz* if they wish to attack a factual foundation of a certification decision. The defendants, if they don't already, should be required to put their best foot forward and advance all arguments and facts relevant to certification at the certification motion. Only if there are facts beyond their control or ability to obtain through reasonable diligence should they be permitted to adduce new factual evidence on a decertification motion. In this sense, and based upon the cases reviewed, only those cases that deal with the manageability of the class proceeding as it moves forward after certification might be prone for decertification.

Decertification or Trial Management?

Even if one passes issue estoppel and establishes a fundamental change, it will not guarantee a decertification of the class action. Section 10 provides that a court "may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate" if the certification conditions are no longer met.[41] This provides the court with broad powers to fashion a remedy. While some have been close to establishing a case for decertification, courts have used such broad powers to remedy the problematic issue as the court is often concerned that decertification may effectively end a class member's claim.

For example, while the individual resolution process in *Webb* ground to a halt, the court dismissed a motion to decertify claiming that the process could be adjusted and suggested that decertification at such a late stage would bring the administration of justice into disrepute if 1,000 class members were then required to commence individual actions.[42] Instead the court made minor adjustments to the process and permitted the hearings to proceed.

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[40] *Peppiatt v. Royal Bank of Canada*, [1996] O.J. No. 118 (Ont. Gen Div.) at p. 4 (QL).
[41] And similar legislation in B.C., Alberta and Saskatchewan.
[42] *Webb v. 3584747 Canada Inc.*, [2005] O.J. No. 449 (O.S.C.J.) at para. 27.

In *Rumley v. British Columbia*, the plaintiff's apparent insistence on proffering individual evidence of abuse rather than evidence of systemic negligence nearly caused the trial judge to decertify the proceeding as being unmanageable. Instead of doing so, the court held that aggressive case-management would focus the issues.[43] The court restricted discovery, suggested that it would likely restrict evidence at the trial of the common issues and amended the common issues to provide direction to the parties and permit the class proceeding to move forward.[44]

Similarly, in *Pearson v Inco*, the court used an undertaking by the plaintiff and required an amended pleading to satisfy the defendant's concern that the plaintiff was changing the theory of its case in advance of trial.[45]

In *Maxwell v. MLG Ventures Ltd.* the court simply refused to permit an amendment to the Statement of Claim sought by the plaintiff as it would have fundamentally changed the nature of the action originally certified. The court stated that, if class members had a valid action based on the allegations sought to be included, an action on that basis could be separately constituted.[46]

To rectify a recent disclosure of varying versions of class member contracts the court in *Peppiatt* ordered the creation of subclasses. Similarly, in *Lacroix v. Canada Mortgage and Housing Corp.* the court ordered the creation of numerous subclasses and limited the plaintiff's ability to adduce evidence of individual misrepresentations.[47]

As noted, even if the defendant establishes a fundamental change or a manageability issue that validly affects the continued prosecution of the action as a class action, the court has varying methods of resolving the issue available to it to ensure a workable class action proceeds. As decertification will effectively end many class members' claims, the court will be wary decertifying a proceeding and will only do so in the most extreme examples.

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[43] *Rumley v. British Columbia* (2003), 12 B.C.L.R. (4th) 121, [2003] B.C.J. No. 313 (B.C.S.C.) at para 74.
[44] *Rumley. v. British Columbia* (2003), 12 B.C.L.R. (4th) 121, [2003] B.C.J. No. 313 (B.C.S.C.) at para 74 and 89-91.
[45] *Pearson v Inco*, [2009] O.J. No. 780 (O.S.C.J.) at paras. 37 and 41.
[46] *Maxwell v. MLG Ventures Ltd.*, [1995] O.J. No. 2698 (O.S.C.J.) at para. 20.
[47] *Lacroix v. Canada Mortgage and Housing Corp.*, [2001] O.J. No. 6251 (O.S.C.J.) at paras. 52-55.

Timing and Effect of Decertification Motions

The high threshold associated with satisfying the section 10 test for decertification demonstrates such motions ought only be brought in the clearest of cases. However, if that clear case presents itself, *when* should a defendant move to decertify? Recent jurisprudence demonstrates that counsel's choice of timing of the motion, might bring with it other, previously unforeseen, consequences.

When a decertification motion is brought well in advance of the common issues trial, it is difficult to envision what evidentiary consequences could arise given that it is a discrete motion based on productions and examinations to date. However, when that same motion is brought after the commencement of a trial of the common issues, on the basis of the evidence tendered thus far at trial, does the very bringing of such a motion foreclose a defendant's ability to subsequently lead evidence of its defence if the motion fails? Based on recent case law in Ontario, a defendant who waits to bring a decertification motion until the close of the plaintiff's case, without calling any evidence of its own, may be put to an election and its ability to tender evidence prescribed.

Are there restrictions on the timing of decertification?

The CPA has no prescription with respect to the appropriate timing of such a motion under section 10. There are no statutory restrictions or indicators as to the time during an action at which such a motion ought to be brought, nor is there a limit on the number of decertification motions which may be brought during a proceeding. In fact, it would be anathema to the very purpose of section 10 to prescribe rigid time lines for decertification motions because they are, by their very nature, to be brought at any time it appears the conditions for certification are no longer satisfied. This could occur during examinations for discovery, the review of documentary productions, as a result of an amendment to a common issue or during the trial itself. That having been said, the discretion of the case management or common issues trial judge codified by section 12 means that a defendant's choice of timing of such a motion is not absolute or as of right: just as the timing or sequencing of a Rule 21 or summary judgment motion is often stayed pending certification, a decertification motion ought not be perceived as any exception. The

timing of such a motion will similarly be subject to the same discretion, expediency concerns and fairness that a case management or common issues trial judge possesses over other steps brought in the proceeding.

Knowing that, defendants ought not lull themselves into believing a decertification motion can be brought at the time of their absolute choosing, at least not without other consequences. While the jurisprudence considering section 10 anticipates that the trial judge may hear a motion to decertify during the common issues trial, and there is no doubt that one may be brought during trial, in an effort to control its own process and ensure a fair and expeditious determination of the action, section 12 confers sufficient discretion on the trial judge to impose terms. Once a common issues trial commences, the ability to bring a decertification motion may be particularly prescribed given the motion's palpable similarities to the traditional non-suit motion.

Decertification at trial and non-suits

The term "non-suit" describes the modern practice of the defendant making an application for judgment at the close of the plaintiff's case on the ground that the plaintiff has failed to "make out a case" to answer. Where a defendant moves for a non-suit, it is also required to elect whether or not to call evidence in support of its defence. If the defendant elects to call evidence, the judge reserves on the motion until the end of the case and if the defendant elects not to call evidence, the motion is ruled upon immediately.[48]

One of the underlying rationales in compelling a defendant seeking on a non-suit to make an election is that it is not the purpose of a non-suit motion to advise the moving party of the strength of the other party's evidence: "a judge should not have to 'express an opinion upon the evidence until the evidence is complete'."[49] The traditional rule requiring a defendant to elect

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[48] *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (C.A.), at paras. 12 – 14, 35 – 36.

[49] *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, [2000] O.J. No. 3762 (S.C.J.) at paras. 8 – 12; *Roberge v. Huberman*, [1999] B.C.J. No. 695, (B.C.C.A.) at para. 25.

arises out of the manifest unfairness that would arise by permitting the moving party to then decide to adduce evidence to rebut a plaintiff's evidence if the non-suit motion were dismissed:

> "...we cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed. Certainly no one would ever dream of asking a jury at the end of a plaintiff's case to say what verdict they would be prepared to give if the defendant called no evidence and we fail to see why a judge should be asked such a question in cases where he and not a jury is the judge that has to determine the facts. In such cases we venture to think that the responsibility for not calling rebutting evidence should be upon the other party's counsel and upon no one else."[50]

Once a common issues trial has commenced, decertification is essentially a class proceeding's equivalent to a non-suit, given the similarity of the consequences associated with a successful non-suit or decertification motion: either dismissal of the action or dismissal of all the class' claims except that of the representative plaintiff. Either type of motion, brought during a trial, would necessarily be based on all of the same evidence which was tendered at trial. As in the case of a non-suit motion, it would be manifestly unfair for a judge to rule on a decertification motion during a trial, express an opinion on the evidence, and then permit the defendant to call its case. The timing of a decertification motion has the potential to fundamentally alter the traditional procedural characterization of certification: when brought in the middle of a trial, it can no longer be argued that decertification is merely the mirror procedural opposite of section 5 certification. Rather, once a decertification motion is brought on the basis of evidence tendered at trial, it morphs into a substantive step, necessarily engaging the merits of the proceeding because it would necessarily involve careful scrutiny of the evidence of the case: "when a decertification motion is brought at a later stage in the proceeding the court must logically consider more than merely the procedural aspects of the case [and] ... also consider the evidence that has been revealed to date and the merits of the positions taken by all parties to the action".[51]

In this way, it is hard to distinguish decertification from a non-suit from which bears certain attendant consequences and constrictions on the ability of a defendant to tender evidence. For example, if, on its proposed decertification motion, the defendant is asking the court to determine whether the plaintiff has proven, or failed to prove, that class-wide damages exist to

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[50] *Alexander v. Rayson*, [1934] 1 K.B. 169 at p. 178.
[51] *Smith v. Inco*, [2009] O.J. No. 5439 (O.S.C.J.), at para. 40.

suggest the class proceeding should be decertified, then it is asking the court for a determination on that common issue, which is essentially a request for a non-suit on that issue.

Application of decertification/non-suit at trial: Smith v Inco

In the recent 2009 case of *Smith v Inco*, following two months of a common issues trial and at the close of the plaintiff's case, the defendant sought to bring a motion under section 10 of the *CPA* to decertify the proceeding. Inco's position was that the evidence adduced thus far by the plaintiff demonstrated that the certification criteria of section 5 no longer remained satisfied and decertification was appropriate. The proposed motion was contemplated at a time in the trial when the defendant had yet to call any evidence nor had it made an election to call evidence. While the plaintiff's position was that a decertification motion at such a stage in the trial was akin to a non-suit motion, forcing Inco to make an election, the defendant argued that it had an unfettered right to bring a decertification motion at any time of its choosing prior to the final determination of the case and that it was entitled to a decision on that motion prior to making an election as to whether it would call evidence at trial. If the decertification motion was successful, Inco's position was that it nevertheless retained the right to then call its defence and tender evidence.

Conversely, the plaintiff argued that the intended decertification motion was nothing more than a cloaked version of a non-suit or summary judgment motion, yet without any of their attendant consequences. Should the motion fail, it would be manifestly unfair to permit Inco to call evidence following its unsuccessful decertification motion after having been advised, with reasons having been provided by the court, of the strengths and weaknesses of the plaintiff's case. Accordingly, the plaintiff argued that Inco could proceed with its decertification motion but only if it elected not to call evidence if the motion failed as it would have been manifestly unfair to allow the defendant to obtain the potential benefits of a non-suit motion without also having to bear the risk of not being permitted to call a case. If Inco was asking the court to determine whether the plaintiff had proven, or failed to prove, that class-wide damages existed to suggest that the action ought to be decertified, then it was really asking the court for a determination on that common issue, which was essentially a request for a non-suit on that issue.

The question to be answered by the trial judge in *Smith v Inco* was the following:

> "If Inco brings a motion for decertification pursuant to section 10 of the *Class Proceedings Act, 1992* and if Inco is unsuccessful in whole or in party in the motion then:
>
> (a) is Inco barred from tendering further evidence in its defence at the trial of the common issues; or
>
> (b) is Inco permitted to call further evidence in its defence at the trial of the common issues, or otherwise?"[52]

Justice Henderson, presiding, canvassed the positions of the parties and the relevant jurisprudence and ultimately accepted, in principle, that "Inco is entitled to bring a motion to decertify at this stage" but that his Honour was entitled to "exercise [his] judicial discretion to decide when and how Inco may do so in the circumstances of this case [as] ... I must determine the most 'fair and expeditious' way to proceed. In doing so, I must keep in mind the three benefits of class proceedings as set out in the *Hollick* case at para. 15."[53] The factors presented in that particular case led the court to find that any decertification motion ought to be deferred until all of the evidence had been received by the court. In so finding, Justice Henderson considered the following factors:

(a) Inco already had several opportunities to make its position on certification known to the court;

(b) Inco's latest challenge to certification was made only eight (8) months prior to the return of the common issues trial;

(c) a decertification motion at trial is very similar to a non-suit motion brought by a defendant at the completion of the plaintiff's case as the court must consider the evidence adduced by the plaintiff to determine whether there is a sufficient evidentiary basis to support the plaintiff's claim or to support continued certification;

(d) if the court must fully scrutinize the plaintiff's evidence to determine whether continued certification is appropriate, why not simply reveal all of the evidence and permit the court to make a final determination of all of the issues';

(e) there may be an unfair tactical advantage to the defendant if the court were to hear and decide the decertification motion before it was called upon present its case as the defendant would have the advantage of hearing or

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[52] *Smith v. Inco*, [2009] O.J. No. 5439 (O.S.C.J.), at para. 2.
[53] *Smith v. Inco*, [2009] O.J. No. 5439 (O.S.C.J.), at para. 37.

reading the judge's views on the plaintiff's evidence before Inco presented its case; and

(f) it would be wasteful to fully scrutinize the all of the evidence twice.[54]

However, Justice Henderson was careful to acknowledge that his Honour's decision turned on the very specific facts of that case and that there might be distinct technical or procedural issues which exist in other actions that "should be dealt with by way of a decertification motion prior to the defendant being put to an election to call evidence".[55]

Election Should Be Imposed on Decertification Motions at Trial

Support for Justice Henderson's holding may also be found in jurisprudence outside the class actions context which nevertheless, similarly considers the analogous effects between summary judgment and a non-suit. In the case of *Meditrust Healthcare Inc. v. Shoppers Drug Mart*,[56] the defendant had filed the evidence it intended to rely upon in support of its motion for summary judgment. At the same time, the plaintiff sought a ruling that the evidence filed thus far by the defendant did not satisfy the test for summary judgment under Rule 20. Justice Molloy determined that this tactic was so similar in its effect to a traditional non-suit motion that like consequences ought to be attached to the plaintiff's decision:

> "...in Ontario a party at trial seeking to non-suit the other, is put to his election as to whether or not he will call evidence. ... It is always open to a responding party to take the position that the moving party's case is so weak that no response is required. However, if that position is successful, then the responding party runs the risk of losing the motion. The respondent having lost on its argument that the other party's material requires no response, cannot turn around and say, 'Alright, now I want to file evidence and have you hear the motion against based on a fuller record.' I consider this to be improper. It is incumbent upon the parties to put all of their materials before the court when the matter is first dealt with."[57] [emphasis added]

Similarly, a defendant, having lost on a decertification motion brought during the common issues trial, cannot turn around and say it now intends to file evidence in defence of the substantive merits of the action. This is so for two primary reasons: (i) there is a manifest injustice to permitting any party to have two 'kicks at the can' and shore up their own case if unsuccessful at first, and (ii) there is no judicial economy to be gained by hearing a decertification motion in the middle of a trial when such arguments can be advanced at the

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[54] *Smith v. Inco*, [2009] O.J. No. 5439 (O.S.C.J.), at paras. 39, 41, 42, 45, 47 and 48.
[55] *Smith v. Inco*, [2009] O.J. No. 5439 (O.S.C.J.), at para. 51.
[56] *Meditrust Healthcare Inc. v Shoppers Drug Mart*, [2000] O.J. No. 3762 (S.C.J.).
[57] *Meditrust Healthcare Inc. v Shoppers Drug Mart*, [2000] O.J. No. 3762 (S.C.J.), at paras. 8 – 12.

closing of trial to accompany arguments why the action ought to be dismissed. This avoids bifurcation of the issues and litigation by instalment as a trial might be stayed pending appeal of a decertification motion rather than having all issues appealed together, along with the ultimate determination on the merits.

Reserving judgment on decertification until the completion of evidence at trial avoids duplication, eliminates the need to hear the parties by instalments and avoids the unfairness associated with permitting a defendant to bring its motion and then call its defence, if unsuccessful, with the benefit of having been advised by the court of the strengths and weaknesses of the plaintiff's case. As acknowledged by the Court of Appeal, motions such as non-suits, which bear the identical effect to decertification motion, only add to the time and expense of a trial rather than "simply tak[ing] on the less onerous task of showing that the plaintiff's claim should fail."[58]

Conclusion: What's the Point?

As noted above, the threshold to decertify a proceeding seems quite high. While defendants have tried, there has yet to a class proceeding decertified in Ontario or the other common law provinces. To decertify a proceeding, one must proffer new evidence of a fundamental change which undermines the certification order, the issue or evidence must not have already effectively been argued and decided at certification, and it must be of such a nature that the other remedies available to the court, such as trial management, the creation of subclasses, the amendment of common issues, etc., would not be sufficient to satisfy the conditions for certification and allow a class action to proceed.

Furthermore, the timing of decertification itself may have implications for the defendant. While section 10 of the *CPA* provides a virtually unlimited ability for a defendant to bring a decertification motion at any time, and as many times as it chooses, the court's power to manage the class action process may require the imposition of terms and restrictions on such motions. As was seen in *Smith v Inco*, the defendant was put to an election as to whether it would call evidence at trial when it sought to bring a decertification motion after the completion of the plaintiff's case at the common issues trial.

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[58] *Prudential Securities Credit Corp. LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (C.A.) at para. 14.

If there is such a high threshold and if the timing of the motion may be scrutinized, what then is the point of decertification? Is the decertification motion simply another in a long line of motions designed to delay and derail plaintiffs and a long shot at ending the class proceeding early? For instance, if a defendant believes that an action has become so deficient as to warrant decertification, why not then move to the common issues trial and obtain a decision that binds the class? Or, does a decertification motion permit the defendant a sneak peak of what a trier of fact thinks of the evidence and theories of the case in advance of trial? In all, based on the foregoing, these authors believe that the decertification motion, in all but the most compelling circumstances, is simply a paper tiger: scary at first, but without much teeth.