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# CLASS ACTION

***A review of class action proceedings, procedure and legislation***

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For 15 years, the standard of proof applied on certification motions in class actions has been the "some basis in fact" standard. However, the concept of "some basis in fact" is ill-defined, easier to describe in the negative and nearly impossible to delineate with certainty. While fraught with considerable uncertainty, the "some basis in fact" standard has played a key role in ensuring that certification motions continue to act as a meaningful screening device. The Supreme Court of Canada's most recent jurisprudence may be undeniably pro-certification, but it does not eliminate or lower the "some basis in fact" standard or otherwise attempt to undermine the important screening function of certification motions. In this article, Derek Ricci & Michael Finley, explore the concept and the impact of Pro Sys.

## Common Issues Trials in B.C.

Since the entry into force in 1996 of B.C.'s *Class Proceedings Act*, the province has gained something of a national reputation as a class actions hotspot. As of August 2015, a decision on certification had been reached in each of 153 cases in B.C., the last date for which comprehensive statistics are available. More certification decisions have been rendered since that time. More certification decisions have been rendered since that time. In this article, Mathew P. Good reviews the nature and outcomes of the certified class actions that have reached adjudication on the merits in B.C., to better understand the potential risks and factors in play when such cases move beyond the more familiar surroundings of the certification battleground.

## *Montreal Convention* Enforceability in Class Action

The *Convention for the Unification of Certain Rules for International Carriage by Air* restricts the types and the amount of claims for damages that may be made against international air carriers and bars all actions for damages, however founded, in the carriage of passengers, baggage and cargo other than claims for death or bodily injury, destruction, damage or loss of baggage and cargo and for delay. In this article, Vincent de l'Étoile explores the enforceability of the *Montreal Convention* in class action matters.

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Class Action Review

# THE MEANING OF "EXISTENCE": WRESTLING WITH "SOME BASIS IN FACT" AND COMMON ISSUES AFTER *PRO-SYS*

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For some 15 years, the standard of proof applied on certification motions in class actions has been the "some basis in fact" standard. As has been recognized by many previous authors,[1] the concept of "some basis in fact" is ill-defined, easier to describe in the negative (*i.e.*, not "a balance of probabilities") and nearly impossible to delineate with certainty. Since it was first articulated by the Supreme Court of Canada in *Hollick v. Toronto (City)*,[2] "some basis in fact" has been left to be recognized by different judges based on their individual views of the particular evidence adduced in each case. While fraught with considerable uncertainty, the "some basis in fact" standard has played a key role in ensuring that certification motions continue to act as a meaningful screening device. The Supreme Court of Canada's most recent jurisprudence may be undeniably pro-certification, but it does not eliminate or lower the "some basis in fact" standard or otherwise attempt to undermine the important screening function of certification motions.

## THE KEY BATTLEGROUND: COMMON ISSUES AND "SOME BASIS IN FACT"

The difficult question of the meaning of "some basis in fact" becomes especially problematic when the concept is applied to the common issues in a given action. The common issues element of the certification test has become the *de-facto* battleground in modern certification motions; judges increasingly accept (in Ontario, at least)[3] that class actions are lawyer-driven and rarely refuse to certify class actions on the basis that it is not the preferable procedure. Indeed, defence counsel have been criticized for even attempting to lead arguments with respect to the elements of the certification test aside from commonality.[4] Absent grounds to strike the pleadings in their entirety, this makes the well-established proposition that the plaintiff is required to demonstrate "some basis in fact for the existence of common issues"[5] particularly important.

But what is "existence"? In his recent, comprehensive article on "some basis in fact", Brandon Kain posited that the Supreme Court's recent decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[6] in which the Court addressed the concept of "some basis in fact", may stand for the proposition that all that the plaintiff must show is that the common issues in question are capable of being resolved in common:

> In *Microsoft*, Rothstein J. held that plaintiffs are under no obligation to adduce evidence in support of the acts which underlie the common issues, even for what he called common issues related to scope and existence of the causes of action (in *Microsoft* itself, issues such as "Did the Defendants, or either [of] them, conspire to harm the Class" or 'Did the conspiracy involve unlawful acts").
>
> In other words, Rothstein J. held that the requirement for evidence at certification relates solely to whether a claim for acts which are assumed to have occurred can

[1] See e.g.: Jon Foreman & Dana Peebles "The Word from the SCC: How Will Recent Decisions Affect the Future of Class Action Cases?" (2014) Law Society of Canada CPD, 1-1; Samaneh Hosseini & Eliot Kolers "Is Eight Enough? The Law of Certification After the Supreme Court of Canada's Recent Flurry of Cases" (2014) 8:4, Class Action Defence Quarterly 43.

[2] 2001 SCC 68

[3] In their article "The Cause of Action of the Representative Plaintiff in Class Proceedings", (2014) 8:4, Class Action Defence Quarterly 38, Silvie Rodrigue, Genevieve Bertrand and James Gotowiec argue that there has been an increased focus on the proposed representative plaintiff in Quebec and contrast this approach with Ontario, which they call "the land of second chances" with respect to representative plaintiffs and which they identify as a jurisdiction where judges are less troubled by "lawyer-driven" actions.

[4] *Baroch v Canada Cartage*, 2015 ONSC 40, at paras 18-21.

[5] *McCracken v Canadian National Railway*, 2012 ONCA 445, at para 106 [*McCracken*].

[6] 2013 SCC 57 [*Pro-Sys*].

> meet the procedural criteria in provisions like section 4(1)(b)-(e) of the B.C. CPA; e.g., whether such notional acts raise issues that can be dealt with in common. The plaintiff is under no evidentiary obligation to establish that the alleged grounds of liability are in fact anchored in reality.[7]

This argument is based on the following three paragraphs in *Pro-Sys*:

> The Hollick standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements.
>
> […]
>
> 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).
>
> […]
>
> The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. 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.[8]

Plaintiff's counsel are increasingly relying on the above excerpts from *Pro-Sys* to maintain that "existence" and "commonality" are, in effect, synonymous and that there is no need for evidence demonstrating that a claim is anchored in reality.[9] This article seeks do demonstrate that something more continues to be required.

## THE STATE OF AFFAIRS PRE-*PRO-SYS*

To understand the flaw in the proposition that only potential commonality is required to show the "existence" of the common issues, it is important to begin with a clear understanding of the state of the law in the period immediately before *Pro-Sys* was decided in October 2013.

Of particular interest among the pre-*Pro-Sys* cases are three decisions of the Court of Appeal for Ontario: *McCracken v. Canadian National Railway*, *Fulawka v. Bank of Nova Scotia* and *Fresco v. Canadian Imperial Bank of Commerce*.[10] All of these cases are so-called "overtime misclassification" cases, in which employees sought unpaid overtime they were allegedly owed by their employers, pursuant to the *Canada Labour Code*.

In all three of these cases the Court of Appeal stated expressly that the *Hollick* standard, "some basis in fact", means that there must be some evidentiary basis that a common issue ***exists*** beyond a bare assertion in the pleadings. Consider the words used by the Court of Appeal, beginning with former Chief Justice Winkler in *McCracken*. Winkler C.J.O. held in *McCracken* that: "There is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order."[11]

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[7] Brandon Kain, "Developments in Class Actions Law: The 2013-2014 Term — The Supreme Court of Canada and the Still-Curious Requirement of "Some Basis in Fact"" (2015), 68 SCLR (2d) 77 at 106-107.

[8] *Pro-Sys*, *supra*, at paras 100, 102, 110.

[9] *Dine v Biomet*, 2015 ONSC 7050 [*Biomet*].

[10] *McCracken*, *supra*; 2012 ONCA 443 [*Fulawka*]; 2012 ONCA 444 [*Fresco*].

[11] *McCracken*, *supra*, at para 75.

The necessity of an "evidentiary foundation" to support the certification was also described in the following terms:

> "In assessing whether there is some basis in the evidence to establish the ***existence*** of the common issues, the motion judge must consider pertinent legal principles that apply to the commonality assessment, with reference to the evidence adduced on the motion".

Similarly, in *Fulawka*, the Court held that it is necessary to "consider the pertinent legal principles with reference to the evidence adduced on the motion to decide if there is some basis in the evidence to establish the ***existence*** of the common issues" and stated that:

> "While the evidentiary basis for establishing the ***existence*** of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that a common issue ***exists*** beyond a bare assertion in the pleadings. To be clear, this is simply the *Hollick* standard of some basis in fact."[12]

The Court of Appeal in *Fresco* proceeded on the same basis, identifying the evidence led by the plaintiff to underpin the existence of common issues, namely affidavit evidence and copies of CIBC's overtime policies.[13]

The holding that there must be evidence of the existence of common issues outside of the pleadings is important because, where there are multiple potential plaintiffs, nearly any issue can be pleaded such that it could possibly be decided in common. The references to evidence of "existence" in the above cases must mean that the courts require some indication that the common issues are anchored in reality, and not just that they could be assessed in common. As such, based on the pre-Pro-Sys jurisprudence, in Ontario at least, there is a two-step test: a motions judge must be convinced (1) that an issue "exists" based on evidence and (2) that the issue can be decided in common.

The first step in this two-step analysis is important to defendants, given the already low bar to certification and the immense cost and well-recognized negative reputational exposure associated with a certified class action.[14] Without a requirement on the certification motion to establish that an issue actually "exists" based on evidence, there would be no protection against entrepreneurial counsel commencing claims based solely on cleverly drafted pleadings.

Consider, for example, a putative class action brought against a car manufacturer such as Volvo, a company that has built its reputation on the safety and high-quality of its cars, on the basis that the airbags in its sedans are dangerously defective. The plaintiff could plead, for example, that she was seriously injured in an accident because her defective airbags failed to deploy. It would be a simple matter for the plaintiff to prepare affidavit evidence establishing that her airbags did not deploy, that a given series of Volvo sedans have the same or similar airbags and that several people purchased those sedans. Based just on this evidence of "commonality", and without any evidence that the airbags should have deployed or were otherwise defective in some way, the plaintiff could establish commonality. Specifically, there would be some basis in fact that the proposed common issue concerning the potential defectiveness of the airbags is common to the class members. Moreover, there would be little doubt that the defectiveness issue would be a substantial

[12] *Fulawka*, *supra*, at paras 79, 82.
[13] *Fresco*, *supra.*
[14] See e.g.: *Player Estate v Janssen-Ortho Inc*, 2014 BCSC 1122, at para 184: "No doubt [the defendants] have the ability to fund this litigation, but money is not the only cost associated with a class action that calls into question the safety of a product such as fentanyl. Upon certification public notices stating that the drug is the subject of a class action and alleging the drug is unsafe and can cause death in ordinary use is likely to alarm anyone who is using or perhaps even prescribing fentanyl.[…] If the evidence is insufficient to support the action then the consequences associated with involvement in an extensive and expensive class action are very serious."

ingredient in the resolution of each class member's claim that significantly advances the litigation. In such a scenario, any attempt by the manufacturer to demonstrate that its airbags were not intended to deploy in the circumstances would be dismissed as an improper intrusion into the merits.

## THE PRO-SYS DECISION AND ITS AFTERMATH

The question, then, is whether the Supreme Court of Canada, in *Pro-Sys*, intended to lower the already low bar to certification to the vanishing point by absolving plaintiffs of the obligation to lead any evidence that the wrong they allege may have actually occurred, such that claims could be certified despite being entirely unmoored from reality and devoid of any evidence pertaining to the alleged wrongful acts.

This seems unlikely. First, it is important to recall that the decision in Pro-Sys was predominantly focused on a different and difficult issue that arises in indirect purchaser cases – that is – whether the alleged loss suffered by the class members could be determined and calculated on an aggregate basis. In particular, Justice Rothstein focussed on the standard upon which the expert's evidence used to establish commonality should be assessed, given that Microsoft had taken the position that the "some basis in fact" standard required the Plaintiff to prove it had met the elements of the test on a balance of probabilities.

Unsurprisingly, the Supreme Court rejected that submission, and found that the well-established *Hollick* standard does not require proof on a balance of probabilities but that the standard remained "some basis in fact".[15] When the Court states that it is not necessary to lead evidence proving that the wrongs alleged "actually occurred", the Court is simply reiterating the well-accepted proposition that the plaintiff does not have to prove its case will or is even likely to succeed at the certification stage and is affirming that proof on a balance of probabilities is not required.

Secondly and, perhaps more obviously, had the Supreme Court intended to overturn *Hollick*, and the subsequent decade-plus of jurisprudence, one might expect the Court would have done so explicitly and would not have reaffirmed *Hollick* as the governing authority.[16] There appears to have been no attempt to radically redefine "some basis in fact"; indeed, the Court in *Pro-Sys* simply held that there is "limited utility in attempting to define 'some basis in fact' in the abstract".[17]

Thirdly, requiring a basis in fact only that the proposed issues are questions which are common to the class members would lead to results that are inconsistent with other findings in *Pro-Sys*. If certification is indeed intended to be a "meaningful screening device" as the Supreme Court expressly affirmed in *Pro-Sys*, it is unlikely that it intended to create a certification regime with little to no screening whatsoever.

Finally, and most significantly, the Supreme Court seemingly put an end to the debate in its subsequent decision in *Fischer v IG Investment Management Ltd*,[18] decided just two months after *Pro-Sys*. *Fischer* involved a putative class action against mutual fund managers for breach of fiduciary duties and negligence. While the central issue before the Supreme Court in *Fischer* was preferable procedure, the Court discussed at length the evidentiary considerations in class actions. In the context of this discussion, Justice Cromwell, for a unanimous court, discussed the same basis in fact standard, specifically referencing *Pro-Sys* but decidedly not describing it as some kind of radical departure or reformulation of the *Hollick* standard.

Instead, Cromwell J. cited with approval some of the pre-*Pro-Sys* decisions of the Court of Appeal for Ontario which, as explained above, held that the *Hollick* standard means that there must be some evidentiary basis that a common issue exists beyond a bare assertion in the pleadings. Cromwell J. quoted from Winkler C.J.O.'s decision in *McCracken*, discussed above, and

[15] *Pro-Sys*, *supra*, at para 102.
[16] *Ibid* at paras 99-102, 137, 139.
[17] *Pro-Sys*, *supra*, at para 104.
[18] 2013 SCC 69 [*Fischer*].

described the case as a "[h]elpful elaboration of the 'some basis in fact' standard".[19]

Since *Pro-Sys*, lower courts have not treated the decision as having changed the "basis in fact" standard, continuing instead to require evidence that the claim is not simply a construct of inventive pleadings. In *Good v. Toronto Police Services Board*,[20] for example, the Divisional Court considered a proposed class action based on alleged wrongful arrests made during the G20 summit protests in Toronto. In its decision reversing the motion judge, the Divisional Court repeated the oft-stated proposition that it is impermissible to weigh the merits of the claim, but went on to hold that some evidence had to exist to support at least the possibility that the claim had merit:

> It was not therefore relevant whether the evidence at the certification stage could prove that all of the arrests were unlawful. Rather, what was relevant was whether there was some evidence that could suggest the possibility of that result. In that regard, the appellant filed affidavits from persons involved who attested to the arbitrary nature of the detentions and arrests supplemented by comments from various police officers that they had no discretion not to detain and arrest. The appellant also pointed to various police notes recording the issuance of mass arrest orders, instructions that persons detained were not to be allowed to leave before being arrested and that the intent was to detain and arrest not to disperse the crowd.[21]

Faced with argument that no evidence is required to underpin the "existence" of the issue which is alleged to be common, Justice Belobaba has recently confirmed that the plaintiff must meet the two step test proposed above, requiring the plaintiff to adduce "evidence that the proposed common issue actually exists and some evidence that the proposed issue can be answered in common across the entire class (that is, some evidence of class-wide commonality)."[22]

Belobaba J. specifically rejected the notion that claims could be made without evidence that they are anchored in reality holding that:

> the plaintiff suggested, tracking a provocative comment made in the Kain article, supra, note 7 at 107, that *Pro-Sys* now means that "the plaintiff is under no evidentiary obligation to establish that the alleged grounds of liability are in fact anchored in reality." I could not disagree more. In my view, this proposition runs counter to the two-step approach taken by the Supreme Court in *Hollick v. Toronto (City)*, by the Court of Appeal in *Fulawka v. Bank of Nova Scotia* and *McCracken v. Canadian National Railway Company*, and by countless judges, myself included, in countless certifications. [citations omitted][23]

Belobaba J. recognized that to hold otherwise would make any case about any issue ripe for certification:

> If all that is needed is some evidence of class-wide commonality and no evidence that the proposed common has even a minimal basis in fact, then almost any proposed class action would have to be certified and the certification motion's role as "a meaningful screening device" would be eviscerated. I do not read *Pro-Sys* Consultants as

[19] *Fischer*, *supra*, at para 41.
[20] *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div Ct).
[21] *Ibid* at para 59.
[22] *Biomet*, *supra*, at para 15 and see also *Da Silva v 2162095 Ontario Ltd*, 2016 ONSC 2069, at para 13 and *Noble v North Halton Golf and Country Club Ltd*, 2016 ONSC 2962, at para 31.
[23] *Biomet*, *supra*, at footnote 9.

reversing *Hollick* and almost 15 years of subsequent case law.[24]

## CONCLUSION

The Supreme Court of Canada's decision in *Pro-Sys* has been rightly described as pro-certification by a number of learned authors and judges. However, it does not mark the end of, or even a lowering of, the same basis in fact standard, as it applies to the critical commonality criterion. The Supreme Court has reaffirmed the important screening function of certification motions. In this regard, with respect to commonality, the representative plaintiff continues to be required to establish, through evidence, some basis in fact that (1) a common issue "exists", and (2) that the issue can be decided in common.

It must be remembered, however, that the requirement to lead evidence that an issue exists is a low threshold. Despite the holding in *Hollick* and many subsequent decisions that defendants are entitled to rebut the plaintiff's evidence with evidence of their own, recent jurisprudence suggests that defendants are unlikely to prevail if the plaintiff has occupied the field with its evidence and shown that the claims are at least plausible. As Mr. Kain suggested, and as the Ontario Divisional Court has recently confirmed, the defendant is only likely to succeed if it can identify significant gaps in the plaintiff's evidence,[25] or where there is no evidence provided for a basis in fact whatsoever.[26] Absent these opportunities, class action defendants may increasingly prefer to bring summary judgment motions in order to defeat or substantially narrow claims against them.

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[24] *Ibid*.

[25] For example, in *O'Brien v Bard Canada Inc*, 2015 ONSC 2470, there was no evidence that multiple medical devices could be assessed in common due to design differences that were set out in the defendant's evidence. Similarly in *Sherry Good v. Toronto Police Services*, discussed above, evidence of overheard comments by one or more police officers, combined with a feeling by French-speakers that they were discriminated against, was insufficient to ground a common issue for a claim that the police discriminated against Quebecois people contrary to Ontario's *Human Rights Code*.

[26] For example, *Williams v Canon Canada Inc*, 2011 ONSC 6571: there was no admissible evidence that there was any defect in the design of certain camera lenses because the plaintiff's experts were not properly qualified to give the evidence (and it was not probative in an event) and because the defendant lead evidence that the alleged defect was, in fact, an intentional design element intended to protect the camera.

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# COMMON ISSUES TRIALS IN BRITISH COLUMBIA: A BRIEF ASSESSMENT

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Since the entry into force in 1996 of the province's *Class Proceedings Act*, British Columbia has gained something of a national reputation as a class actions hotspot. As of August 2015, a decision on certification had been reached in each of 153 cases in British Columbia, the last date for which comprehensive statistics are available.[2] More certification decisions have been rendered since that time.[3]

It is well known that the majority of class proceedings settle either following a contested certification or upon a consent certification. In British Columbia, of the total number of certification decisions, approximately 71% (or 109 cases) were contested, while 29% (or 44 cases) proceeded by consent. Of those cases where certification was fought, 62% (or 67 cases) were certified. More than 80% of those matters then resolved through settlement without a trial. Of those that proceeded to certification by consent, 75% (or 33 cases) of those were for settlement purposes.[4]

What has received less attention is the small minority of cases that do not settle at or after certification, and which go on to a trial on the merits.[5] At least 15 cases have gone to the merits stage in British Columbia since 1996. A greater proportion of certified class actions have reached trial in British Columbia than in other provinces, including Ontario, despite that jurisdiction's longer history with class proceedings legislation, and its larger population, economy and legal markets.[6]

It is worthwhile to briefly review the nature and outcomes of the certified class actions that have reached adjudication on the merits in British Columbia, to better understand the potential risks and factors in play when such cases move beyond the more familiar surroundings of the certification battleground. This inquiry is performed only at a high level, to draw general conclusions. Further detailed and comparative study would be beneficial to the Bar, the courts and litigants.

## CASES THAT HAVE REACHED COMMON ISSUES TRIALS IN BRITISH COLUMBIA

Cases can usefully be divided into two groups – those in which the plaintiff class was successful (at least in part) on the merits, and those in which the defendants were victorious.

Class claims were refused on the merits, in whole, in the following actions, whether at trial or on appeal following a trial:

- *Barbour v. University of British Columbia* (claim that the university did not have the statutory authority to issue and collect parking fines on campus – class was initially successful at common issues trial, but a retroactive statutory

[1] The author practises class actions and commercial litigation with Blake, Cassels & Graydon LLP in Vancouver.

[2] Ward Branch, *Class Actions in Canada* (Toronto: Canada Law Book, November 2015 release), c. 22.

[3] See, e.g. *Baker v. Rendle*, 2016 BCSC 801 (certification denied); *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 (certified); *Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561 (certified); *Jiang v. Peoples Trust Company*, 2016 BCSC 368 (certification denied); and *Monaco v. Coquitlam (City)*, 2015 BCSC 2421 (certification denied).

[4] Statistics courtesy of Chelsea Hermanson, Naomi Kovak and Rebecca Spigelman, "BC Class Action Roundup – Significant Cases in 2015", presented April 13, 2016 at the Canadian Bar Association B.C. Class Action Section meeting in Vancouver, B.C. It is not determinable from the statistics what happened to the 11 cases that were certified by consent, but not for settlement.

[5] There is a separate class of cases that are determined on the merits – by summary trial or summary judgment – prior to certification, but they are a minority. See, e.g. *The Consumers' Association of Canada v. Coca-Cola Bottling Company et al.*, 2006 BCSC 863 aff'd 2007 BCCA 356.

[6] According to Branch, by August 2015, there had been 25 common issues merits decisions in Ontario, out of 153 contested but certified claims (out of 234 total), a ratio of 16%. Compare this to merits determinations in 14 out of 67 contested but certified claims in B.C., or 22%, although this figure includes one decision issued after statistics were last available in August 2015.

amendment resulted in a loss on appeal);[7]

- *Bennett v. British Columbia* (claim by retired public sector employees for payment of health benefits – action dismissed at summary trial on the basis that there was no fiduciary duty owed by the Crown to the class);[8]

- *Elms v. Laurentian Bank of Canada* (claim against law firm and others arising from a failed investment scheme – action dismissed against that defendant at summary trial on the basis that there was no fiduciary duty owed by the lawyers to the class);[9]

- *Kotai v. Queen of the North* (claim arising from the sinking of a ferry – an agreed statement of facts resulted in mini-trials on the entitlement of class members to damages for psychological injuries, which were not made out on the evidence);[10]

- *Nanaimo Immigrant Settlement Society v. British Columbia* (claim that fees imposed by the Province on charitable gambling were *ultra vires* and thus unlawful indirect taxes – on an application for summary judgment, the fees were found to be lawful and in any event proper direct taxes);[11]

- *Reid v. British Columbia (Egg Marketing Board)* (claim that the statutory board had acted in abuse of public office – the action was dismissed on the failure of the plaintiffs to prove their case on the evidence);[12]

- *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.* (claim by investors in a hotel project against the developer for negligent misrepresentation and breach of fiduciary duty – class partially successful at trial but reversed on appeal);[13] and

- *Withler v. Canada (Attorney General)* (claim of age discrimination by public servants regarding the payment of a death benefit – action dismissed after trial).[14]

Conversely, class claims were successful on the merit (at least in part) in the following actions:

- *Gautam v. Canada Line Rapid Transit Inc.* (claim by businesses and property owners regarding nuisance and injurious affection caused by transit construction – after full trial, class successful in part on injurious affection claim, but entitlement to any damages left for another hearing);[15]

- *Haghdust v. British Columbia Lottery Corporation* (claim by problem gamblers for withheld winnings – on summary trial, class successful in part entitling some plaintiffs to damages);[16]

- *Halvorson v. Medical Services Commission of British Columbia* (claim by physicians regarding entitlement to payment for services to de-enrolled

[7] 2009 BCSC 425 rev'd 2010 BCCA 63 application for leave to appeal denied [2010] S.C.C.A. No. 135.
[8] 2009 BCSC 1358 aff'd 2012 BCCA 115.
[9] 2004 BCSC 1013 aff'd 2006 BCCA 86.
[10] 2009 BCSC 1405 and 2009 BCSC 1604.
[11] 2003 BCSC 1852 aff'd 2004 BCCA 410 application for leave to appeal denied [2004] S.C.C.A. No. 429.
[12] 2007 BCSC 155.
[13] 2007 BCSC 1262 rev'd 2009 BCCA 224 appeal dismissed 2011 SCC 23.
[14] 2006 BCSC 101 aff'd 2008 BCCA 539 aff'd 2011 SCC 12.
[15] 2015 BCSC 2038.
[16] 2014 BCSC 1327.

patients – on summary trial, action successful in part for certain time periods);[17]

- *Jer v. Samji* (claim against fraudster and third parties regarding a Ponzi scheme – factual common issues decided in favour of class, but no damages sought or awarded);[18]

- *Kilroy v. A OK Payday Loans Inc.* (claim that interest and fees on payday loan products were unlawful – on summary trial, class entirely successful, but remedies left to a further hearing);[19]

- *Lieberman v. Business Development Bank of Canada* (claim by employees of the bank regarding pension benefits – after trial, class successful in part on liability, but no loss was shown and thus no damages awarded);[20] and

- *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.* (claim that interest and fees on payday loan products were unlawful – on summary trial, class entirely successful).[21]

## MODE AND LENGTH OF TRIAL

Contrary to the popular conception that a class action must necessarily become a "monster of complexity and cost"[22] when it moves from certification forward to trial, the British Columbia merits decisions make it clear that this does not have to be the outcome and usually is not.

It is notable that, of the 15 merits cases, six went by way of summary trial, one by way of summary judgment, and another by agreed statement of facts and mini-trials for individual class members. This suggests that alternative procedures are viable options for dealing even with complex class proceedings, and that summary determination should be considered. It may even be that the nature of common issues, discretely posed, help to focus the hearing, argument and decision-making.

The actions that did go to full trials (i.e. traditional hearings with oral evidence), with a few exceptions,[23] were relatively short, lasting on between one and nine days. This is comparable to the length of trials in non-class action matters in British Columbia, which average about six days.[24] A one- to nine-day hearing is also substantially shorter than true 'monster' litigation, such as aboriginal treaty cases, like *Delgamuukw* (which took 374 days before the judge)[25] and *Tsilhqot'in* (339 days),[26] or *Charter* rights cases like *Conseil Scolaire Francophone* (which ran just shy of 250 days).[27] Of course, the experience in *Andersen v. St. Jude* – 138 days of evidence at trial – indicates that mega-trials are still a potential result in class proceedings.[28]

Another comparison is illustrative: The length of certification hearings in British Columbia have been, at least anecdotally, increasing for some time. Recent cases bear this trend out, to some extent: for example, 12 days in *Watson v. Bank of America Corporation*;[29] nine days, without completing, in *Cantlie v. Canadian*

[17] 2014 BCSC 448.
[18] 2014 BCSC 1629 aff'd 2015 BCCA 257 leave to appeal denied S.C.C. File No. 36592 (January 21, 2016).
[19] 2006 BCSC 1213 aff'd 2007 BCCA 231.
[20] 2009 BCSC 1312.
[21] 2008 BCSC 669 aff'd 2009 BCCA 110 leave to appeal denied [2009] S.C.C.A. No. 194 and 2009 BCSC 1036 aff'd 2010 BCCA 357.
[22] *Tiemstra v. Insurance Corp. of British Columbia*, [1996] B.C.J. No. 952 (S.C.) at para. 20, per Esson C.J.S.C.
[23] *Sharbern Holdings Inc.* (32 days), *Gautam* (21 days) and *Withler* (13 days).
[24] B.C. Justice Review Taskforce – *Proposed Rules of Civil Procedure of the British Columbia Supreme Court*: Questions and Answers (September 15, 2008) at footnote 8 (circa 2008). Online at https://www.lawsociety.bc.ca/%5Cdocs%5Cpublications%5Cnotices%5Cjrtf-paper.pdf
[25] *Delgamuukw v. British Columbia*, [1991] B.C.J. No. 525 (S.C.).
[26] 2007 BCSC 1700.
[27] See 2016 BCSC 1764.
[28] *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660.
[29] 2014 BCSC 532.

*Heating Products Inc.*;[30] seven days in both *Seidel v. Telus Communications Inc.*[31] and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*;[32] and five days in each of *Jiang v. Peoples Trust Company*[33] and *Jer v. Samji*.[34] The certification hearing in each of these cases, except *Cantlie*, was also followed by extensive appeal proceedings, including leave applications and Supreme Court of Canada appearances.[35] This is a jarring contrast, given the exclusively procedural nature of certification in this province, which does not even permit cross-examination on affidavits without a court order, and the low bar to success for plaintiffs. It might be that parties' resources could be more usefully focused on post-certification, pre-trial procedures.

## POST-JUDGMENT PROCEEDINGS

Based on a review of the jurisprudence, it is apparent that not every merits decision finally resolved the claim, even where the plaintiffs were successful in obtaining judgment or favourable rulings on some of the certified common issues. For example, in some decisions not all the certified common issues were addressed at trial. In particular, remedial entitlement looks like a more contentious issue, as in *Kilroy* and *Gautam*, which may necessitate further hearings.

In a similar vein, not every case resulted in an appeal (for example, *Haghdust* and *Halvorson*). With the full knowledge of the facts and the court's opinion, it may be that parties take a realistic view of their prospects, and decline to invest further time in pursuing lost causes. This contrasts with certification decisions, from which it is almost inevitable in British Columbia that the losing side will appeal, without leave as they have a right to do under the legislation.[36]

## SOME OBSERVATIONS

Based on this summary review of the existing case law, some more general comments can be made about the potential outcomes of class actions that proceed to hearing on the merits of the certified common issues.

First, thus far, success has been roughly evenly divided between plaintiffs and defendants. This should give some comfort to defendants who may be concerned that proceeding to trial will of necessity result in a victory for plaintiffs, given their prior success on certification. It is a useful reminder that the merits are distinct from the low hurdle of certification. A careful assessment of the underlying evidentiary and legal strengths and weaknesses of a case post-certification, and especially following pre-trial procedures, may reveal a very different case from the one envisioned before or described at certification. That said, actions against government or quasi-government bodies do not seem to hold any great prospect of success, having failed in six of nine determinations.[37]

Second, the weight of the existing jurisprudence indicates that success on some common issues for plaintiffs will not always mean pecuniary recovery. This, too, should be a comfort to defendants, who are inclined to envision massive awards against them at trial, perhaps based on the American experience. A decision on some common issues can also set up a forum for further settlement discussions with full knowledge of the litigation landscape, as occurred in *Tracy*, which was ultimately settled after trial.[38] It is likewise notable that the amounts recovered in cases at trial are relatively modest.[39]

[30] 2016 BCSC 694.
[31] *Supra*.
[32] 2008 BCSC 575.
[33] *Supra*.
[34] *Supra*.
[35] See, e.g., *Pro-Sys* and *Jer*. In *Seidel*, certification was preceded by appeals to the Supreme Court of Canada.
[36] *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 36.
[37] As an aside, it is striking that five of the successful plaintiffs' cases were brought by a single law firm – Hordo Bennett Mounteer LLP (and its predecessor and successor firms). As a further aside, it is interesting that the defendants have not been successful at first instance since 2009.
[38] 2015 BCSC 2138.
[39] From a few hundred-thousand dollars in *Haghdust*, to no financial recovery at all in *Lieberman* and *Jer* (the deep-pocketed defendants having settled prior to trial).

Third, the British Columbia experience shows that class actions are capable of being managed and can be determined on the merits, in court before a judge, with all the procedural and substantive protections that process affords. In light of the roughly even success rate for plaintiffs and defendants, this may be an opportunity for defendants to reconsider the urge to settle quickly just because of the fact of certification. Even in extremely complicated, high-value litigation, the merits can be adjudicated without the proceeding becoming a complete quagmire – witness the international arbitration-style procedure established for the trial in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[40] a vast and factually-complex case.

Fourth, summary trial procedures are effective and should not be discounted simply because a case is brought as a class proceeding. The perception of unmanageability may well be incorrect, and counsel should work closely with the case management judge to craft an appropriate method of adjudication. This may well result in better use of resources for all concerned, courts, plaintiffs and defendants. Particular care should be taken in drafting common issues, as they will inform the pre-trial and trial processes.

British Columbia has only a decade worth of experience with class proceedings. It may be that more certified class proceedings are already on their way to trial, and which will alter the understanding and practice of this type of litigation in this province. Until then, the existing cases offer some guidance about how to best approach certified class actions, and address them in a meaningful way.

[40] Comprehensive trial management order pronounced May 29, 2015 per Myers J. (L043175).

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# THE EXCLUSIVITY OF THE *MONTREAL CONVENTION* IN CLASS ACTIONS ARISING FROM INTERNATIONAL AIR TRANSPORTATION

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The *Convention for the Unification of Certain Rules for International Carriage by Air* [2] (the "*Montreal Convention*") restricts the types and the amount of claims for damages that may be made against international air carriers and bars all actions for damages, however founded, in the carriage of passengers, baggage and cargo other than claims for death or bodily injury, destruction, damage or loss of baggage and cargo and for delay.

When applicable, the exclusivity of the *Montreal Convention* prevails in class action matters, as recently reaffirmed in *Zougrana* v. *Air Algérie*[3] and *O'Mara* v. *Air Canada*[4], and from long standing jurisprudence from around the globe.

The enforceability of the *Montreal Convention* in class action matters may thus prevent the meeting of the certification or authorization criteria, oust common law remedies, or significantly reduce the nature of a claim made against an international air carrier further to an unfortunate event arising during international air transportation.

## THE SCOPE AND EXTENT OF THE *MONTREAL CONVENTION*

The *Montreal Convention* was entered into by the States Parties in Montreal on May 28, 1999, replacing the previous *Convention for the Unification of Certain Rules Relating to International Carriage by Air*[5] (the "*Warsaw Convention")* and has the force of law further to its incorporation into Canadian law by the *Carriage by Air Act,*[6] as amended by *An Act to amend the Carriage by Air Act.*[7] The *Montreal Convention* became effective in Canada and in the Unites States of America on November 4, 2003.

By virtue of Article 1 of the *Montreal Convention,* it applies "*to all international carriage of persons, baggage or cargo performed by aircraft for reward*", *as well as "equally to gratuitous carriage by aircraft performed by an air transport undertaking.*" "*International carriage*" is defined as follows by the *Montreal Convention*:

> *For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.*[8]

The *Montreal Convention* thus applies to all international air transportation and provides for specific and exclusive rules pertaining to a carrier liability in relation to the following:[9]

> (i) An accident causing passenger death, wounding or bodily injury while the passenger is on board the aircraft or in the process of embarking or disembarking,

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2 2242 U.N.T.S. 309.
3 2016 QCCS 2311.
4 2013 ONSC 2931.
5 137 L.N.T.S. 11.
6 RSC 1985, c C-26.
7 S.C. 2001, c. 31.
8 *Montreal Convention,* Article 1 (2).
9 Paul S. DEMPSEY and Michael MILDE, *International Air Carrier Liability: The Montreal Convention of 1999,* Montreal, McGill University, 2005, p. 58.

(ii) The loss or damage of baggage or cargo; and

(iii) Delay.

The *Montreal Convention* further provides for limits of monetary liability and capped compensation for damages in case of death or injuries to passengers, or in relation to damages or delay to baggage and cargo.[10]

## THE EXCLUSIVITY OF THE *MONTREAL CONVENTION*

The *Montreal Convention* applies and provides exclusive remedies in the following circumstances in the context of international transportation:

(i) An accident causing passenger death, wounding or bodily injury while the passenger is on board the aircraft;

(ii) An accident causing passenger death, wounding or bodily injury while the passenger is in the process of embarking the aircraft;

(iii) An accident causing passenger death, wounding or bodily injury while the passenger is in the process of disembarking the aircraft;

(iv) The loss or damage of baggage or cargo that took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier; and

(v) Delay in the carriage by air of passengers, baggage or cargo.

An abundant case law recognizes that a claim invoking one or the other of the aforementioned circumstances would fall within the scope of the *Montreal Convention*, which would provide the exclusive basis for the cause of action and establish the sole available remedies to a plaintiff.[11]

Notably, the Court of Queen's Bench of Saskatchewan, in the matter of *Walton* c. *Mytravel Canada Holdings Inc.*,[12] recognized that *"[a]ny claim for damages of a passenger of an international flight against a carrier, contracting carrier or employee of either carrier can only be brought within the ambit of the Montreal Convention of 1999"*.

The Supreme Court of the United States, in the matter of *El Al Israel Airlines Ltd* v. *Tsui Yuan Tseng*,[13] came to a similar conclusion and indicated that it precluded a passenger from asserting any air transit personal injury claims under local law.

### An "Accident"

The notion of "accident" within the meaning of the *Montreal Convention* and its predecessor the *Warsaw Convention* has been defined as "*an unexpected or unusual event or happening that is external to the passenger.*"[14]

For the *Montreal Convention* to apply, any such accident must occur while the passenger is onboard the aircraft for international air service, or in the process of embarking or disembarking same.

A claim that would arise outside the scope of international carriage by air would thus fall outside the scope of the *Montreal Convention.* As reminded by the Supreme Court of the United Kingdom in *Stott* v. *Thomas Cook Tour Operators Ltd.*,[15] it is not possible to link a damage that occurred during international

[10] *Montreal Convention*, Articles 21 and 22.
[11] *Thibodeau* v. *Air Canada*, [2014] 3 S.C.R. 340.
[12] 2006 SKQB 231.
[13] 525 U.S. 255 (1999).
[14] *Air France v. Saks*, (1985) 105 C.Ct. 1338, 1345; *Quinn v. Canadian Airlines International Ltd.* [1994] O.J. No. 1137; *Koor v. Air Canada*, [2001] O.J. No. 2246; *Croteau* v. *Air Transat AT inc.*, 2007 QCCA 737.
[15] [2014] UKSC 15.

carriage to an operative cause or a pre-existing claim that arose prior to embarkation.

> *[...] In the course of argument it was suggested that Mr Stott had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage. If so, it would of course follow that such a pre-existing claim would not be barred by the Montreal Convention, but that was not the claim advanced. Mr Stott's subjection to humiliating and disgraceful maltreatment which formed the gravamen of his claim was squarely within the temporal scope of the Montreal Convention. It is no answer to the application of the Convention that the operative causes began prior to embarkation. To hold otherwise would encourage deft pleading in order to circumvent the purpose of the Convention. [...]*

Indeed, the *Montreal Convention* is not applicable to the relations between a carrier and its customers. As such, the *Montreal Convention* does not address, regulate or otherwise deal with the sale of airfare, the terms and condition of flights bookings and the accessibility to an aircraft.

In the matter of *Sidhu* v. *British Airways*,[16] the House of Lords notably indicated that *[t]he [Warsaw] Convention does not purport to deal with all matters relating to contracts of international carriage by air.* In *Waters v. Alitalia*,[17] the United States District Court District of New Jersey further emphasised that "*the [C]onvention is concerned with certain rules only, not with all the rules relating to international carriage by air."*

In *Brauner et al.* v. *British Airways PLC*,[18] the United States District Court for the Eastern District of New York also reminded that:

> *[o]nly passenger injuries that occur "on board the aircraft or in the course of any the operations of embarking or disembarking" fall under the Convention. [...] Claims of non-performance of contract similarly fall outside the scope of the Convention.*

Similarly, the case law has repeatedly recognized that claims of non-performance of contract fall outside the scope of the *Montreal Convention.*[19]

## Embarking and Disembarking

Outside events occurring onboard an aircraft for international air service, the *Montreal Convention* applies to events occurring while the passenger is in the process of embarking or disembarking such an aircraft.

As per the United States Court of Appeal for the Second Circuit in *Day* v. *Trans World Airlines, Inc.*[20] and subsequent cases,[21] the determination as to whether a passenger is in the process of embarking or disembarking an aircraft is incumbent on a case-by-case analysis in light of the following criteria:

> (i) The activity in which the passenger is engaged;
>
> (ii) Carrier restriction of the passengers' movements;
>
> (iii) Imminence of actual boarding; and

[16] [1997] A.C. 340 (House of Lords).
[17] *Waters v. Alitalia et al.*, 2001, US District Court of New Jersey, August 15, 2001.
[18] *Brauner et al.* v. *British Airways PLC*, 2012 U.S. Dist. LEXIS 51802, April 12, 2012.
[19] *Brauner et al.* v. *British Airways PLC*, 2012 U.S. Dist. LEXIS 51802, April 12, 2012; *Goune* v. *Swiss International Airlines*, 2009 U.S. Dist. LEXIS 130884 (D.C.).
[20] 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890, 50 L. Ed. 2d 172, 97 S. Ct. 246 (1976).
[21] *Kalantar* v. *Lufthansa German Airlines*, 276 F. Supp. 2d 5 (2003); *Upton* v. *Iran National Airlines Corporation*, 450 F. Supp. 176 (1978); *Sweis* v. *Trans World Airlines, Inc.*, 681 F. Supp. 501 (1988); *Elnajjar* v. *Northwest Airlines, Inc. and KLM Royal Dutch Airlines*, 2005 U.S. Dist. LEXIS 36792; *Kruger* v. *Virgin Atlantic Airways, Limited*, 976 F. Supp. 2d 290 (2013).

(iv) Physical proximity to the plane.

In any case, one must perform an assessment as to whether the passenger, when the facts in dispute occurred, was doing something that, at that particular time, constituted a necessary step in the process of embarking or disembarking in a place not too remote from the location at which he or she was slated to enter the designated aircraft or deplane same.[22]

## Injuries Not Provided for by the *Montreal Convention* Are Barred

In *Tseng*, the Supreme Court of the United States held that *"recovery for personal injury suffered on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' . . . if not allowed under the Convention, is not available at all."*

Aside for damages to baggage and cargo and delay, the *Montreal Convention* solely provides for an indemnification for bodily injuries in its strict classical meaning:

> *Two features of the Conventions are of critical relevance. First, there are limits to the type of injury or damage which is compensable and the amount of compensation recoverable. Bodily injury (or lésion corporelle) has been held not to include mental injury, such as post-traumatic stress disorder or depression [...] The same would apply to injury to feelings. [...]*[23]

Indeed, although courts have voiced the concern that international treaties may not provide the same protection or impose the same obligations in relation to fundamental rights or protection against discrimination that internal legislation do, they have previously held that psychological injuries, moral damages, emotional distress or claims for discrimination arising from international air transportation do not give rise to a cause of action.[24]

Even the potentially traumatizing and humiliating experience such as an arrest by armed police forces in front of all other passengers onboard an aircraft or while disembarking the aircraft cannot root a claim under the *Montreal Convention* if the passenger has not sustained bodily injury.[25]

In the same vein, claims for punitive, aggravated or exemplary damages do not survive the *Montreal Convention*. In *O'Mara* v. *Air Canada*,[26] the Plaintiff instituted a proposed class action alleging negligence and seeking, *inter alia*, punitive and/or aggravated and/or exemplary damages further to alleged misleading statements to the passengers after an aircraft had dived to avoid a mid-air collision and entered into emergency manoeuvres causing an unpleasant turmoil onboard. As a result of the application of the *Montreal Convention*, all claims for punitive, aggravated and exemplary damages as well as claims for pure psychological injury were struck after the claim was filed.

In addition, as per the Supreme Court of Canada in *Thibodeau* v. *Air Canada*,[27] statutory claims for quasi-constitutional rights are also barred under the *Montreal Convention.* In that case, the Plaintiffs sought damages and structural orders for breaches of the *Official Languages Act* for not having received services in French during international flights. The Court found that any such claims were not provided for by the *Montreal Convention* and were barred at law as a result.

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[22] *McCarthy* v. *Northwest Airlines, Inc*., 56 F.3d 313 (1995).
[23] *Stott* v. *Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15.
[24] *El Al Israel Airlines Ltd* v. *Tsui Yuan Tseng*, 525 U.S. 255 (1999); *King* v. *American Airlines Inc.*,284 F.3d 352 (United States Court of Appeals, Second Circuit); *Waters v. Alitalia et al.*, 2001, US District Court of New Jersey, August 15, 2001; *Plourde* v. *Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739; *Simard* v. *Air Canada*, 2007 QCCS 4452; *Walton* v. *MyTravel Canada Holdings Inc.*, 2006 SKQB 231; *Doe* v. *Etihad Airways*, 37, Av. Law Rep. (CCH) 17,281 (E.D. Mich., 2015).
[25] *Gontcharov* v. *Canjet*, 2012 ONSC 2279; *Eid* v. *Alaska Airlines, Inc.*, 621 F.3d 858 (9th Cir. 2010).
[26] 2013 ONSC 2931.
[27] [2014] 3 S.C.R. 340.

## STATUTE OF LIMITATIONS

The *Montreal Convention* provides for specific limitations ruling following which an action against an international air carrier must be brought within a period of two years from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.[28]

Again, the provisions of the *Montreal Convention* in that regard supersedes that of local law, which ought to be disregarded whenever the *Montreal Convention* is found to apply, even if providing for a shorter limitations period.[29]

Even if the local was to provide for non-juridical days for which the computation of delays would not run for common law claims, any such rule was found not to alter the running of the limitation for the purposes of the *Montreal Convention.*[30]

## COURT JURISDICTION UNDER THE *MONTREAL CONVENTION*

The *Montreal Convention* also provides for specific rules pertaining to the jurisdiction of the courts and the *situs* where actions may be brought.[31]

The rules pertaining to the *rationae loci* are strict and provide for seven criteria over which a court can assert jurisdiction when dealing with the *Montreal Convention*:[32]

> (i) The court is that of the domicile of the contractual carrier;
>
> (ii) The court is that of the principal place of business of the contractual carrier;
>
> (iii) The court is that of the domicile of the operating carrier;
>
> (iv) The court is that of the principal place of business of the operating carrier;
>
> (v) The court is that where the contractual carrier has a place of business through which the contract has been made;
>
> (vi) The court is that of the place of destination of the passenger; or
>
> (vii) The court is that of the passenger's principal and permanent residence at the time of the accident and to or from which the carrier operates.

The *Montreal Convention* would even do away with forum-selection clauses in a contract for air transportation. When in presence of any such clause that is inconsistent with the *Montreal Convention*, same shall be unenforceable and the jurisdiction granting provisions of the *Montreal Convention* prevailing.[33]

Thusly, the *Montreal Convention* supersedes provisions of local law and Private International Law principles with regard to the jurisdiction of tribunals, which ought to be declared incompetent if a dispute falling under the *Montreal Convention* does not permit to assert its jurisdiction in accordance with the latter, even if in presence to a provision of local law to the contrary. However, the case law recognizes that the doctrine of *forum non convenience* can apply for claim captured by

[28] *Montreal Convention*, Article 35.
[29] *Cattaneo* v. *American Airlines*, No. 15-ev-01748-BLF (N.D. Cal., 2015); *Parizeau* v. *Air Canada*, 2014 QCCQ 11969; *Hu* v. *Air Canada*, 2014 QCCQ 12628; *Viger* v. *Delta Air Lines*, 2013 QCCQ 602
[30] *Awimer*v. *Yollari*, 2015 WL 5922206 (E.D. Cal., 2015).
[31] *Montreal Convention*, Article 33.
[32] Laurent CHASSOT, *Les sources de la responsabilité du transporteur aérien international : entre conflit et complémentarité*, Zurich, Schulthess Verlag, 2012, p. 135.
[33] *Avalon Technologies, Inc.* v. *EMO Trans, Inc.*,2015 WL 1952287 (E.D. Mich, 2015).

the *Montreal Convention* and lead to the dismissal of the claim if another, more appropriate and convenient forum exists to adjudicate it.

The supremacy of the jurisdiction granting provision of the *Montreal Convention* and its incidence on class proceedings is evidenced by the recent decision of the Superior Court of Quebec in *Zoungrana* v. *Air Algérie*.[34]

In that case, the plaintiff sought to institute a proposed class action on behalf of the families and relatives of the passengers of the deadly crash of flight AH5017 connecting Ouagadougou, Burkina Faso, with Algiers, Algeria. The spouse and the two children of the Plaintiff had perished in the crash, whose final destination was Montreal, Canada. Some other twelve passengers were Canadians, while the majority of the passengers were of other nationalities.

The Superior Court of Quebec reminded that the exclusivity of the *Montreal Convention* also applies with regard to the jurisdiction of the courts. According to the Court, even if local rules of procedure applies to an action brought under the *Montreal Convention*, any such rules of procedure cannot grant jurisdiction to the court if not otherwise provided for by the *Montreal Convention.* A class action relying on the *Montreal Convention* can be instituted, provided that the court has jurisdiction over each of the individual claims it purports to include.[35]

In the end, the Superior Court found it lacked jurisdiction over all the class members that were not related to the twelve Canadians that perished in the crash, which claims had to be brought in other jurisdictions as per the *Montreal Convention.*

In such circumstances, although the claim disclosed a cause of action, raised common issues and the plaintiff was found to be an adequate class representative, the proposed class action was dismissed due to the insufficient size of the proposed class and the ease with which the eligible purported class members could bring individual actions or join together in a conventional claim.

## CONCLUSION

Canadian courts tend to strongly affirm the prevalence of the *Montreal Convention* whenever found to be applicable and to give enormous weight to the jurisprudence emanating from various countries having abided by the strict wording of the *Montreal Convention.*

Class action directed against an international air carrier invoking a claim in relation to international air service must be thoroughly scrutinized to determine if it falls within the ambit of the *Montreal Convention*, in which case the defendant may benefit from various grounds to delay or cancel departure of any such proposed class action.

[34] 2016 QCCS 2311.

[35] See also *Bisaillon* v. *Concordia University*, [2006] 1 S.C.R. 666.