# The Supreme Court of Canada Rules on Market Timing in the Context of a Class-action Suit

December 1, 2013

**Facts and judicial history**

The Supreme Court of Canada has rendered a decision which is likely to generate a lot of commentary in the Canadian class action scene. On December 12, 2013, the Court issued a ruling in the case of *AIC Limited* v. *Fischer*[1] (hereinafter '*Fischer*'), now frequently referred to as the 'market timing decision'. While the issue of market timing has given rise to class actions in several Canadian provinces, the case in question originated in Ontario, and the Court's unanimous decision[2] was based on the applicable class action rules in Ontario, as set out in that province's Class Proceedings Act, 1992 (the 'C.P.A.').[3]

In this decision, the Supreme Court ultimately gives the green light to the certification of a class action instituted by numerous investors, represented by Mr. Fischer, against two mutual fund managers (AIC Limited and CI Mutual Funds Inc.), who engaged in market timing. This practice consists of attempting to predict the direction of the market based on short-term economic indicators and making purchase and sale decisions of securities based on these predictions. It is a risky practice which can be prejudicial to the long-term value of investments.

The primary interest of this decision is the Court's holding on the so-called 'preferable procedure', or preferability, criterion. According to this criterion, the court must assess whether, in the circumstances of the specific case, the certification of a class action is 'preferable' to other means for the members of the proposed class to obtain redress. In other words, the court must determine whether a class action is the preferable procedure to resolve the common issues.

In *Fischer*, the Court decided that the class action could proceed even though the mutual fund managers involved in the proceeding had already concluded a settlement agreement with the Ontario Securities Commission to reimburse the investors for a certain percentage of their losses as a result of the said market timing activities. This settlement agreement was concluded in the context of a parallel regulatory proceeding to which the investors who were members of the class in the proposed class action were not parties.

The Court therefore held that this parallel regulatory proceeding was not a preferable procedure capable of barring the certification of the class action, which was nevertheless the preferable procedure for resolving the common issues.

The judge at first instance,[4] noting that the members of the proposed class had already received

monetary compensation, refused to certify the class action because he found that, under the circumstances, it was not the preferable procedure within the meaning of section 5(1)(d) of the C.P.A.

This decision was appealed to the Ontario Divisional Court[5] which allowed the appeal, overturning the first judge's decision. The Ontario Court of Appeal,[6] in turn, dismissed the subsequent appeal, agreeing with the outcome in the Divisional Court, but for different reasons.

For its part, the Divisional Court would have certified the class action based on a comparison of the amount of the compensation paid as a result of the regulatory proceeding with the amount of the damages claimed in the proposed class action. By virtue of this comparison, the Court concluded that the class members would still be able to recover a substantial amount in the class-action proceeding and, therefore, that the proceeding before the OSC could not be regarded as preferable to the proposed class action.

While the Ontario Court of Appeal confirmed this conclusion of the Divisional Court, it based its decision on a comparison between the class action and the regulatory proceeding — the procedural rights afforded the proposed class members in the class action stood in contrast to their limited ability to participate in the regulatory proceeding. It therefore held that the analysis followed by the court in determining whether a class action is the preferable procedure in a given case must include a component which addresses the procedural rights afforded to the members of the proposed class.

**The Supreme Court of Canada's decision and the importance of the access to justice criterion**

It is important to note that the Supreme Court (whose reasons were delivered by Justice Cromwell) agreed with the reasons of the lower appeal courts, but proposed a new method of analysis for deciding the preferable procedure criterion. Observing that section 5(1)(d) of the C.P.A. requires the court to conduct a comparative analysis between two or more potential recourses, the Supreme Court established the following test, in five steps, for doing so:

1) What are the barriers to access to justice?
2) What is the potential of the class proceedings to address those barriers?
3) What are the alternatives to class proceedings?
4) To what extent do the alternatives address the relevant barriers?
5) How do the two proceedings compare?

The Court added that the central concept of this analysis is access to justice, which has two fundamental components relating to justice, a substantive dimension and a procedural dimension:

[24] There is no doubt that access to justice is an important goal of class proceedings. But what is access to justice in this context? It has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. They are interconnected because in many cases defects of process will raise doubts as to the substantive outcome and defects of substance may point to concerns with the process. As the Honourable Frank Iacobucci put it, “access to justice must contain both a procedural and a substantive component. I find it difficult to accept that providing injured parties with a process to pursue their claims can be divorced from ensuring that the ultimate remedy arising from the process provides substantive justice where warranted”: “What Is Access to Justice in the Context of Class Actions?”, in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17, at p. 20. While it may be analytically convenient to look at process and substance considerations separately, this must not be done at the expense of an overall assessment

of the access to justice implications of the proposed class action.

After conducting the five-step analysis which it proposed in this case, the Court, as noted above, found that the proceeding before the OSC was not the preferable procedure, and upheld the decisions of the lower appeal courts. Accordingly, the class action proposed by the investors was certified.

**Conclusion and impact on class actions in Quebec and Canada**

This decision will, in our view, have a significant impact on class action litigation in Canada. Until now, defence attorneys have sometimes successfully pleaded that the certification of a class action was barred because there was a chance that the members could obtain redress through another proceeding. The argument that the goals of the class action — access to justice, judicial economy, and behavior modification — could be achieved otherwise than by resorting to the courts of law was a seductive one, and a significant number of class actions were previously dismissed on this basis at the certification stage.

However, the odds are that the effect of this judgment of the Supreme Court will be to facilitate the certification of class actions notwithstanding that regulatory proceedings may be possible, or even where the respondents have set up a voluntary settlement process to address specific problems faced by their clients, if the representative can show that those other proceedings do not fully resolve the matter.

It should be noted that no criterion similar to the preferability criterion exists in the Quebec legislation. Nevertheless, it will be interesting to see whether the *Fischer* case has a limited or more substantial impact on the class-action law in Quebec. The Quebec courts could choose to base themselves on this decision in assessing the criteria for authorization of class actions. If so, in our view, they would likely do so by reminding us of the importance of the concept of access to justice and the fact that it is unquestionably one of the pillars underlying the creation of the class action procedure in 1978.

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[1] 2013 SCC 69.

[2] The Court's decision was written by Justice Cromwell (and concurred in by Chief Justice McLachlin and Justices LeBel, Rothstein, Moldaver, Karakatsanis and Wagner).

[3] S.O. 1992, c. 6, and specifically section 5(1)(d).

[4] Justice Perell of the Ontario Superior Court of Justice.

[5] Ontario Superior Court of Justice, Divisional Court, 2011 ONSC 292 (Justice Molloy, Justices Swinton and Herman concurring).

[6] 2012 ONCA 47 (Chief Justice Winkler, Justices Epstein and Pardu (*ad hoc*) concurring).