

SECTION 36 OF THE *COMPETITION ACT*: STILL A WORK IN PROGRESS?

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Introduction

Section 36 of the *Competition Act*² creates a cause of action for persons injured by conduct in violation of Part VI of the Act (which includes price-fixing conspiracy provisions). Until the 1990s, when the provinces began implementing class action legislation, section 36 was rarely relied on by plaintiffs. Since then, a number of class actions have been commenced alleging vertical and horizontal anti-competitive conduct. Many early cases were resolved through settlement and, as a consequence, many important legal issues were not addressed by the courts. In recent years, an increasing number of cases have been pursued through contested certification motions and beyond. The results in these cases have been mixed – in some early cases, certification was denied; however, recently there has been a trend towards certification.

Notwithstanding the growing body of case law, there remain a number of significant issues yet to be resolved. Indeed, later this year, the Supreme Court of Canada will grapple with the issue of passing on. In price-fixing conspiracy and other competition law cases, the concept of passing on – that the direct purchaser of the price-fixed product passed on all or part of any unlawful overcharge to its customers – can be used in two ways: (1) it can be used as a defence on the merits; and (2) the fact of pass through can be used by indirect purchasers to assert a claim against the defendant. The Supreme Court of Canada will be asked to determine whether the passing on defence is available to defendants and whether indirect purchasers have a cause of action. The resolution of these questions could shape the nature and scope of future cases.

Another important matter that has yet to be resolved is the availability of the aggregate damages provisions contained in class proceedings legislation, which provide a mechanism for assessing damages in situations where the amount at issue for individual class members is small. The Ontario and British Columbia courts have taken different approaches on this issue. In British Columbia, the matter has been largely resolved – the aggregate damages provisions can be used to establish concurrently both quantum of damages and fact of loss. In Ontario, the approach taken is much more divergent. Some courts have held that the aggregate provisions are available upon a finding of potential liability and that a finding of breach of section 45 establishes potential liability.³ Other courts have held that breach of section 45 and fact of loss

must be proven before access to aggregate damages provisions is available.⁴ How this issue is resolved could affect, among other things, the duration and complexity of the certification motion.

The Enactment of Section 36

The private right of action established by the Act is contained in subsection 36(1) and is as follows:

36.(1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

This private right of action was first enacted in 1976 as section 31.1 to the *Combines Investigation Act*, as part of a package of amendments to that statute.

The origins of these amendments can be traced to the Economic Council of Canada's *Interim Report on Competition Policy*, released in July 1969.⁵ In particular, the Council was in favour of creating civil law remedies to further the federal government's relevant economic policy in order to better achieve its economic goals and to improve its effectiveness and acceptability to the general public.⁶

In addition, the Council was of the view that the criminal law was rigid and inflexible, while the civil law was flexible and well-suited to areas "that do not lend themselves well to relatively unqualified prohibitions and that may in addition call for some case-by-case consideration of the likely economic effects of particular business structures or practices."⁷

The Constitutionality of Section 36

The authority to regulate competition in Canada falls within Parliament's general power to regulate trade and commerce conferred under section 91(2) of the *Constitution Act, 1867*.⁸

Available Remedies

Section 36 is narrow in scope and is expressly limited to damages arising from

criminal conduct contrary to the Part VI of the Act or contravention of a Competition Tribunal (the “Tribunal”) order. Barring a breach of an order issued by the Tribunal, there is no cause of action for conduct that offends other parts of the Act. Indeed, the law is clear that reviewable practices under the Act are not criminal offences.⁹

A plaintiff is expressly limited to recovering “an amount equal to the loss or damage proven to have been suffered by” him or her. This language precludes a claim for punitive damages. For instance, in *Wong v. Sony Canada Ltd.*, Cumming J. struck a claim for punitive damages on the following basis:

Section 36(1) of the *Competition Act* (and s. 31.1(1) of the *Combines Investigation Act*) provide that punitive damages are not permitted pursuant to the legislation. A claim for punitive damages is dependent upon the pleading of a separate cause of action that would permit such damages.

Accordingly, the existing pleading does not disclose a reasonable cause of action for punitive damages and consequentially, paragraph 1(c) of the amended statement of claim is struck.¹⁰

The Tribunal has exclusive jurisdiction over reviewable practices.¹¹ A plaintiff cannot circumvent the Tribunal’s exclusive jurisdiction and Parliament’s deliberate limits on the right of action under section 36 by asserting conspiracy in respect of conduct that is fundamentally a reviewable practice.¹²

It is unclear whether injunctive relief is available in the context of an action brought under section 36. Indeed, while section 33 of the Act provides the Attorneys General of Canada or of the provinces the right to seek injunctive relief to prevent violations of the Act, the Act does not confer similar rights on private litigants. This absence of statutory authority has led some courts to conclude that injunctive relief is only available when the conduct complained of can give rise to a cause of action in favour of the plaintiff independently of any rights the plaintiff might have to damages under section 36.¹³

In contrast, in *Telus Communications Co. v. Rogers Communications Inc.*, the British Columbia Court of Appeal held that the British Columbia Supreme Court had the inherent jurisdiction to grant an interlocutory injunction in the context of an action brought under section 36, notwithstanding that: (a) the plaintiff’s claim is statutory; and (b) that the statute itself does not provide for the issuance of injunctions at the behest of a private party.¹⁴ However, the Court expressly declined to opine on whether a permanent injunction can be granted to a private party in a claim brought pursuant to section 36 of the Act.¹⁵ Therefore, in British Columbia at least, a plaintiff in a section 36 action may

seek an interlocutory injunction without having to assert any independent causes of action.

The Two-Year Limitation Period

Subsection 36(4)(a) prescribes a two-year limitation period for commencing an action under section 36. Specifically, an action must be brought within two years from the day on which the impugned conduct was engaged in (subsection 36(4)(a)(i)), or the day on which any criminal proceedings are disposed of (subsection 36(4)(a)(ii)), whichever is later. Subsection 36(4)(a) states:

- (4) No action may be brought under subsection (1),
 - (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
 - (i) a day on which the conduct was engaged in, or
 - (ii) the day on which any criminal proceedings relating thereto were finally disposed of,whichever is the later;
- [...]

On its face, subsection 36(4)(a)(ii) appears to have the potential for creating an indefinite limitation period in cases where no criminal proceedings have been initiated. Although there appears to be no case that addresses this issue directly, in *Eli Lilly and Co. v. Apotex Inc.*, the Federal Court found that as no criminal proceedings had been brought in relation to the defendants' alleged violations of Part VI of the Act, subsection 36(4)(a)(i) was the operative limitation period.¹⁶ Although the court did not elaborate on how it arrived at this conclusion, it appears consistent with the Supreme Court of Canada's holding in *Murphy v. Welsh* that the underlying rationale for limitation periods in general is: (a) the need for a potential defendant to be certain that he or she will not be held to account for ancient obligations; (b) the need to foreclose claims based on stale evidence; and (c) the need to ensure that plaintiffs act diligently and not "sleep on their rights."¹⁷

The case of *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*¹⁸ has helped shed some light on when the limitation period begins to run in the context of conspiracy cases. In that case, the plaintiff alleged that the defendant had engaged in conspiracy and price fixing during negotiations and discussions leading up to three purchase agreements between November 2003 and March 2006. The defendant moved for summary judgment on the basis that the plaintiff's claim was statute-barred. The motion judge, Russel J., granted the motion and dismissed the plaintiff's claim.

In support of its motion, the plaintiff argued that the limitation period had

not expired because the purchase agreements caused the offending conduct to continue into the future. In rejecting that argument, Russel J. concluded that the offence of conspiracy consists of the agreement, not its effects. Accordingly, any alleged ongoing effects of the agreements did not extend the limitation period.¹⁹

The plaintiff also argued that the limitation period should continue as long as the plaintiff continued to suffer damage as a result of the conspiracy. Russel J. dismissed that argument as well, finding that the limitation period is triggered by the commission of the predicate offence under Part VI. In the case of conspiracy, the offence is complete upon the making of the agreement. In other words, the effects of the conspiracy are not part of the offence and any ongoing damage caused by the conspiracy does not extend the limitation period.²⁰

In addition, the plaintiff argued that the discoverability rule applied and that the limitation period did not begin to run until it had discovered: (a) the alleged conspiracy; and (b) that it had suffered damage as a result of the conspiracy. In rejecting that argument, Russel J. indicated that the discoverability rule applies in cases where the event that triggers the limitation period is the accrual of a cause of action or an event that occurs only when the plaintiff has knowledge of an injury. In contrast, the limitation period established under subsection 36(4) (a) of the Act runs from a date that is independent of the plaintiff's knowledge and, as such, the discoverability rule does not apply.²¹

In *Fairview Donut Inc. v. The TDL Group Corp.*,²² Strathy J. relied on Russel J.'s decision in *Garford* to conclude that: (a) in conspiracy cases, the limitation period contained in subsection 36(4)(a) runs from the date of the conduct itself (i.e., the date on which the parties entered into the impugned agreement(s)); and (b) the discoverability rule does not apply to subsection 36(4)(a), since the statutory limitation period is expressly tied to a specific event.²³

The Federal Court of Appeal reviewed the decision in *Garford*, and upheld Russel J.'s conclusion that the ongoing effects of the conspiracy, holding:

In this case, as the judge explained, the alleged offence under section 45 was complete at the time of the conclusion of the purchase agreements. Ongoing effects do not extend the time period established in subsection 36(4). *Garford's* position is tantamount to saying that the conduct prohibited by section 45 is only an agreement which, in fact, injured the market. This is not the law. At the relevant time (section 45 has since been amended), the offence was complete upon the finalization of an agreement that, if carried into effect, would unduly limit competition.²⁴

The Court further held that the discoverability issue did not arise on the facts since the information available to the plaintiff as early as April 2006 was virtually the same as the information that it had when it commenced its claim in August 2008.²⁵ This fact precluded “any argument based on discoverability, *assuming without deciding, it is legally available.*”²⁶

In *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*,²⁷ the plaintiffs brought claims for equitable fraud, which claims were based on alleged price-fixing. The British Columbia Court of Appeal applied the discoverability principle to postpone the running of the limitation period under subsection 36(4)(a) of the Act. However, the parties had agreed that the discoverability principle applied in that context and, as such, the Court did not rule on that issue.²⁸

Competition Class Actions

The Evolving Approach to Certification

Section 36 was rarely utilized until the 1990s, when provinces began implementing class proceedings legislation. Since then, plaintiffs have initiated a number of competition class actions in respect of vertical and horizontal anti-competitive conduct.

Before an action can proceed as a class proceeding, it must be certified as such by the court. The test for certification requires plaintiffs to satisfy certain criteria. In Ontario, those criteria are set out in section 5 of the *Class Proceedings Act, 1992*²⁹ and are as follows:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
 - (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Other provinces have enacted largely similar legislation.³⁰

Many competition law class actions were settled prior to 2009, and there was accordingly little jurisprudence relating to class certification. However, there is now a growing body of case law that gives practitioners some guidance.

In order to establish liability under section 36, a plaintiff is required to prove that he or she has suffered loss as a result of the defendant's breach of the criminal provisions contained in Part VI of the Act. Complicating matters in the class action context, particularly in cases involving so-called indirect purchasers, is the fact that courts may have to grapple with the concept of "pass-on" or "pass-through" when deciding whether the plaintiff has demonstrated a common issue of loss and/or whether a class action is the preferable procedure.

Pass on is frequently relied on by defendants in price-fixing cases as a means of preventing certification. The underlying rationale for this defence is that those who purchase goods at artificially inflated prices will "pass on" any such price increases to downstream purchasers by charging higher prices. Thus, defendants may claim that direct purchasers (i.e., plaintiffs who have purchased the goods at issue directly from the defendants) have not suffered any loss at all because they either passed on any price increases to the next purchaser in the distribution chain, or that any recovery is necessarily limited to the amounts that each direct purchaser was unable to pass on, thereby making loss an individual issue. Conversely, as against indirect purchasers (i.e., purchasers further down the distribution chain, such as distributors, retailers and consumers), defendants may assert that such individuals suffered no losses either because no such losses were passed down to them or they passed on any such losses further down the distribution chain or to the ultimate consumer, or that any losses suffered require individual assessment. Where a class is comprised of both direct and indirect purchasers, defendants will often assert that a conflict exists between the different levels of purchasers.

Plaintiffs have generally sought to present a methodology, usually in the form of expert evidence, for determining loss on a class-wide basis. The Ontario Court of Appeal decision in *Chadha v. Bayer Inc.*,³¹ indicated that a plaintiff needed to present evidence of a methodology for determining class-wide harm. Plaintiffs and defendants have disagreed on the level of evidence that *Chadha* requires.

In *Chadha*, the plaintiffs alleged that the defendants had conspired to increase the price of iron oxide, a chemical pigment used in the production of bricks and paving stones that are used in the construction of new homes. On the basis of

that alleged horizontal conspiracy, the plaintiffs sought to certify a class action on behalf of a broad class of new home purchasers across Canada who had allegedly paid an artificially higher price for their homes. Sharpe J., as he then was, granted certification at first instance, but his decision was reversed by the Divisional Court. In particular, the Divisional Court held that the plaintiffs faced “insurmountable” problems relating to pass on:

The respondents face insurmountable problems of proof with respect to the “pass on” issue given the large number of parties in the chain of distribution and the multitude of variables affecting the end purchase price of a building. See the Chain of Distribution – Iron Oxide Pigment illustration included as an Appendix to these reasons. These problems of proof are compounded by the fact that the product in question, iron oxide, is used merely as a small component in another product or series of products and the alleged overcharge is only a trivial part of the purchase price of residential or commercial buildings, which are highly individualized end products. Assuming that the respondents can establish that the appellants engaged in a conspiracy that increased the price of iron oxide, they will still have to establish on balance that this price increase was “passed on” to them. This they are unable to do on a class-wide basis. For a discussion of the problems of proof involved in actions such as the one at bar, see C.S. Coutroulis and D.M. Allen, “The Pass-On Problem in Indirect Purchaser Litigation” (Spring 1999) *The Antitrust Bulletin* 179.³²

Accordingly, the Court concluded that a class action was not the preferable procedure as certification of not move the litigation forward in any meaningful way.

The Court of Appeal affirmed the Divisional Court’s decision to deny certification. Writing for the Court, Feldman J.A. reiterated that the plaintiffs bore the onus of leading evidence which demonstrated that there were sufficient “common issues” relating to liability and damages to warrant a class proceeding. Feldman J.A. underscored that the existence of “class-wide loss” will depend in large part on the court’s assessment of the expert evidence. On the facts of *Chadha*, Feldman J.A. determined that the plaintiff’s expert evidence was not sufficient, since the plaintiff’s expert had merely “assumed” that the alleged overcharge caused by the conspiracy had been passed-on through the distribution chain to a class of indirect purchasers. In other words, the expert had not accounted for the real possibility that some or all of the alleged overcharge had been absorbed by various parties in the distribution chain – in which case purchasers would have suffered no loss. As a result, Feldman J.A. concluded that

the plaintiff's expert had failed to establish that loss could be proved on a class-wide basis. There was no common issue of loss, no common issue of liability, and, accordingly, certification was declined.³³

Feldman J.A. also compared the plaintiff's expert evidence with the much more detailed expert evidence that the Third Circuit had considered in the case of *In re Linerboard Antitrust Litigation*.³⁴ In *Linerboard*, the Third Circuit certified an antitrust class action in respect of an alleged price-fixing conspiracy relating to corrugated cardboard, in part, on the basis of the plaintiff's extensive expert evidence that was supported by economic analysis and industry evidence. Feldman J.A. noted that the plaintiff's expert in *Linerboard* had performed analysis based on "actual data" which focused on the "key issue" of "whether the variations in purchasers, products, regions, etc. precluded common impact."³⁵ After taking the variations into account, the expert in *Linerboard* arrived at the positive conclusion that "all purchasers would have paid a higher price because of the conspiracy" and "as a result, the fact of loss was common."³⁶ In contrast, in *Chadha*, the plaintiff's expert had conducted no analysis of industry data or other records which would substantiate his pass-through analysis.³⁷ It is to be noted that *Linerboard* was decided with the benefit of extensive pre-certification discovery, which is not available under the rules of civil procedure in Ontario or the other Canadian provinces with class action legislation.

Certification was also denied in *Price v. Panasonic Canada Inc.*³⁸ In that case, the plaintiff alleged that over a ten-year period, he and approximately 20 million class members had paid artificially higher prices for electronic goods manufactured by the defendant as a result of the latter's alleged practice of resale price maintenance. In considering the requirements for certification, Shaughnessy J. noted that, in order to ascertain whether the class members experienced a loss, the court would need to consider the prices paid by each class member. However, those prices varied greatly since they were dependent on many variables, including competition from other brands, the timing of the purchase, the volume of the purchase, the existence of dealer incentives, the existence of individual negotiation, etc. Accordingly, Shaughnessy J. concluded that there was no way to ascertain whether every class member had experienced a loss in the absence of an individualized inquiry and denied certification.

Certification was also denied at first instance in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*³⁹ In that case, the plaintiff franchisees sought to certify an action against their franchisor on the basis that they had been overcharged for the products they bought from their designated distributor of food, contrary to the prohibition against resale price maintenance that was then

entrenched in section 61 of the Act. Perell J. refused to certify the class action on the ground that the plaintiffs had failed to establish a methodology for calculating what the prices for the class members would have been, and what the class members ought to have paid. Thus, Perell J. reasoned that as loss is a component of liability under section 36 of the Act, neither liability nor damages were common issues. This, in turn, would have the effect of “an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues.”⁴⁰ As explained below, the Divisional Court overturned the decision of Perell J. and certified the action.

In Québec, certification was denied in *Harmegnies v. Toyota Canada Inc.*⁴¹ At issue in that case was a program known as “Access Toyota.” Under that program, the defendant, based on prices for certain car models submitted to it by dealers, would calculate an average to establish the prices at which those various models of cars were to be sold. Dealers participating in the program were required to sell the models at standardized prices. The plaintiffs alleged that this program caused them to pay higher prices for these cars, thereby causing them to suffer loss. The Quebec Superior Court denied certification on the basis that the evidence of loss adduced by the plaintiffs was lacking and that any common issues would be overwhelmed by a myriad of individual issues.

In affirming that decision,⁴² the Quebec Court of Appeal found that the representative plaintiff had failed to compare prices with non-Access Toyota dealers to see if he could obtain a lower price, that the plaintiffs could not demonstrate that they collectively suffered loss, that any losses suffered would vary among individuals depending on whether an individual was a skilled bargainer and that the value of the vehicles would vary according to the availability of the vehicle and individual preferences relating to accessories, extended warranties, service options, etc.

In British Columbia, certification was initially denied in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*.⁴³ In that case, the plaintiffs sought to certify a claim against the leading manufacturers of Dynamic Random Access Memory (“DRAM”) - a type of memory chip used in consumer electronic products such as computers, mobile phones, cameras and automobiles. The plaintiffs alleged, among other things, that between 1999 and 2002, the defendants had agreed to limit the price decline for DRAM - which had up until that point been declining significantly - and sought certification of a class of direct and indirect purchasers of DRAM in British Columbia. The plaintiffs conceded that the proposed class primarily consisted of indirect purchasers, including the representative plaintiff, which had purchased a laptop computer in 2002.

In opposing certification, the defendants argued that the plaintiffs had failed to present a methodology for establishing harm on a class-wide basis and, in particular, that there was no credible methodology for: (a) establishing that any allegedly overinflated prices were passed on to indirect purchasers; or (b) estimating what amounts were passed on to indirect purchasers. In examining the evidence proffered by the plaintiffs, the motions judge, Masuhara J., indicated that:

[G]iven the inherent complexities, the scrutiny cannot be superficial. The evidence must establish that the proposed methodology has been developed with some rigor and will be sufficiently robust to accomplish the stated task.⁴⁴

Masuhara J. ultimately rejected the methodology for proving class-wide harm put forth by the plaintiffs on the basis that it did not “avoid the need for a vast number of individual inquiries regarding the participants and conditions in the marketplace for DRAM” and that the plaintiffs had not “sufficiently demonstrated that a workable class-wide methodology is available to establish harm.”⁴⁵

In addition, Masuhara J., relying on *Chadha*, concluded that while the damages aggregation provisions contained in the applicable class action legislation could be used to determine damages once liability had been proven, those provisions could not be used to determine liability under section 36 of the Act, as loss is a component of liability. In other words, those provisions could not be used to get around the requirement of demonstrating harm to class members. Masuhara J. stated:

In my view, *Chadha* remains good law in precluding the plaintiff from resorting to the aggregation provisions of the Act to establish liability when there is otherwise no basis to do so, and I follow it. In this case, liability requires that a pass-through reached the Class Members. That question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked.⁴⁶

As explained below, the British Columbia Court of Appeal overturned the decision of Masuhara J. and certified the action.

The only action under section 36 to break this trend of non-certification between 2003 and 2009 was *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*⁴⁷ In *Axiom*, the plaintiffs alleged that the defendant had conspired with its distributors and certain “Tier 1” auto parts manufacturers to enhance and fix the price of engineering resins used in the production of automotive parts, contrary to sections 45 and 61 of the Act.

The plaintiff argued that the economic effect of the alleged conspiracy between the defendant and its distributors was that the latter were compelled to sell resins to class members at not less than list price unless the defendant agreed. As to the alleged conspiracy between the defendant and the “Tier 1” manufacturers, the plaintiff alleged that the defendant had made agreements with certain of those manufacturers that specified higher resin prices for “Tier 2” manufacturers, including the plaintiff. The Tier 1 manufacturers would then receive a rebate of a portion of the prices paid by the Tier 2 manufacturers.

The motions judge, Hoy J., as she then was, certified only that portion of the plaintiff’s claim relating to the alleged conspiracy involving the defendant and its distributors, and then only on the condition that the class definition be narrowed to consist only of direct purchasers of engineering resins in Canada who were required by their customers to use only resins manufactured by the defendant during the class period. Hoy J. refused to certify the alleged “Tier 1 conspiracy” on the basis that it failed to raise common issues.

On the issue of whether loss could be established on a class-wide basis, the defendant argued that the plaintiff had failed to present evidence that satisfied the requirements established by the Ontario Court of Appeal in *Chadha*, and argued that as in *Price* and *Chadha*, the plaintiff had failed to establish that loss was a common issue. However, Hoy J. distinguished *Chadha* and *Price* as follows:

This case is different than *Chadha*, where the plaintiffs sought to rely on the passing-on of loss to indirect purchasers to establish damage. Here, the class members are direct purchasers and passing-on may be raised as a defence. Axiom does not rely on an assumption of passing-on. The possibility that the defence of passing on might prevail at trial does not mean that there cannot become basis in fact for finding that class members suffered loss.

This case is also different from *Price*, a decision of the Superior Court, released before the Court of Appeal’s decision in *Chadha*.

In *Price*, the plaintiffs alleged that the defendant, Panasonic, had engaged in resale price maintenance in respect of eight categories of audio-visual consumer electronic products and brought a proposed class action on behalf of an estimated 20 million end-purchasers. Shaughnessy R.S.J. (as he then was) concluded that a class proceeding was not manageable and not the preferable procedure. He found that the nominal price at which the products were sold did not reflect the “real price”; dealers often included “extras” such as stands, speaker wire, cases, tapes and batteries, as

well as extended warranty service, which had the effect of reducing the purchase price attributable to the products at issue. Therefore, the actual price at which a product was sold to a consumer had in each case to be determined individually. Shaughnessy R.S.J. similarly found that the “but for” price would also have to be determined individually with respect to each transaction and loss was accordingly not a common issue. It appears that the only evidence proffered by the plaintiff as to how the “but for” price might be determined was a British newspaper article suggesting that British consumers were paying 15-20 per cent too much for consumer electronic products because of price collusion.

DuPont’s evidence is that it provided added value to its customers and potential customers, by, for example, assisting them with the design and testing of their products, parts and process problem solving, and part failure trouble-shooting, and that not all of its competitors did so. Its counsel appears to argue that these are tantamount to the “extras” in *Price* and, as in *Price*, this will necessitate individual determination of the “actual” and “but for” prices. The “value adds” are intangible, and some are provided to persons who are not customers. They are not comparable to those in *Price*.⁴⁸

Ultimately, Hoy J. indicated that, in the case of the narrowed class, she was satisfied “on basic economic principles” there was “some basis in fact that each such person suffered some loss as a result of the alleged vertical, price-fixing CUPS conspiracy.”⁴⁹

Two non-competition law cases – *Markson v. MBNA Canada Bank*⁵⁰ and *Cassano v. Toronto-Dominion Bank*⁵¹ – have also been the subject of judicial comment in the price-fixing area. Both of these cases deal with the availability of the aggregate damages provisions of the CPA. In price-fixing conspiracy cases, defendants often argue that individual issues relating to fact of loss and damages will overwhelm any common issues and that a class action is not the preferable procedure. These arguments are particularly prevalent where the class includes indirect purchasers, each with a relatively small claim. Plaintiffs argue that the aggregate damages provisions make it feasible to assess damages in situations where the amount at issue for individual class members is small.

Markson involved allegations that a financial institution received interest on cash advances in violation of s. 347(1)(b) of the *Criminal Code*, which prescribes a 60 per cent maximum interest rate. MBNA Canada Bank charged a transaction fee, in addition to compound interest, on every cash advance from

its credit cards. The plaintiffs alleged that these charges amounted to “interest” and sought restitution, damages for breach of contract and injunctive relief.

The motions judge denied certification, concluding that millions of transactions would have to be examined manually to determine liability. The Divisional Court agreed. On appeal to the Court of Appeal, the plaintiff reframed its case to take advantage of sections 23 and 24 of the CPA, which permit the admission of statistical information as evidence to determine issues relating to the amount or distribution of a monetary award under the CPA and permit the court to determine a defendant’s liability to class members on an aggregate basis, respectively.

The Court of Appeal overturned the decisions below and granted certification. Writing for the Court, Rosenberg J.A. noted that the statistical sampling “authorized by s. 23 cannot be used to determine the defendant’s liability” and confirmed that the Court’s decision in *Chadha* had held that section 24 of the CPA “is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage.”⁵² He then went on to state that in the context of the case before the court:

If the common issues relating to the application for a declaration and injunctive relief were to be determined in the plaintiff’s favour, the trial court will have found that the defendant received interest in excess of an effective annual rate of 60 per cent on cash advances. Thus, liability to some class members will have been established. At least some members of the class would therefore be entitled to a remedy, either by way of restitution or damages for breach of contract. In my view, those two findings – liability and entitlement to a remedy – are sufficient to trigger the application of ss. 23 and 24. [...]

The difficult issue in this case is whether s. 24 can apply where, as here, it is alleged that whether or not an individual was affected by a breach of contract or violation of the *Criminal Code* can only be done on a case-by-case basis. This depends on an interpretation of s. 24(1). Section 24 has received relatively little attention in the reported cases....However, I agree with Cullity J. in *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974 at para. 25 (S.C.J.) that at the certification stage the plaintiff need only establish that “there is a reasonable likelihood that the precautions in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues.”⁵³

Section 24 of the CPA applies only where “no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability.” Rosenberg J.A. held that this requirement is satisfied where “potential liability” can be established on a class-wide basis, but entitlement to monetary relief may depend on individual circumstances. Rosenberg J.A. stated:

Section 24(3) provides, in part, that, “In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award.” The subsection therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. Condition (b) must be interpreted accordingly. In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.

In the context of this case, if the plaintiff can establish that the defendant administered its cash advances in a manner that violated s. 347 and/or breached its contract with its customers, it will have established potential liability on a class-wide basis. Each member of the class would be entitled to declaratory and injunctive relief. The only matter remaining would be the application of the decision on the common issues to the specific account activity of each class member to determine that class member’s entitlement to monetary relief. Section 23 can be used to calculate the global damages figure. Section 24 can be used to find a way to distribute the aggregate sum to class members. It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because “it would be impractical or inefficient to identify the class members entitled to share in the award.”⁵⁴

Rosenberg J.A. then distinguished the Court’s prior decision in *Chadha* on the basis that the issue in *Chadha*, namely whether or not the result of the defendant’s allegedly illegal acts was passed through to the consumers who made

up the proposed class, was not an issue in the case before the court. Rosenberg J.A. stated:

Nor does this application of the CPA offend this court's holding in *Chadha, supra*, or *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641, leave to appeal refused [2006] S.C.C.A. No. 1. In *Chadha*, the plaintiff adduced no evidence that the result of the defendants' allegedly illegal acts were passed through to consumers who made up the proposed class. That is not an issue in this case. There is no question that the allegedly illegal fees were passed on to the class members and received by the defendant. The only serious issue is how many members of the class actually suffered an economic loss. This issue can be addressed by ss. 23 and 24.⁵⁵

In *Cassano*, the plaintiff claimed that the defendant bank had breached its contract with the holders of its Visa credit cards when it charged undisclosed and unauthorized fees on foreign currency transactions. The motions judge denied certification on the basis that damages could not be determined on a class-wide basis. The Divisional Court upheld that ruling. However, the Ontario Court of Appeal reversed the decisions below and granted certification. As in *Markson*, the case turned on whether section 24 of the CPA was applicable on the facts. Relying on *Markson*, Winkler C.J.O., writing for the Court, concluded that it was:

Condition (b) remains to be considered. In *Markson*, Rosenberg J.A. concluded that this condition is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. In the present case, if a finding were made that there had been a breach of contract in relation to the charging of the fees, there would be no "questions of fact or law other than those relating to the assessment of monetary relief" remaining to be determined. The finding that there had been a breach of contract would make all such fees improper. Accordingly, the only assessment necessary would be to quantify the amount of the fees charged. That falls squarely within the contemplation of 24(1)(b).⁵⁶

The defendant also argued that the cost of determining the quantum of damages by checking individual records was too high. In rejecting that argument, Winkler C.J.O. indicated that that submission ignored the fact that damages calculation would only become necessary if the defendant was found to have breached the contract with its cardholders and that it would "hardly be sound policy to permit a defendant to retain a gain made from a breach of con-

tract because the defendant estimates its costs of calculating the amount of the gain to be substantial.”⁵⁷

Markson and *Cassano* were the subject of debate in the case of *Irving Paper Limited v. Atofina Chemicals Inc.*,⁵⁸ which was the first action involving both direct and indirect purchasers to be certified as a class action in Canada.

In *Irving Paper*, the plaintiffs alleged that the defendants had conspired to fix the prices for hydrogen peroxide and, among other things, asserted a claim for damages under section 36 of the Act. The proposed class, although consisting of some direct purchasers, was predominantly comprised of indirect purchasers of hydrogen peroxide. In opposing certification, the defendants argued, in part, that the expert evidence adduced by the plaintiffs for proving loss on a class-wide basis failed to meet the threshold required under *Chadha*. The plaintiffs, on the other hand, submitted that *Chadha* had been overtaken by *Markson* and *Cassano*.

In deciding whether to grant certification, the motions judge, Rady J., first examined the decisions in *Chadha*, *Price*, *Harmegnies* and Perell J.’s decision in *Quizno’s*, and concluded that:

As is evident from these decisions, there are considerable impediments to certification in price-fixing cases involving indirect purchasers. Simply put, given their number, they must demonstrate a methodology to establish damages on a class wide basis and avoid individual inquiries in order to succeed.⁵⁹

Rady J. next considered *Markson*, *Cassano*, *Axiom* and Masuhara J.’s judgment in *Pro-Sys*. With respect to *Pro-Sys*, Rady J. noted the following:

Masuhara J. also distinguished *Markson*. While *Markson* allows for aggregation provisions to be used, he noted that liability must first be established. The inability to prove damage or harm – that is to establish liability – precluded the application of the B.C. equivalent of s. 24 [...]

Masuhara J. compared the case before him to *Chadha*. He concluded that the plaintiffs must first demonstrate harm to constitute a class. He then concluded that the after-the-fact proof of pass-through would lead to an unmanageable class proceeding [...] [...]

As a result, class proceedings were not the preferable procedure for indirect purchasers and certification was denied. As already noted, a decision of the British Columbia Court of Appeal is under reserve. I expect that one of the court’s considerations will be

whether the import of *Markson* was misapprehended, bearing in mind that *Markson* spoke of the need to establish potential liability on a class-wide basis. It is possible that there will be a discussion as well about whether it is necessary at the certification stage to prove class-wide damages, as opposed to a methodology to do so.⁶⁰ [Underlining in original.]

Ultimately, Rady J. declined to follow *Chadha* and *Pro-Sys* because, in her view, *Markson* and *Cassano* signalled a different approach to certification. Rady J. stated:

The real question is whether there is sufficient evidence in the record to support the plaintiffs' contention that the proposed common issues (i)(d), (ii)(b), (vi) and (vii) – the fact of harm and aggregate damages – are appropriate and viable common issues.

At the heart of the debate is whether the decision in *Chadha* has been overtaken by the recent Court of Appeal decisions in *Markson* and *Cassano*, *supra*. The plaintiffs submit that it has. In particular, they argue that the evidentiary threshold established in *Chadha* is unrealistic in an environment of no pre-certification discovery and that *Markson* signals a relaxation of the threshold.

On the other hand, the defendants submit that *Chadha* remains good law and indeed has been consistently followed in Ontario and elsewhere, for example, in British Columbia in *Pro-Sys Consultants Ltd.*, *supra*, being one such example.

I am of the view that *Markson* and *Cassano* signal a different approach to be taken to certification whether it be breach of contract or other types of cases. Justice Rosenberg spoke of the need to establish “potential liability” before resort to the aggregation provisions could be had. That being so, it seems to me that the plaintiffs here need only prove potential liability – in other words, that the defendants acted unlawfully. This would trigger the aggregate assessment provisions. Further, *Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis.⁶¹

Rady J. then went on to review the competing expert reports filed by the parties and concluded that the plaintiffs had presented sufficient evidence to warrant certification. Importantly, Rady J. also concluded that, on a certification motion, the court is not required to weigh expert evidence or determine which expert report should be preferred:

It is probably an understatement to observe that there is little common ground between the two experts. There appears to be a fundamental disagreement on many aspects of the damage analysis, the underlying assumptions, and the methodology.

...[A] court is ill-equipped to resolve competing expert opinions. I understand the defendants' various criticisms of Dr. Beyer's report, but it seems to me that I need only be satisfied that a methodology may exist for the calculation of damages. Dr. Beyer's report attempts to postulate such a methodology. Whether his evidence will be accepted at trial is a completely different issue. It may well be that Dr. Schwindt's various criticisms are well-founded. However, at this stage of the proceedings and on the strength of the evidentiary record as it exists today, I simply am unable to say that Dr. Beyer's opinion will not be accepted by a court....It is simply not possible at this stage of the proceeding to determine whose opinion is to be preferred.⁶²

The defendants sought leave to appeal to the Divisional Court, but that motion was dismissed by Leitch J.⁶³ The defendants' main arguments on that motion were that: (a) *Chadha* was still good law and had not been overtaken by *Markson* and *Cassano*; (b) Rady J.'s conclusion that *Markson* had overtaken *Chadha* was wrong in law and conflicted with existing jurisprudence upholding *Chadha*; and (c) section 24 of the CPA did not assist the plaintiffs in establishing liability (i.e., loss) on a class-wide basis and is only applicable where liability has already been established. In contrast, the plaintiffs submitted that Rady J.'s decision did not conflict with *Chadha*, which was distinguishable on the facts, and that, on a certification motion, the judge is neither required nor permitted to engage in a weighing of expert evidence. Rather, the test to be met is whether there is some basis in fact that the certification requirements have been met.

With respect to the defendants' submission that *Chadha* was still good law, Leitch J., stated, in part:

The moving parties submit that by using the phrase "potential liability" Rosenberg J.A. was referring to actual liability. Because *Markson* alleged a breach of contract by the defendant, its actual liability to each individual class member was established if the breach was proven. There was no need in *Markson* to prove individual loss. That submission has merit, in my view, because the court in *Markson* specifically confirmed *Chadha* in para. 55 set out above and para. 40 as follows:

The statistical sampling authorized by s. 23 cannot be used to determine the defendant's liability. Rather, s. 23 provides a means "of determining issues relating to the amount or distribution of a monetary award." Similarly, this court held in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 at para. 49, leave to appeal refused [2003] S.C.C.A. No. 106, that s. 24 "is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage."

Similarly, in *Cassano* proof of the breach of contract created liability to all of the class members. As noted by the court at para. 42:

In the present case, unlike in *Markson*, the determination of the common issue relating to the breach of contract question will determine liability to all members of the class, with the only possible remaining issue being that of damages. Despite this distinction, the comments in *Markson* related to the proper interpretation of s. 24 of the CPA are useful for present purposes.

I am inclined to the view of the moving parties that the statistical evidence provisions in s. 23 and the aggregate damages provisions in s. 24 cannot be utilized to demonstrate that class-wide injury can be proven as a common issue, nor can those provisions allow a plaintiff to avoid proof of class-wide injury.

[...]

In this case, as was the case in *Chadha*, there must be evidence to prove class-wide loss. As the Court of Appeal in *Markson* made clear, the plaintiff in *Chadha* was unsuccessful because it "adduced no evidence that the result of the defendants' allegedly illegal acts were passed through to the consumers who made up the proposed class."⁶⁴

Leitch J. also indicated that she was "inclined to agree" with the defendants' position that *Chadha* had established the following propositions:

- (a) Where damages are sought on behalf of indirect purchasers whose claims depend upon damage suffered as a result of price increases being passed through to such purchasers, the action will be unmanageable (and therefore not preferable under paragraph 5(1)(d) of the CPA) if injury and loss must be proven on an individual basis;
- (b) If the plaintiff seeks to certify proof of loss as a common issue (thereby addressing the foregoing unmanageability problem), it

must be shown, by admissible, cogent and persuasive evidence, that there exists some methodology by which loss can be proven on a class-wide basis; and

- (c) Evidence to demonstrate to the certification court that loss will be provable on a class-wide basis at the common issues trial must necessarily take the form of expert economic evidence.⁶⁵

However, Leitch J. rejected the defendants' argument that *Chadha* requires a certification judge to evaluate and weigh the expert evidence adduced by both parties, and to ultimately decide whether that the evidence does or does not demonstrate the existence of a viable methodology. Rather, Leitch J. concluded that certification judges are only required to determine whether the plaintiffs have shown a "credible and plausible methodology to establish loss on a class-wide basis" and whether the expert evidence required by *Chadha* provides "some basis in fact" to satisfy the certification requirements of commonality and preferability. Leitch J. was satisfied that the plaintiffs had satisfied those requirements and there was accordingly no good reason to doubt Rady J.'s determination of that issue. Leitch J. stated:

[T]he plaintiffs have shown a credible and plausible methodology to establish damage on a class-wide basis. In my view, Dr. Beyer's opinion provides some basis in fact to satisfy the certification requirements of commonality and preferability. The fact that the defendants strenuously challenged the validity of that opinion does not lead to the conclusion that it ought not to be accepted at this stage of the proceeding.

[...]

In this case, as required by *Chadha*, there is evidence that establishes class-wide harm and a method of how to assess damages. The certification judge considered that evidence and concluded the plaintiffs had met their evidentiary burden in relation to the certification requirements of commonality and preferability. There is no good reason to doubt the correctness of the certification order.⁶⁶

As to the defendants' argument that Rady J.'s application of *Markson* and *Cassano* was wrong in law, Leitch J. noted that Canadian courts had clearly stated that *Chadha* remains good law and had not been overtaken by *Markson* and *Cassano*. Nevertheless, Leitch J. concluded that there was no basis to doubt the correctness of Rady J.'s certification order because the plaintiffs had provided some basis in fact for each of the certification requirements.⁶⁷

Shortly after the certification decision in *Irving Paper* was released, the British

Columbia Court of Appeal issued its decision in *Pro-Sys*, wherein it set aside the decision of Masuhara J. and granted certification.⁶⁸ Writing for the Court, Smith J.A. held that Masuhara J. had “set the bar too high” in his assessment of the plaintiff’s expert evidence and that for the purposes of certification, it was sufficient for the plaintiff to merely demonstrate a “credible or plausible” methodology for proving class-wide injury, which it had through its proposed use of regression analysis. Smith J.A. held:

In my view, this analysis set the bar for the appellant too high.

[...]

The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding....The burden is on the plaintiff to show “some basis in fact” for each of the certification requirements, other than the requirement that the pleading disclose a cause of action....However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one -- it requires only a “minimum evidentiary basis”[.]

[...]

Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial.

[...]

The chambers judge subjected the evidence of Dr. Ross to rigorous scrutiny. He weighed it against the respondents’ evidence and against Ms. Sanderson’s evidence in particular. [...]

The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. Ms. Sanderson gave evidence that aggregate harm had been estimated by two experts in the U.S. litigation. As well, it appears from the U.S. plea agreements that the Department of Justice was prepared to prove that the agreed fines were justified as representing twice the gross gain or the gross loss resulting from the price-fixing conspiracy. The dispute here is over whether total gain or loss can be determined as a practical matter on the particular facts of this case. Those facts have not yet been fully developed

and it was therefore premature of the chambers judge to reject Dr. Ross' opinion. The close examination to which he subjected it should have been left for the trial judge, whose task it will be to evaluate the conflicting expert opinions and to decide what weight to give them. In my view, Dr. Ross' evidence met the low threshold required to establish for purposes of certification that gain and its counterpart, damage, can be shown on common evidence.⁶⁹

Smith J.A. further concluded that the aggregate damages provision contained British Columbia's class proceedings legislation, which are virtually identical to those in the CPA, *can* be used to concurrently establish both damages and liability. The Court of Appeal held that Masuhara J. had erred in relying on *Chadha* for the opposite proposition. Smith J.A. stated:

As I have noted, the chambers judge relied on *Chadha* for his conclusion that the aggregation provisions of the CPA cannot be used until after liability has been established. He purported to distinguish Knight from the case at bar. He said,

At issue on the appeal [in *Knight*] ... was whether the aggregation provisions could be used to calculate and allocate damages after liability was already established.

In my view, the chambers judge misapprehended the decision in *Knight*. In *Knight*, this Court affirmed the certification of an aggregate monetary award under the CPA as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct without an antecedent liability finding -- rather, the aggregate assessment would establish concurrently both that the defendant benefited from its wrongful conduct and the extent of the benefit.⁷⁰

Interestingly, Smith J.A. refused to wade into the debate of whether *Markson* had overtaken *Chadha*, holding that the Court's decision in *Knight* was the controlling authority in British Columbia:

I digress to note that much argument was addressed to us at the hearing of this appeal concerning the state of the law in Ontario in regard to whether aggregate monetary awards can be the subject of a common issues trial. In particular, there was disagreement as to whether the decisions in *Chadha* and *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 282 D.L.R. (4th) 385, are in conflict and, if so, as to which case correctly states the law in that province. The

chambers judge was drawn into that dispute and discussed it in his reasons. As I have concluded that *Knight* settles the point in this province, I do not consider it necessary to address the submissions made concerning those cases.⁷¹

The Divisional Court's decision in *Quizno's* also demonstrates a more relaxed approach toward the certification of competition class actions.⁷² Specifically, in a decision released in April 2009, a majority of the Court overturned Perell J.'s decision and granted conditional certification, pending the approval of a revised litigation plan by Perell J. Among other things, the majority was satisfied that the non-expert evidence adduced by the plaintiffs demonstrated "some basis in fact" for the proposition that loss could be proven as a common issue. The non-expert evidence was that there existed: (a) homogeneous relationships between the class members and defendants; (b) commonality of the products purchased; (c) commonality of the prices paid for the products; and (d) commonality of the underlying franchise contracts and distribution agreements.⁷³

The majority also found that Perell J. had erred in weighing the merits of the expert evidence filed by the parties, as it was "neither necessary nor desirable" to engage in a weighing of conflicting expert evidence on a certification motion.⁷⁴ Instead, the majority favoured the following approach:

The plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent that they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader. Where the assumptions are debated by experts, these questions are best resolved at a common issues trial. A motions judge is entitled to review the evidentiary foundation to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports.⁷⁵

The majority also concluded that as in *Markson* and *Cassano*, the plaintiffs could rely on section 24 of the CPA to calculate damages on a class-wide basis. In doing so, however, the majority referred to *Chadha* and confirmed that section 24 of the CPA "is procedural in nature, and cannot aid in proving an element of liability."⁷⁶

Swinton J. dissented on the basis that, in her view, Perell J. had been correct to deny certification. In particular, Swinton J. indicated that the plaintiffs had

failed to demonstrate a methodology to prove, on a class-wide basis, that the actual prices for supplies paid by franchisees exceeded the price they would have paid for those products they would have paid but for the alleged anti-competitive conduct. In addition, Swinton J. was of the view that sections 23 and 24 of the CPA were of no assistance to the plaintiffs on the basis that section 23 “does not permit a defendant’s liability to be based on statistical probabilities or percentages” and “cannot be used to alter the constituent elements of any cause of action.”⁷⁷ Similarly, although section 24 “is a provision for assessing the quantum of damages on a global or aggregate basis”, it does not assist plaintiffs in proving the “fact of damage.”⁷⁸ As to the effect of *Markson*, Swinton J. stated:

This is not a case like [*Markson*], where the Court held that s. 24(1) can be used where “potential liability can be established on a class-wide basis” (at para. 48). Here, the motions judge found that the appellants had not shown that potential liability could be proved on a class wide basis....Therefore, s. 24(1) was not available to assist them in showing that there was a common issue.⁷⁹

Although the appellants were granted leave to appeal, the Court of Appeal ultimately upheld the majority’s decision.⁸⁰ Among other things, the Court concluded that with respect to the applicability of section 24(1) of the CPA, on a certification motion, a plaintiff is only required to establish that there is a reasonable likelihood that the preconditions in that section would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues. However, the Court also affirmed the majority’s conclusion that section 24 “is procedural and cannot be used to prove liability.”⁸¹ Although decided after the *Irving* leave to appeal decision was issued, the Court of Appeal did not need to consider that decision and therefore made no comment on which approach was correct – the approach Justice Rady had taken at certification (*Markson* has overtaken *Chadha*) or the approach Justice Leitch took on the leave to appeal motion (*Chadha* remains good law).

The trend toward the certification of competition class actions continued in *Fanshawe College of Applied Arts and Technology v. LG Philips LCD Co.*⁸² In that case, the plaintiffs alleged that the defendants had engaged in a global price-fixing conspiracy in the market for large LCD panels and televisions, computer monitors and laptops (“LCD Panels”) containing LCD Panels (“LCD Products”).

The plaintiffs sought certification of a class consisting of “primary” and “secondary” purchasers of LCD Panels and LCD Products. The motions judge, Tausendfreund J., described these categories as follows:

This class includes what the plaintiff terms as “primary” and

“secondary” purchasers, as distinguished by the plaintiff from direct and indirect purchasers. A primary purchaser is someone who purchased an LCD Panel from a defendant or an LCD Product from a defendant or a named OEM or Distributor. A secondary purchaser is someone who purchased an LCD Panel from a primary purchaser of an LCD Panel or someone who purchased an LCD Product from a primary purchaser of an LCD Product. The plaintiff asserts that this categorization is more appropriate than direct and indirect purchasers, as it better accommodates vertical integration, which is common in the LCD industry.⁸³

In deciding to grant certification, Tausenfreund J., relying primarily on the British Columbia Court of Appeal’s decision in *Pro-Sys*, concluded that the plaintiff’s expert had provided a “credible and plausible” methodology for establishing aggregate damages and pass-through on a class-wide basis and that it was unnecessary to resolve conflicting expert reports on a certification motion. Further, Tausenfreund J. appeared to accept that *Chadha* was still a controlling authority in common law claims in conspiracy or actions under section 36 of the Act:

In *Chadha*, the Court of Appeal confirmed that for common law claims in conspiracy or actions under s. 36 of the *Competition Act*, harm is a prerequisite to liability. Furthermore, harm cannot be proven without demonstrating pass-through, and in a class action, pass-through can only be a common issue if the plaintiff provides a methodology for determination of pass-through on a class-wide basis. In *Chadha*, the complexity of the pass-through inquiry and the failure of the plaintiffs to propose the requisite methodology meant that liability was not a common question.

As it relates to this certification motion, I agree with Leitch J. in *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2010] O.J. No. 2472 at para. 51 that *Chadha* stands for these propositions:

- a) Where damages are sought on behalf of indirect purchasers whose claims depend upon damages suffered as a result of price increases being passed through to such purchasers, the action will be unmanageable (and therefore not preferable under paragraph 5(1)(d) of the *CPA*) if injury and loss must be proven on an individual basis.
- b) If the plaintiff seeks to certify proof of loss as a common issue (thereby addressing the foregoing unmanageability problem),

it must be shown, by admissible, cogent and persuasive evidence, that there exists some methodology by which loss can be proven on a class-wide basis;

c) Evidence to demonstrate to the certification court that loss will be provable on a class-wide basis at the common issues trial must necessarily take the form of expert economic evidence.⁸⁴

Applying those principles, Tausenfreund J. concluded that *Chadha* was distinguishable on the facts because, unlike the expert in *Chadha*, who had merely assumed pass-through, the plaintiffs' expert had demonstrated a "viable methodology for proving loss on a class-wide basis."⁸⁵ Accordingly, unlike the plaintiffs in *Chadha*, the plaintiff in the case before him had "provided an evidentiary basis that loss as a component of liability could be proved on a class-wide basis."⁸⁶ As discussed in more detail below, in late 2011, Rady J. allowed the defendants' motion for leave to appeal to the Divisional Court.⁸⁷

Uncertainty Regarding the Existence of the Passing On Defence and the Availability of Indirect Purchaser Claims

Despite the recent trend toward the certification of competition class actions discussed above (which includes claims brought on behalf of both direct and indirect purchasers), recent jurisprudence indicates that the issue of whether indirect purchasers have a cause of action at law is still very much unsettled. Indeed, as discussed below, the British Columbia Court of Appeal's decisions in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*⁸⁸ and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*⁸⁹ suggest that the approach to indirect purchaser claims in Canada may be shifting toward the approach mandated under American federal law by the Supreme Court of the United States' decisions in *Hanover Shoe Inc. v. United Shoe Machinery*⁹⁰ and *Illinois Brick v. Illinois*.⁹¹

In *Hanover Shoe*, the Court rejected the pass-on defence and held that defendants cannot reduce their liability for antitrust offences by arguing that the plaintiff had passed on some of its damages to others. The main basis for this decision was that it would be difficult to prove that losses had in fact been passed on and that allowing such a defence would undermine the deterrent effect of the antitrust legislation. Writing for the Court, White J. stated:

We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether,

had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the pass-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.⁹²

The Court built on this decision nine years later, in *Illinois Brick*, where it concluded that indirect purchasers do not have a cause of action in antitrust litigation. In particular, a majority of the Court was of the view that allowing claims by both direct and indirect purchasers would create the risk of double recovery and make the process of determining who had suffered what proportion of the price overcharge too complex. Conversely, giving direct purchasers access to 100 percent of the recovery would incentivize these entities to aggressively prosecute antitrust claims. In rejecting the dissenting justices' view that the unavailability of the pass-on defence to a defendant should not necessarily preclude its use by plaintiffs, White J., writing for the majority, stated:

First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. A

one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications - and therefore of unwarranted multiple liability for the defendant - by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. As in *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972), we are unwilling to “open the door to duplicative recoveries” under [section] 4.

Second, the reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments. The principal basis for the decision in *Hanover Shoe* was the Court’s perception of the uncertainties and difficulties in analyzing price and output put decisions “in the real economic world rather than an economist’s hypothetical model,” 392 U.S., at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.¹² This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants. However “long and complicated” the proceeding would be when defendants sought to prove pass-on, *ibid.*, they would be equally so when the same evidence was introduced by plaintiffs. Indeed, the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution. The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff.⁹³

In dissent, Brennan J., writing on behalf of himself and Justices Marshall and Blackmun, stated as follows:

Today’s decision that [section 4 of the *Clayton Act*] affords a remedy only to persons who purchase directly from an antitrust offender is a regrettable retreat from that line of cases. Section 4 was clearly

intended to operate to protect individual consumers who purchase through middlemen. Indeed, Congress acted on the premise that 4 gave a cause of action to indirect as well as direct purchasers when it recently enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394-1396, 15 U.S.C. 15c et seq. (1976 ed.), and authorized state attorneys general to sue as *parens patriae* to recover damages on behalf of citizens of their various States.

Today's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers. This frustration of the congressional scheme is in no way mandated by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). To the contrary, the same considerations that *Hanover Shoe* held required rejection of the defendant's argument there, that because plaintiff had passed on cost increases to consumers in the form of higher prices defendant should be relieved of liability - especially the consideration that it is essential to the public interest to preserve the effectiveness of the private treble-damages action - require affirmance of the decision below construing 4 to authorize respondent's suit.⁹⁴

Since *Illinois Brick* was decided, more than 35 states through legislative reform or judicial decisions have allowed indirect purchasers to recover damages under state antitrust law.⁹⁵ The result is that direct and indirect purchaser cases are pursued separately, each with treble damages.

In Canada, the law regarding the availability of the passing on defence and indirect purchaser claims is uncertain. Plaintiffs have asserted consolidated classes of direct and indirect purchasers and defendants have regularly invoked the concept of pass through as both a defence on the merits and as a reason for denying certification. Plaintiffs have argued there is no pass-through defence, but that indirect purchasers have a cause of action.

In Ontario, the courts have held that indirect purchasers have a cause of action. In *Chadha*, which was brought on behalf of a class consisting entirely of indirect purchasers, the court dismissed the defendants' motion to strike the plaintiff's statement of claim for failure to disclose a cause of action. Sharpe J., as he then was, held:

The claim appears to be novel, but given the overall purpose and object of the *Competition Act* to discourage anti-competitive practices and to protect the public from such practices, it is my view that it cannot be said with the degree of certainty necessary at this stage of the proceeding that a party in the position of the plaintiffs has no right of action.⁹⁶

On certification, relying on U.S. authorities, the defendants again argued indirect purchasers do not have a cause of action. Sharpe J. held that although the U.S. authorities "deserve serious consideration by this court, they are plainly not binding." The decisions are based on policy considerations relating to the enforcement of American antitrust laws and "these policies may well differ from the values underlying Canadian competition law."⁹⁷

In *Vitapharm Canada Ltd v F. Hoffmann-La Roche Ltd*, Cumming J. likewise declined to follow U.S. authorities, holding that section 36 of the Act provides that "any person who has suffered loss or damage" can bring an action, "including it would seem, retail purchasers."⁹⁸ It is to be noted, however, that this statement was made in the context of a "carriage motion," where the issues to be resolved were which of ten class actions brought on behalf of the same class should proceed, which actions should be stayed, and who was to be lead counsel.

The British Columbia Court of Appeal in *Sun-Rype Products v Archer Daniels Midland Company* and *Pro-Sys Consultants Ltd. v Microsoft Corp.*, in split decisions, reached the opposite conclusion. In *Sun Rype*, the plaintiffs brought horizontal price-fixing claims against several manufacturers of high fructose corn syrup. The proposed class consisted of direct and indirect purchasers of that product. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the plaintiffs sought certification of various vertical price-fixing and anti-competitive claims against Microsoft. The proposed class was comprised solely of indirect purchasers of Microsoft software. The British Columbia Supreme Court certified both cases as class actions. The defendants' appeals from those decisions were heard by the same three-judge panel of the British Columbia Court of Appeal.

In concurrent judgments released on April 15, 2011, both appeals were allowed by the same 2-1 majority of the Court of Appeal. Relying primarily on

the Supreme Court of Canada's decision in *Kingstreet Investments Ltd. v. New Brunswick*,⁹⁹ the entire panel agreed that the passing on defence was not available under Canadian law. However, like the U.S. Supreme Court in *Illinois Brick*, the Court was divided on the issue of whether it necessarily followed that indirect purchasers had no cause of action. The majority concluded that this was the only available conclusion and that the plaintiffs had therefore failed to satisfy a pre-requisite of certification. Writing for the majority, Lowry J.A. stated the following in *Sun-Rype*:

If then it is right to say there is no defence of passing on, it must, in my view, follow that even though an overcharge may in fact have been passed on (as the invalid tax was said to have been passed on in *Kingstreet*), the law does not recognize it: as a matter of law, the overcharge or the loss for which the wrongdoer is liable is sustained when the overcharge is paid at first instance. It is no defence to contend there was no loss (or it was something less) because the overcharge was passed on. If that is so, then those who would seek to recover an overcharge that has been passed on are effectively claiming a loss that in law is not recognized. For that, there can be no cause of action.

Thus, it would follow the IPs have no maintainable cause of action against the defendants.

If it were otherwise – if both the DPs and the IPs had independent causes of action against the defendants who could not raise a passing-on defence – the defendants could be liable to the DPs for 100% of the overcharge they paid and could also be liable to the IPs for whatever amount of the overcharge may have been passed on: double recovery (the recovery of the same loss twice by different plaintiffs), which our law will not sanction.

...

Given there is now no passing-on defence in Canadian law, there does not appear to me to be any sound basis upon which it could be said a claim can nonetheless be made for an illegal overcharge that may have been passed on: if a defendant cannot raise a passing-on defence, it can have no liability to other than a direct purchaser for what may have been passed on. The law must be consistent. Passing on cannot be denied in one context and recognized in another.¹⁰⁰

Lowry J.A. also rejected the respondents' argument that the phrase "any

person” as used in section 36 includes indirect purchasers to whom an alleged overcharge had been passed on through the distribution chain:

It is contended that “any person” must include indirect purchasers who have borne some of the overcharge the DPs are alleged to have paid to the defendants. But, in my view, a person who has suffered loss can only mean a person who has suffered a loss that is recognized in law.¹⁰¹

In the result, the majority remitted the application for certification back to the lower court for further consideration.

In a detailed dissent, Donald J.A. stated the following in *Sun-Rype*:

Double recovery provides the chief argument supporting the proposition that the obverse of rejecting the pass-through defence is that the IPs have no claim. I do not think that is universally true. Here, the remedies sought are either aggregate damages or a constructive trust in restitution – one amount for the entire class. There is no realistic possibility of double recovery with a single all-encompassing assessment. Furthermore, class proceedings are flexible enough to create ways and means of avoiding over recovery. [...]

...

I have no difficulty with the postulates behind this analysis: the rule against double recovery is a bedrock principle and the CPA cannot provide a cause of action to a party who would have no cause outside a class proceeding. [...]

The fact that a problem case can be hypothesized is not a good reason to deny a claim in an actual case that does not have the problem. This is such a case. So is the companion case, Microsoft, where the DPs are alleged to have formed a conspiracy with Microsoft in restraint of competition, and they are therefore unlikely to sue for the same overcharge as the IPs.

As for the imagined possibility of multiple suits, this seems unlikely where the claim is for overcharges caused by market misconduct. These are the cases that bring up the pass-through issue. Experience shows that usually the only practical way such claims can be pursued is through class actions. Again, the present case is illustrative. The DPs and IPs need each other to amass a critical number to make the case economically viable.

To summarize: although the pass-through defence is dead, the

corollary proposition barring a pass-through claim is by no means a logical or legal necessity. The plaintiffs offer evidence to overcome the assumed impossibility of proof and they will not seek over-recovery. Other adequate safeguards will be available. As I will discuss more fully later, unless the IPs can participate in this class proceeding, the case may not be economically viable and the alleged wrongdoers will retain most of their ill-gotten gains with the result that the class action goals of deterrence and behaviour modification will be lost.¹⁰²

Both sides relied on their respective reasons for judgment in *Sun-Rype* in disposing of the appeal in *Microsoft*. As the representative plaintiffs had no cause of action maintainable at law, the action was dismissed.

The decisions in *Sun-Rype* and *Microsoft* have since been applied in other Canadian jurisdictions for various purposes. For instance, in Quebec, in *Option Consommateurs v. Infineon Technologies AG*,¹⁰³ the Quebec Court of Appeal expressly adopted the dissenting opinion of Donald J.A. in *Sun-Rype* and *Microsoft* and certified a class of direct and indirect purchasers of DRAM. In doing so, the Court found that it was premature to determine whether any overcharges had been passed on to indirect purchasers and dismissed the defendants' concerns relating to double recovery.¹⁰⁴

As discussed above, Rady J. granted leave to appeal in *Fanshawe*.¹⁰⁵ In doing so, Rady J. noted the conflict between *Microsoft* and *Sun-Rype* on the one hand, and the certification decision in *Fanshawe* and the Quebec Court of Appeal's decision in *Option Consommateurs*, on the other. She further indicated that "the availability of the passing on defence is a fundamental issue underlying most price-fixing class cases and as such, warrants review by an appellate court in Ontario" and that "whether indirect purchasers have a cause of action is in a state of uncertainty."¹⁰⁶ In addition, Rady J. was of the view that "[s]ome consistency in the law would be most helpful to the litigants, counsel and the judiciary, particularly because many of these claims are advanced simultaneously in several jurisdictions, and in particular, in Ontario, Québec and British Columbia."¹⁰⁷

The Supreme Court of Canada has recognized the need for such certainty and on December 1, 2011 granted leave to appeal in *Sun-Rype* and *Microsoft*.¹⁰⁸ On May 17, 2012, the Court also granted leave to appeal in *Option Consommateurs* and ordered that the appeal be heard together with the appeals in *Sun-Rype* and *Microsoft*.¹⁰⁹ As is normally the case, the Court did not release reasons in respect of its decision to grant leave. The appeals are tentatively scheduled to be heard in October 2012.

Although a detailed analysis of the possible outcomes of these pending appeals is beyond the scope of this paper, given the current state of the law in Canada, the issue of whether Canadian competition law should follow the path paved by *Hanover Shoe* and *Illinois Brick* in the United States, or some variation thereof, is now before our highest court. How the Court decides those cases may have a significant impact on claims brought pursuant to section 36 of the Act.

Amendments to the Act

Recent amendments to the Act have arguably reduced the scope of section 36.

The Repeal of Section 61(1)

Section 61(1) was repealed on March 11, 2009. That section had made vertical and horizontal price maintenance a *per se* criminal offence under Part VI of the Act subject only to very limited statutory exemptions, and was capable of giving rise to a claim for damages under section 36. Indeed, it was relied on by plaintiffs in class actions, including *Axiom* and *Quizno's*.

On its repeal in 2009, section 61 was replaced with a provision making price maintenance a civilly reviewable practice that allows for the imposition of limited remedies if it can be established that the impugned price maintenance activity is likely to have an “adverse effect on competition in the market.” Pursuant to section 76, the Tribunal is permitted, upon application of the Commissioner or a private person with leave, to make an order prohibiting the price maintenance activity or requiring the supplier to supply on usual trade terms. The Tribunal is not empowered to order financial penalties. In addition, no provision is made to allow a private party to sue for damages based on a breach of these provisions.

Although the repeal of section 61(1) will decrease the number of claims that can be brought under section 36, a private party may still be entitled to commence an action for damages under section 36 if a person fails to comply with an order of the Tribunal issued under section 76.

Amendments to Section 45

Amendments to the conspiracy provisions of the Act took effect on March 12, 2010. As a result of these amendments, there is now a dual-track approach to agreements between competitors. As discussed below, under this approach, there are now only three well-defined categories that give rise to *per se* criminal liability. All other types of agreements are now subject to review under a non-criminal framework.

Section 45 now gives rise to *per se* criminal liability for agreements between competitors that: (a) fix, maintain, increase or control the price for the supply of a product in respect of which the agreeing parties are competitors; (b) allocate sales, territories, customers or markets for the production or supply of the products; or (c) fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

The term “competitor” is defined in section 45(8) as including “a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement” to do anything described above. The term “price” is defined to include “any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.”

Importantly, as the former section 45 was not confined to agreements between competitors, it was able to capture, among other things, vertical agreements between suppliers and customers. However, the fact that the new section 45 contains such constraints suggests that it may no longer apply to such agreements.

The new section 45 is specifically aimed at “hard core” cartel behaviour. Indeed, the *Competitor Collaboration Guidelines* issued by the Competition Bureau provide the following description of the type of conduct that is intended to be captured by section 45:

Section 45 describes categories of agreements that are so likely to harm competition and to have no pre-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effects. These are agreements between competitors to fix prices, allocate markets or restrict outputs that constitute ‘naked restraints’ on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture). The categories of agreements described in subsection 45(1) are *per se* unlawful and are subject to significant criminal sanctions. Other forms of competitor collaboration, such as joint ventures and strategic alliances, may be subject to review under the civil agreements provision in section 90.1, which prohibits agreements only where they are likely to substantially lessen or prevent competition.¹¹⁰

Section 45 also contains an ancillary restraints defence. The ancillary restraints defence applies in cases where it can be established, on a balance of probabilities, that: (a) the impugned agreement is ancillary to a broader or

separate agreement or arrangement that includes the same parties; (b) the impugned agreement is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and (c) the broader or separate agreement or arrangement, considered alone, does not itself fall within the scope of any of the three categories of *per se* liability.

The former section 45 required an analysis of whether the impugned agreements “unduly” lessened or “unreasonably” enhanced prices. The new section 45 removed this requirement and therefore it is no longer necessary to prove that they did so.

Conclusion

Since the enactment of class proceeding legislation, numerous cases have been commenced under section 36 of the Act. The courts have now set clear guidance on the role of the certification judge in reviewing expert evidence. However, many important issues remain to be determined – including the availability of the passing on defence and the validity of indirect purchaser claims, that will be before the Supreme Court of Canada later this year. The Supreme Court of Canada’s decision in this regard could have a significant impact for both plaintiffs and defendants. If the Supreme Court holds that pass on is not available as a defence, the certification of direct purchaser claims will be greatly simplified. If the Supreme Court holds that indirect purchasers do not have a cause of action, some plaintiffs will be precluded from bringing claims under section 36.

ENDNOTES

¹ Laura F. Cooper is a partner of Fasken Martineau DuMoulin LLP who has acted for numerous defendants in competition class actions. Charles M. Wright is a partner of Siskinds LLP who has represented the plaintiffs in many of those cases and others. The authors cooperated on this chapter, which hopefully beneficially discusses the state of the law, but neither should be taken to have been the author of any characterizations of the law as written herein. Vaso Maric is an associate with Fasken Martineau. The assistance of Linda Visser (Associate, Siskinds LLP) in the preparation of this article is acknowledged with thanks.

² R.S.C. 1985, c. C-34, as amended (the “Act”).

³ See for example the decision of Rady J. in *Irving Paper Limited v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (S.C.J.) (“*Irving Paper* (Certification)”).

⁴ See for example the decision of Leitch J. in *Irving Paper Limited v. Atofina Chemicals Inc.*, [2010] O.J. No. 2472 (Div. Ct.) (“*Irving Paper* (Leave to Appeal)”).

⁵ Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen’s Printer, 1969) at p. 109 (“*Interim Report*”); *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641 at pp. 686-87 (“*General Motors*”).

⁶ *Interim Report*, p. 109.

⁷ *Ibid.*

⁸ *General Motors*, pp. 693-94.

⁹ See, for instance, *Ice Fashionable Accessories Inc. v. Holt Renfrew & Co.*, [2001] O.J. No. 1527 at para. 18 (S.C.J.), var'd on other grounds (2002), 155 O.A.C. 355 (C.A.). (emphasis added)

¹⁰ [2001] O.J. No. 1707 at paras. 17-18 (S.C.J.).

¹¹ *Manos Foods International Inc. v. Coca-Cola Ltd.*, [1999] O.J. No. 3623 at para. 10 (C.A.).

¹² *Charette v. Honeywell Ltd.* (2003), 40 B.L.R. (3d) 181 at paras. 9-11 (F.C.).

¹³ See for example *947101 Ontario Ltd. (c.o.b. Throop Drug Mart) v. Barrhaven Town Centre Inc.*, [1995] O.J. No. 15 (Gen. Div.).

¹⁴ 2009 BCCA 581 at para. 44 (C.A.).

¹⁵ *Ibid.*, para. 45.

¹⁶ [2009] F.C.J. No. 1229 at para. 728 (F.C.).

¹⁷ [1993] 2 S.C.R. 1069 at pp. 1079-80.

¹⁸ [2010] F.C.J. No. 1259 (F.C.) ("*Garford*").

¹⁹ *Ibid.*, paras. 43-45.

²⁰ *Ibid.*, para. 46.

²¹ *Ibid.*, paras. 32-33.

²² [2012] O.J. No. 834 (S.C.J.) ("*Fairview Donut*").

²³ *Ibid.*, paras. 638-47.

²⁴ [2012] F.C.J. No. 220 at para. 19 (C.A.) ("*Garford (FCA)*").

²⁵ *Ibid.*, para. 14.

²⁶ *Ibid.*, para. 16.

²⁷ [2008] B.C.J. No. 1298 (C.A.).

²⁸ *Ibid.*, para. 110.

²⁹ S.O. 1992, c. 6 (the "*CPA*").

³⁰ See for example section 4 of the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

³¹ [2003] O.J. No. 27 (C.A.) ("*Chadha*").

³² (2001), 54 O.R. 520 at pp. 543-44 (Div. Ct.).

³³ *Chadha*, paras. 28, 30-31 and 40.

³⁴ 305 F. 3d 145 (3d Cir. 2002) ("*Linerboard*"); *Chadha*, paras. 32-41.

³⁵ *Chadha*, para. 36

³⁶ *Ibid.*

³⁷ *Chadha*, paras. 39-41.

³⁸ [2002] O.J. No. 2362 (S.C.J.) ("*Price*").

³⁹ [2008] O.J. No. 833 (S.C.J.) ("*Quizno's*").

⁴⁰ *Ibid.*, para. 115.

⁴¹ [2007] J.Q. No. 1072 (S.C.) ("*Harmegnies*").

⁴² [2008] J.Q. No. 1446 (C.A.).

⁴³ [2008] B.C.J. No. 831 (S.C.) ("*Pro-Sys*").

⁴⁴ *Ibid.*, para. 139.

⁴⁵ *Ibid.*, para. 166.

⁴⁶ *Ibid.*, para. 176

- ⁴⁷ [2007] O.J. No. 3327 (“*Axiom*”).
- ⁴⁸ *Ibid.*, paras. 131-34.
- ⁴⁹ *Ibid.*, para. 137.
- ⁵⁰ [2007] O.J. No. 1684 (C.A.) (“*Markson*”).
- ⁵¹ [2007] O.J. No. 4406 (C.A.) (“*Cassano*”).
- ⁵² *Markson*, para. 40.
- ⁵³ *Ibid.*, paras. 41 and 44.
- ⁵⁴ *Ibid.*, paras. 48-49.
- ⁵⁵ *Ibid.*, para. 55.
- ⁵⁶ *Cassano*, para. 47.
- ⁵⁷ *Ibid.*, para. 49.
- ⁵⁸ *Irving Paper (Certification)*, *supra*, note 1.
- ⁵⁹ *Ibid.*, para. 64.
- ⁶⁰ *Ibid.*, paras. 83-85.
- ⁶¹ *Ibid.*, paras. 115-118.
- ⁶² *Ibid.*, paras. 142-43.
- ⁶³ *Irving Paper (Leave to Appeal)*, *supra*, note 2.
- ⁶⁴ *Ibid.*, paras. 43-45 and 49.
- ⁶⁵ *Ibid.*, para. 51.
- ⁶⁶ *Ibid.*, paras. 62 and 65.
- ⁶⁷ *Ibid.*, paras. 66-67.
- ⁶⁸ [2009] B.C.J. No. 2239 (C.A.) (“*Pro-Sys (C.A.)*”).
- ⁶⁹ *Ibid.*, paras. 63 and 65-68.
- ⁷⁰ *Ibid.*, paras. 38-39.
- ⁷¹ *Ibid.*, para. 40.
- ⁷² [2009] O.J. No. 1874 (Div. Ct.) (“*Quizno’s (Div. Ct.)*”).
- ⁷³ *Ibid.*, para. 95.
- ⁷⁴ *Ibid.*, para. 102.
- ⁷⁵ *Ibid.*
- ⁷⁶ *Ibid.*, para. 118.
- ⁷⁷ *Ibid.*, para. 184.
- ⁷⁸ *Ibid.*, para. 185.
- ⁷⁹ *Ibid.*, para. 186.
- ⁸⁰ [2010] O.J. No. 2683 (C.A.) (“*Quizno’s (C.A.)*”).
- ⁸¹ *Ibid.*, para. 55.
- ⁸² [2011] O.J. No. 2337 (S.C.J.) (“*Fanshawe*”).
- ⁸³ *Ibid.*, para. 21.
- ⁸⁴ *Ibid.*, paras. 50-51,
- ⁸⁵ *Ibid.*, para. 55.
- ⁸⁶ *Ibid.*, para. 57.
- ⁸⁷ As of the date of writing, the appeal has not been heard.
- ⁸⁸ 2011 BCCA 187 (“*Sun-Rype*”).
- ⁸⁹ 2011 BCCA 186 (“*Microsoft*”).
- ⁹⁰ 392 U.S. 481 (1968) (“*Hanover Shoe*”).
- ⁹¹ 431 U.S. 720 (1977) (“*Illinois Brick*”).
- ⁹² *Hanover Shoe*, pp. 492-93.

⁹³ *Illinois Brick*, pp. 730-33.

⁹⁴ *Ibid.*, pp. 749-50.

⁹⁵ Antitrust Modernization Commission, *Report and Recommendations* (ABA Antitrust Modernization Commission, 2007) at 268-269.

⁹⁶ *Chadha v. Bayer Inc.*, 1998 CarswellOnt 5225 at para. 5 (Gen. Div.).

⁹⁷ *Chadha v. Bayer* (1999), 45 O.R. (3d) 29 at p. 34 (Gen. Div.).

⁹⁸ *Vitapharm Canada Ltd v F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 at para. 44 (S.C.J.).

⁹⁹ [2007] 1 S.C.R. 3.

¹⁰⁰ *Sun-Rype*, paras. 80-82 and 88.

¹⁰¹ *Ibid.*, paras. 94-95.

¹⁰² *Ibid.*, paras. 26 and 30-33.

¹⁰³ [2011] Q.J. No. 16769 (C.A.) ("*Option Consommateurs*").

¹⁰⁴ *Ibid.*, para. 109.

¹⁰⁵ Unreported decision issued on November 21, 2011 ("*Fanshawe* (Div. Ct.)").

¹⁰⁶ *Ibid.*, paras. 11-12.

¹⁰⁷ *Ibid.*, para. 11.

¹⁰⁸ See [2011] S.C.C.A. No. 2036 (*Sun-Rype*) and [2011] S.C.C.A. No. 396 (*Microsoft*)

¹⁰⁹ [2012] S.C.C.A. No. 20.

¹¹⁰ Competition Bureau of Canada, *Competitor Collaboration Guidelines* published December 23, 2009, p. 6.