A DECADE OF COMPETITION LAW CLASS ACTIONS: FROM *CHADHA* TO THE "NEW TRILOGY"

Charles M Wright, Andrea DeKay, Linda Visser, and Kerry McGladdery Dent

Abstract: The brief history of Canadian competition law class actions has been marked by a significant evolution in approach, from hesitancy to acceptance. The debate has focused on the evidentiary standard and the viability of indirect purchaser claims. Early attempts at certification in competition law class actions failed, in part, because Canadian courts imposed American evidentiary standards. In *Chadha v Bayer Inc*, the Ontario Court of Appeal held that plaintiffs must provide a methodology for establishing pass-through. Ontario courts have since taken a more flexible approach, but *Chadha* remains in effect. In British Columbia, the standard established in *Chadha* has never been applied; the British Columbia Court of Appeal has indicated that a plaintiff can use statistical evidence to prove fact of loss and quantum of damages concurrently. The Supreme Court of Canada recently released a trilogy of price-fixing class action certification decisions, which dealt with four issues central to the certification analysis in price-fixing cases: (1) whether defendants can rely on the passing-on defence, (2) whether indirect purchasers have a cause of action, (3) the evidentiary requirements at the certification stage, and (4) the evidence required at the certification stage in respect of pass-through. The Supreme Court's conclusions on these issues simplified some aspects of the certification motion, but the need for complex expert evidence on price-fixing certification motions is an access to justice concern.

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A. INTRODUCTION

The history of contested certification motions in Canadian competition law class actions is brief but characterized by constant evolution. In just over a decade, Canadian courts have shifted their approach to competition law class actions from hesitant to acceptant. There have been two main areas of debate: the evidentiary standard and indirect purchaser claims.

Early cases were resolved through settlement before the certification hearing. *Chadha v Bayer Inc* was the first price-fixing conspiracy class action to proceed to a contested certification.[1] In *Chadha*, the Ontario

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Court of Appeal denied certification and set a high evidentiary standard relating to proof of loss (a required element for a statutory or common law conspiracy claim). Other early contested certifications were also unsuccessful due to inadequacies in the record.[2]

Since *Chadha*, the courts have moved towards more flexible evidentiary standards. Most of the caselaw has developed in British Columbia and Ontario. In British Columbia, the Court of Appeal held that the aggregate damages provisions could be relied upon to concurrently prove quantum and fact of damage.[3] In Ontario, some courts moved towards a more flexible approach, but there was no clear direction from the courts on the evidentiary requirements at certification. This meant that plaintiffs often choose to lead evidence that met the requirements of *Chadha*, but argued that a lower evidentiary standard should apply.

In Ontario, relatively early on, the courts accepted indirect purchaser claims.[4] In recent cases originating in British Columbia and Quebec, this issue has been revived, with the British Columbia Court of Appeal holding that indirect purchasers do not have a cause of action[5] and the Quebec Court of Appeal holding that indirect purchasers have a cause of action.[6] This debate was resolved by the new Supreme Court of Canada trilogy.

Both the conflicting caselaw regarding indirect purchaser claims and the uncertain evidentiary threshold for *Competition Act* claims were finally addressed by the Supreme Court in late October 2013, when it issued

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and services, including air cargo, hydrogen peroxide, LCDs, CRTs, compressors, polyether polyols, and various auto parts.

1 (1999), 45 OR (3d) 29 (SCJ) [*Chadha* SCJ], rev'd (2001), 54 OR (3d) 520 (Div Ct), rev'd (2003), 63 OR (3d) 22 (CA) [*Chadha* CA], leave to appeal to SCC refused (2003), 65 OR (3d) xvii.

2 See *Price v Panasonic*, [2002] OTC 426 (SCJ); *Harmengies v Toyota Canada*, 2007 QCCS 539; *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2008 BCSC 575 [*Infineon* SC], rev'd 2009 BCCA 503 [*Infineon* CA], leave to appeal to SCC refused, [2010] SCCA No 32.

3 *Knight v Imperial Tobacco Canada Limited*, 2006 BCCA 235 at paras 38–40 [*Knight*].

4 See *Chadha v Bayer Inc*, 1998 CanLII 14791 (Ont Ct Gen Div) at paras 4-5; *Chadha* SCJ, above note 1 at paras 6–12.

5 *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2011 BCCA 187 [*Sun-Rype* CA], rev'g 2010 BCSC 922 [*Sun-Rype* SC], aff'd 2013 SCC 58 [*Sun-Rype* SCC]; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2011 BCCA 186 [*Microsoft* CA], rev'g 2010 BCSC 285 [*Microsoft* SC], rev'd 2013 SCC 57 [*Microsoft* SCC].

6 *Option consommateurs v Infineon Technologies AG*, 2011 QCCA 2116 [*Option consommateurs* CA], rev'g 2008 QCCS 2781 [*Option consommateurs* CS], aff'd 2013 SCC 59 [*Option consommateurs* SCC].

a new trilogy of cases: *Pro-Sys Consultants Ltd v Microsoft Corporation*,[7] *Sun-Rype Products Ltd v Archer Daniels Midland Company*,[8] and *Infineon Technologies AG v Option consommateurs*.[9] The trilogy grappled with four issues central to the certification analysis in price-fixing conspiracy class action cases:

Whether defendants can rely on the passing-on defence in a price-fixing conspiracy case: The passing-on defence is premised on the argument that direct purchasers of the price-fixed product were able to pass on all or part of the unlawful overcharge to their customers. The Court held that the passing-on defence is not a valid defence.

Whether indirect purchasers have a cause of action in a price-fixing conspiracy case: Claims by indirect purchasers are premised on the argument that, as a factual matter, some or all of the overcharge was passed on to them. The Court held that indirect purchasers have a cause of action in a price-fixing case. The Court endorsed an all-inclusive model, with the claims of all levels of purchasers being pursued in a single action.

The evidentiary requirements at the certification stage: The Court maintained the "some basis in fact" evidentiary threshold and affirmed that certification judges should not engage in a weighing of conflicting evidence. Had the Court adopted the US approach, which requires a much higher evidentiary standard and a weighing of the expert evidence, certification motions would have become longer, more complex, and more expensive. This issue transcends price-fixing and is relevant to all certification motions.

The evidence required at the certification stage in respect of pass-through: In a price-fixing conspiracy case that includes indirect purchasers, the expert evidence "must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement."[10] In indirect purchaser cases, this includes a methodology that is capable of establishing pass-through. The Court held that the aggregate damages provisions are not available until a finding of liability has been made.

In this paper, the authors discuss in detail the 2013 Supreme Court of Canada trilogy and its significance for competition law litigation specifically

7 *Microsoft* SCC, above note 5.
8 *Sun-Rype* SCC, above note 5.
9 *Option consommateurs* SCC, above note 6.
10 *Crosslink v BASF Canada*, 2014 ONSC 1682 at para 36, leave to appeal to Div Ct refused, 2014 ONSC 4529 [*Crosslink*].

and for class actions more generally. First, the authors trace the history of price-fixing class actions in Canada. Next, they examine the 2013 trilogy of cases and the Court's holdings with respect to the passing-on defence, indirect purchasers' causes of action, and the evidentiary requirements at certification. Throughout, the authors provide observations about the ramifications of the Court's decisions for the future of price-fixing class actions in Canada.

B. THE CONTEXT

1) The Ontario Court of Appeal's Decision in *Chadha*

Chadha related to allegations that the defendants conspired to fix the price of iron oxide used in concrete bricks. The plaintiff sought to certify a class consisting entirely of indirect purchasers: the owners of buildings containing concrete bricks. A key issue in *Chadha* was whether the indirect purchaser class members could establish, on a class-wide basis, that any overcharge was passed through a complicated chain of distribution to them, thereby establishing liability and allowing damages to be calculated on an aggregate basis.

The Court of Appeal held that the certification requirements were not satisfied. The plaintiff's expert had assumed pass-through of the alleged illegal price increase and had not suggested a methodology for proving pass-through or dealing with the other variables that affect the end price of real property.[11] Therefore, liability was not a common issue, and the aggregate damages provisions of the *Class Proceedings Act, 1992*[12] could not be relied on.

In considering the expert evidence, the Court of Appeal adopted the evidentiary thresholds established by a US court in *In Re Linerboard Antitrust Litigation*.[13] By doing so, the court set seemingly high evidentiary standards for establishing that fact of loss can be proven on a class-wide basis. The court effectively imported the high evidentiary standards existing in the United States without considering that unlike the United States there is no pre-certification discovery in Canada. The expert opinion in *Linerboard* was obtained only with the benefit of extensive defendant discovery evidence, including detailed sales data produced by the defendants in advance of certification.

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11 *Chadha* CA, above note 1 at paras 30–31.

12 SO 1992, c 6, s 24.

13 203 FRD 197 (ED Pa 2001), aff'd 305 F3d 145 (3d Cir 2002) [*Linerboard*].

The high evidentiary requirements set by the Ontario Court of Appeal in *Chadha* exemplify the courts' early tentative approach to certification of price-fixing conspiracy class actions.

2) Competition Law Certification Decisions Post-*Chadha*

Courts have since retreated from *Chadha* and taken a more flexible approach to the evidence required at the certification stage, albeit inconsistently. In Ontario, the approach varied somewhat, with some judges continuing to follow *Chadha*. In British Columbia, the courts followed *Knight v Imperial Tobacco Canada Limited*, which held that the aggregate damages provisions could be relied upon to concurrently prove damages and fact of loss.[14]

a) Ontario

In *Axiom Plastics Inc v EI DuPont Canada Company*,[15] the Ontario Superior Court of Justice distinguished *Chadha* on the basis that the proposed class consisted of direct purchasers, such that class members did not need to rely on pass-through to establish harm and liability. The court was satisfied on "basic economic principles" that persons specifically required by their customers to buy DuPont resins would have been injured by the alleged vertical price-fixing conspiracy.[16]

In affirming the decision, the Divisional Court held that the motion judge correctly identified the distinguishing factors of *Chadha*.[17] The court was not "persuaded that *Chadha* establishes the standard of evidence required in a motion for certification such as this where the class includes a discrete and readily identifiable number of direct purchasers."[18]

In *2038724 Ontario Ltd v Quizno's Canada Restaurants Corporation*,[19] in which the now-repealed price maintenance provisions of the *Competition Act*,[20] the tort of conspiracy, and breach of contract were all pleaded, the Divisional Court adopted a pragmatic approach to class-wide loss and aggregate damages. The Court of Appeal confirmed the Divisional Court's

14 Above note 3 at paras 38–40.
15 (2007), 87 OR (3d) 352 (SCJ) [*Axiom* SCJ], aff'd (2008), 90 OR (3d) 782 (Div Ct) [*Axiom* Div Ct].
16 *Axiom* SCJ, above note 15 at para 137.
17 *Axiom* Div Ct, above note 15 at para 52.
18 *Ibid*.
19 (2008), 89 OR (3d) 252 (SCJ), rev'd (2009), 96 OR (3d) 252 (Div Ct), rev'd 2010 ONCA 466 [*Quizno's* CA].
20 RSC 1985, c C-34.

holding that a finding as to whether the price maintenance provisions of the *Competition Act* were breached is "itself an appropriate common issue, which advances the litigation."[21] The Court of Appeal similarly agreed with the Divisional Court that the first four elements of the tort of conspiracy, which related solely to the defendants' conduct, would advance each class member's claim and avoid duplication of fact finding and legal analysis.[22] This conclusion was significant in that it provided for the possibility of certifying a price-fixing conspiracy class action without showing that fact of loss can be proven on a class-wide basis. Notably, the Court of Appeal did not reference its earlier decision in *Chadha*, despite the fact that *Chadha* had been argued by the defendants on the appeal.

In *Irving Paper Ltd v Atofina Chemicals Inc*, the certification judge relied on the Ontario Court of Appeal decisions in *Markson v MBNA Canada Bank*[23] and *Cassano v Toronto Dominion Bank*[24] in holding that the aggregate damages provisions were available upon a finding of "potential liability."[25] A finding of potential liability could be made based on the existence of a breach of the *Competition Act*. Leave to appeal to the Divisional Court was denied, but the court held that the plaintiffs must satisfy the *Chadha* requirements.[26]

In *Fanshawe v LG Phillips LCD Co*, the court likewise followed *Chadha*.[27] Leave to appeal certification was granted on the basis that there was uncertainty in the law regarding indirect purchaser claims.[28] Although the Supreme Court of Canada has since provided clarity in the law on this point, as of the time of writing, the defendants are continuing to pursue the appeal.[29]

b) British Columbia

In British Columbia, the courts have declined to apply *Chadha*. Instead, they have followed *Knight*, which held that statistical evidence can be used concurrently to prove fact of loss and quantum of damages.[30]

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21 *Quizno's* CA, above note 19 at para 43.
22 *Ibid* at para 49.
23 2007 ONCA 334, leave to appeal to SCC refused, [2007] SCCA No 346 [*Markson*].
24 2007 ONCA 781, leave to appeal to SCC refused, [2008] SCCA No 15 [*Cassano*].
25 *Irving*, above note *, at the beginning of this article, at para 118.
26 *Irving* 2, above note *, at the beginning of this article, at para 66.
27 2011 ONSC 2484 at paras 50–57 [*Fanshawe*].
28 2011 ONSC 6645 at paras 11–12.
29 The appeal will likely be heard in the fall of 2014.
30 *Knight*, above note 3.

In *Pro-Sys Consultants Ltd v Infineon Technologies AG*,[31] the plaintiff asserted a tort claim for civil conspiracy to fix prices and intentional interference with economic interests, damages pursuant to section 36 of the *Competition Act*,[32] and restitutionary awards in unjust enrichment, constructive trust, and waiver of tort. The British Columbia Court of Appeal overturned the certification judge's decision denying certification. The Court of Appeal held that *Chadha* was not the relevant authority in British Columbia.[33]

The Court of Appeal indicated that the plaintiff might be able to establish that the defendants benefited from their wrongful conduct and thus prove liability without resort to economic evidence. Three defendants had pleaded guilty in the United States to price-fixing, and their plea agreements indicated that the amount of the fine was calculated based on the gross pecuniary gain derived from the criminal conduct. Proof of these admissions would establish liability in the restitutionary actions.[34]

The plaintiff also argued that it could use common statistical evidence to prove that the defendants had obtained a wrongful gain from their unlawful conduct. The plaintiff proposed to use economic evidence to show that the defendants had benefited from the conspiracy, thus establishing liability and, at the same time, the amount of the benefit.[35] Moreover, the plaintiff's expert proposed to use a multiple regression analysis to establish pass-through. The Court of Appeal held that subjecting the expert evidence to rigorous scrutiny at the certification stage was "fundamentally unfair," when the plaintiff had not had discoveries and an adequate opportunity to marshal the evidence required by the expert for his analysis.[36] At the certification stage, the plaintiff is required to show only a "credible or plausible methodology" for establishing pass-through and aggregate damages. The evidence of the plaintiff's expert satisfied this low threshold.[37]

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31 *Infineon* SC, above note 2.

32 Above note 20.

33 *Infineon* CA, above note 2 at para 40.

34 *Ibid* at para 33.

35 *Ibid* at para 34.

36 *Ibid* at para 67.

37 *Ibid* at paras 67–68. As the Court of Appeal's reasons had focused largely on the restitutionary claims, clarification was sought on the terms of the certification order. At that time, the Court of Appeal confirmed that the common issues relating to the tort of conspiracy and interference with economic interests, and damages pursuant to s 36 of the *Competition Act* were also certified: *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2010 BCCA 91.

In *Microsoft* SC, the British Columbia Supreme Court held that the Court of Appeal's findings in *Knight* sanctioned the use of economic and statistical evidence to determine the benefit obtained by the defendants from their wrongful acts.[38] The court concluded that the plaintiffs' expert had presented a plausible methodology for proving class-wide loss and found it unnecessary to address the critiques raised by the defendants' expert.[39] In *Sun-Rype* SC, the court did not engage in a debate regarding the authoritativeness of *Chadha* or *Markson*.[40] The plaintiffs' demonstration of a credible and plausible methodology was found to be sufficient to meet the certification criteria. However, both certification decisions were overturned on appeal.

3) The Court of Appeal Decisions Underlying the New Trilogy

The new trilogy arose from two cases in British Columbia (*Sun-Rype* and *Microsoft*) and one case in Quebec (*Option consommateurs*). The court of appeal decisions focused largely on the issue of whether indirect purchasers have a cause of action.

Sun-Rype relates to an alleged price-fixing conspiracy in the market for high fructose corn syrup, a sweetener used in various food products and soft drinks. The action was certified as a class proceeding on behalf of both direct and indirect purchasers of high fructose corn syrup.[41] The British Columbia Court of Appeal partially overturned certification, holding that indirect purchasers do not have a cause of action.[42]

The majority held that defendants are not able to rely on the passing-on defence.[43] Interestingly, this point had been conceded by defence counsel, which we believe was a first. The majority found that as the passing-on defence is not recognized in law, the fact that some of the overcharge was passed on cannot be relevant to establishing a cause of action.[44] Direct purchasers should be entitled to the whole of the overcharge regardless of pass-on in the same way as if they were the only plaintiffs in the action.[45] Anything less would deprive them of what they would legally be

38 *Microsoft* SC, above note 5 at para 116.
39 *Ibid* at para 164.
40 *Sun-Rype* SC, above note 5 at paras 166–67.
41 *Sun-Rype* SC, above note 5.
42 *Sun-Rype* CA, above note 5.
43 *Ibid* at para 76.
44 *Ibid* at para 83.
45 *Ibid* at para 84.

entitled to recover.[46] The majority expressed concerns that allowing indirect purchaser claims would create the potential of double recovery (something the law will not sanction).[47]

The minority held that the certification judge had correctly drawn a distinction between the passing-on defence and the fact of pass-through.[48] The minority agreed with the certification judge's reasoning on this point:

- Pass-through could occur in fact even if the court does not allow defendants to use this fact as a defence.[49]
- Defendants face potential liability to the class as a whole. At the certification stage, it does not matter which part of the class ended up with the loss. The focus is on how much was the wrongful gain. If both direct and indirect purchasers in the class are included and if econometric methods to determine the total amount overcharged by the defendants to the class as a whole are used, there will be no possibility of overrecovery.[50]
- The need to show a "credible and plausible methodology" for calculating pass-through (as required in recent Canadian jurisprudence) eliminates the concern about the evidentiary complexity of calculating pass-through.[51]

In *Microsoft*, the plaintiffs alleged various anticompetitive acts that had allowed the defendants to overcharge for their products. The action had been certified as a class proceeding on behalf of retail purchasers of Microsoft products.[52] The appeal was decided in conjunction with *Sun-Rype*.

For the same reasons expressed in *Sun-Rype*, the majority of the Court of Appeal held that indirect purchasers do not have a cause of action.[53] The minority decision held that indirect purchasers have a claim in a competition law case.[54] The plaintiffs alleged that Microsoft had combined with original equipment manufacturers (OEMs) to achieve the overcharges. The minority decision held that, on the facts of this case, if the court was to give effect to the argument that indirect purchasers have no claim, the OEMs who are alleged to have participated in the unlawful activities

46 *Ibid*.
47 *Ibid* at para 82.
48 *Ibid* at para 21.
49 *Ibid* at para 53.
50 *Ibid*.
51 *Ibid* at para 25.
52 *Microsoft* SC, above note 5.
53 *Microsoft* CA, above note 5 at paras 72–78.
54 *Ibid* at para 29.

will have valid claims, and the innocent victims will have no means of recovery.[55]

In *Option consommateurs*, the plaintiff sought to certify a class on behalf of both direct and indirect purchasers of DRAM (a semiconductor memory chip). The plaintiff sought recovery on behalf of direct and indirect purchasers in an amount equal to the aggregate amount of the unlawful overcharge.[56] In holding that indirect purchasers have a cause of action, the Quebec Court of Appeal agreed with the approach of the minority in *Sun-Rype*.[57] The Court of Appeal held that there was no risk of double recovery on the facts — the plaintiff sought a single, aggregate loss in an amount equal to the total overcharge.[58] The court stated that the complexity of proving pass-through is an evidentiary issue; the preclusion of the passing-on defence does not mean, as a matter of fact, that pass-on did not occur.[59] If the defendants had faced an independent action by direct purchasers and had paid to them the full amount of the overcharge notwithstanding that pass-on had occurred, the direct purchasers would have been unjustly enriched at the expense of the indirect purchasers.[60] Where direct and indirect purchasers join to claim a single amount as the total of the unlawful overcharge, there is neither the risk of double recovery nor the risk of unjust enrichment.[61]

C. THE NEW TRILOGY

The 2013 trilogy marks the first time the Supreme Court of Canada has considered certification in a price-fixing case. These three decisions represent the most significant decisions the Supreme Court has issued in the area of class actions since the initial trilogy — *Western Canadian Shopping Centres Inc v Dutton*,[62] *Hollick v Toronto (City)*,[63] and *Rumley v British Columbia*[64] — in 2001. The 2013 decisions will not only shape the framework of future price-fixing cases but also impact all future certification motions.

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55 *Ibid* at para 30.
56 *Option consommateurs* CS, above note 6.
57 *Option consommateurs* CA, above note 6 at para 109.
58 *Ibid*.
59 *Ibid*.
60 *Ibid* at para 113.
61 *Ibid* at para 114.
62 2001 SCC 46.
63 2001 SCC 68 [*Hollick*].
64 2001 SCC 69.

1) The Passing-On Defence Is Put to Rest

The passing-on defence is premised on the theory that a direct purchaser's recovery should be limited to the extent that the direct purchaser was able to pass on its losses to its customers by charging a higher price.

In a series of decisions not dealing with class actions that led up to the trilogy, the Supreme Court of Canada considered the passing-on defence[65] and concluded that the defence is not valid at law. However, as the Supreme Court had not previously ruled on this issue in the tort context, defendants continued to rely on the passing-on defence and the possibility that it exists in an effort to defeat certification and avoid liability. The availability of the passing-on defence in the price-fixing context was squarely before the Court in the appeals pending in *Sun-Rype* and *Microsoft*.

The Supreme Court rejected the passing-on defence in its entirety, holding that there was "no principled reason to reject the defence in one context but not another."[66] The Court rejected the defence on three grounds:

1) The Supreme Court's jurisprudence supports the broader rejection of the defence. This jurisprudence indicates that plaintiffs and the courts should not be burdened with the task of following every transaction to the final result.[67]
2) As held in *Kingstreet*, a rejection of the defence is in keeping with basic restitutionary principles. Rejecting the defence "helps to ensure that wrongdoers are not able to retain their ill-gotten gains simply because it would be difficult to ascertain the precise extent of the harm." Alleged price fixers should not be shielded from liability simply because of the complexities of tracing the alleged overcharge through the distribution chain.[68]
3) There is support in the academic commentary for a broad rejection of the defence.[69]

65 *Air Canada v British Columbia*, [1989] 1 SCR 1161; *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38; *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*].
66 *Microsoft* SCC, above note 5 at para 29.
67 *Ibid* at para 25.
68 *Ibid* at para 27.
69 *Ibid* at paras 25–29.

Although previous courts had held that the availability of the passing-on defence was not a barrier to certification,[70] the Supreme Court's definitive rejection of the defence should serve to eliminate such arguments and simplify the certification hearing. In direct purchaser–only cases, there will be no need to address the issue of passing-on. In cases where only the top layers of the distribution chain are included, the analysis of pass-through will be simplified. An example of this is the recent polyether-polyols decision, which was decided after the trilogy.[71] The case was brought on behalf of purchasers of polyether polyols only, and not purchasers of downstream products containing polyether polyols.[72] In that case, the court relied entirely on the Supreme Court's ruling in *Microsoft* and rejected the defendants' pass-through arguments outright.[73]

Although direct purchaser cases are simpler to prove, in recognition that indirect purchasers often bear a substantial portion of the alleged overcharge we expect that most cases will continue to be pursued on behalf of both direct and indirect purchasers. The decision whether to include all downstream purchasers will likely depend on the nature of the product and, specifically, whether it remains identifiable as it passes through the distribution chain.

2) Indirect Purchasers Have a Cause of Action in a Competition Law Case

Perhaps the most contentious issue before the Supreme Court of Canada was whether indirect purchasers have a cause of action in a price-fixing conspiracy case. The defendants made a number of arguments, all of which were rejected by the Supreme Court.

a) The "Necessary Corollary" Argument

The defendants argued that because passing-on cannot be used defensively, it should not be used offensively either. The Supreme Court rejected this argument, holding that "symmetry for its own sake without adequate justification cannot support the 'necessary corollary' argument."[74]

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70 See *Axiom* SCJ, above note 15 at para 131; *Irving*, above note *, at the beginning of this article, at paras 145–50.

71 *Crosslink*, above note 10.

72 *Ibid* at para 2.

73 *Ibid* at paras 101 and 103.

74 *Microsoft* SCC, above note 5 at para 34.

b) The "Double Recovery" Argument

The defendants argued that allowing indirect purchaser claims exposes them to possible double liability. The Supreme Court was not concerned with the spectre of multiple recovery on the basis that the risk can be managed by the courts. The Court accepted the reasoning of Brennan J, dissenting in *Illinois Brick Co v Illinois*,[75] that the risk of overlapping recovery exists only where additional suits are filed after damages have been awarded or if separate direct and indirect purchaser actions are pending at the same time.[76] The complexity of class actions and the short two-year limitation period in Canada mitigate the first risk. If parallel class actions by direct and indirect purchasers are pending at the same time, the defendants can bring such evidence before the trial judge, who will then manage this second risk.[77] Likewise, if a defendant presents evidence of parallel lawsuits in other jurisdictions that could result in multiple recovery, the court may deny the claim or modify the damages award.[78] In *Sun-Rype*, this was a live issue — the defendants pointed to settlements achieved in the United States with direct purchasers that they asserted overlapped with the claims of indirect purchasers in Canada. The Supreme Court remained confident in the court's ability to avoid duplicative recovery.[79]

This aspect of the decision raises an issue for future determination with respect to the nature of evidence trial judges will require to deny the claim or modify the damages award. As a matter of policy, it could be argued that where the defendants have engaged in unlawful conduct, the primary concern should be compensating the innocent victim, ahead of avoiding the possibility of double payment by the defendants.

c) The "Remoteness and Complexity" Argument

The defendants in *Microsoft* and *Option consommateurs* argued that the remoteness of the overcharge and complexity of proving loss create serious

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75 431 US 720 (1977) at 762. In this case, the US Supreme Court considered pass-on in the context of price-fixing and held that since passing-on cannot be used defensively, it also cannot be used offensively by indirect purchasers. Accordingly, indirect purchasers did not have a cause of action in price-fixing cases. The decision attracted considerable criticism; several states have since enacted legislation permitting indirect purchaser claims.

76 *Microsoft* SCC, above note 5 at para 37.

77 *Ibid* at paras 38–39.

78 *Ibid* at para 40; *Sun-Rype* SCC, above note 8 at para 21.

79 *Sun-Rype* SCC, above note 8 at paras 18 and 21.

difficulties of proof, which burden the court system.[80] The Supreme Court rejected this argument, holding that indirect purchaser actions will often involve "large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task."[81] However, these complexities should not foreclose indirect purchasers' having an opportunity to make their case.[82]

d) The "Deterrence and Compensation" Argument

The Supreme Court considered whether the offensive use of passing-on frustrates the enforcement of antitrust laws, thus reducing deterrence.[83] The defendants in *Sun-Rype* claimed that previous awards to indirect purchasers had been distributed cy près and that cy près awards do not advance deterrence, because any deterrence achieved could be equally achieved by a claim made solely on behalf of direct purchasers.[84] The defendants also argued that the distribution of an award to a not-for-profit entity would frustrate the compensation goal of Canadian competition law.[85] Again, the Supreme Court rejected the defendants' argument. Unlike the passing-on defence, the offensive use of passing-on creates "little danger" that the alleged wrongdoer will avoid liability and frustrate deterrence efforts.[86] Direct purchasers might be reluctant to pursue claims for "fear of jeopardizing a valuable business relationship."[87] In these circumstances, indirect purchasers might be the only means of deterrence.[88]

While cy près is not the ideal distribution, cy près distributions are contemplated in the legislation and allow the court to distribute the money to an appropriate substitute for the class. Although the compensation objective is not furthered by a cy près distribution, the deterrence objective is not reduced by the possibility of a cy près distribution.[89]

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80 *Microsoft* SCC, above note 5 at para 42; *Option consommateurs* SCC, above note 6 at para 71.
81 *Microsoft* SCC, above note 5 at para 44.
82 *Ibid* at paras 44–45.
83 *Ibid* at para 46.
84 *Sun-Rype* SCC, above note 5 at para 24.
85 *Ibid*.
86 *Microsoft* SCC, above note 5 at para 48.
87 *Ibid* at para 49.
88 *Ibid*.
89 *Sun-Rype* SCC, above note 5 at paras 25–27.

e) Restitutionary Principles

The Supreme Court concluded that allowing indirect purchaser claims is consistent with the remediation objective in that it allows the parties who suffered actual harm to claim.[90] Absent a claim by indirect purchasers, direct purchasers would be able to recover the entire overcharge (because defendants cannot rely on the passing-on defence). However, this does not mean that direct purchasers are entitled to the entire overcharge. Where indirect purchasers are able to demonstrate that the unlawful overcharge was passed on, they will be entitled to claim that portion of the overcharge.[91]

f) The "All-Inclusive" Model

In *Sun-Rype*, the Supreme Court endorsed an all-inclusive model whereby the direct and indirect purchasers are included in the same class. The evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, which is then shared among the direct and indirect purchasers. To the extent that there is a conflict between these two groups as to how the aggregate amount is to be distributed, this is not relevant to the defendants and is not a basis for denying indirect purchasers the right to bring an action.[92] This all-inclusive model has been implemented in the settlement context and endorsed by other Canadian courts.

In the settlement context, claims of indirect purchasers are typically resolved in tandem with the claims of direct purchasers. The settling defendants will consent to certification for settlement purposes of a broader class (generally consisting of all purchasers of the price-fixed product, including manufacturers, distributors, intermediaries, and end-users) to achieve a more complete release.[93] The settlement proceeds are distributed to direct and indirect purchasers based on an estimate of the extent to which the alleged overcharge has been passed through the distribution chain. Various mechanisms, including expert economic evidence and mediations, have been used to determine the allocation of settlement proceeds between different categories of purchasers.

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90 *Microsoft* SCC, above note 5 at para 50.

91 *Sun-Rype* SCC, above note 5 at para 23.

92 *Ibid* at paras 19–20.

93 See, for example, *Alfresh Beverages Canada Corp v Hoechst AG et al* (2002), 16 CPC (5th) 301 (Ont SCJ); *Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd* (2005), 74 OR (3d) 758 (SCJ); *Stone Paradise Inc v Bayer Inc* (16 November 2005), London 45604CP (Ont SCJ).

In those Canadian cases that have certified claims on behalf of direct and indirect purchasers, the courts have accepted the plaintiffs' approach of determining the global damages figure (in an amount equal to the total unlawful overcharge) and then allocating damages among the different levels of purchasers based on the extent to which the overcharge was passed through the distribution chain. The plaintiffs in these cases submitted expert evidence to the effect that pass-through can be measured using a regression analysis.[94]

The all-inclusive approach has a number of benefits:

Avoidance of multiplicity of proceedings: Multiple proceedings create a host of problems: defendants are forced to undergo duplicative and wasteful litigation, judicial resources are wasted, there is a risk of inconsistent findings, and there is potential for duplicative damages.

Ensuring recovery by those injured: Allowing both direct and indirect purchasers to claim through a single proceeding will ensure that all those injured by the unlawful conspiracy are compensated for their losses.

Avoidance of a windfall to direct purchasers: In certain circumstances, direct purchasers will only absorb a small part of the illegal overcharge. For example, where the direct purchaser is a distributor who resells the price-fixed product without any further processing, the direct purchaser will be able to pass on much of the overcharge to its customers. Allowing these direct purchasers to claim the full overcharge results in a windfall for the direct purchasers while leaving those persons injured by the alleged conspiracy entirely without compensation.

Encouraging settlement: Defendants can resolve all claims as part of a single, global settlement, negotiating with a single set of counsel and seeking court approval from a single court.

3) "Some Basis in Fact" Test Affirmed

The Supreme Court of Canada affirmed the "some basis in fact" standard of proof established in *Hollick*.[95] At certification, the issue is not whether there is "some basis in fact" for the claim itself but rather "some basis in fact" that the certification requirements (aside from the cause of

94 See, for example, *Irving*, above note *, at the beginning of this article, at para 125; *Infineon* CA, above note 2 at para 51; *Fanshawe*, above note 27 at paras 33 and 37.

95 *Hollick*, above note 63 at para 25; *Microsoft* SCC, above note 5 at paras 99–105.

action requirement) are met. The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at certification the court is "ill-equipped" to resolve conflicts in the evidence or engage in "finely calibrated assessments of evidentiary weight."[96] The Supreme Court rejected the defendants' position that the standard of proof should be on a "balance of probabilities." The Court also rejected the US approach of engaging in a robust analysis of the merits of the action. Certification is not a determination of the merits, and the outcome of the certification motion is not predictive of the ultimate outcome of the common issues trial.[97]

The low evidentiary burden at certification helps to promote access to justice and keep costs of pursuing a case to certification more reasonable. As it stands, considerable resources are required to pursue a case to the certification stage. Increasing this burden on plaintiffs would reduce the number of cases brought and the number of law firms capable of financing litigation of this sort. The courts have recognized that the objectives of the class proceeding legislation — judicial economy, access to justice, and behaviour modification — are dependent, in part, upon counsel's willingness to take on class proceedings.[98]

While the main purposes of class proceeding legislation are judicial economy, access to justice, and behaviour modification, another underlying policy "is to reach these goals in a way that is fair to defendants who are exposed to the aggregate claims."[99] In this regard, certification is "intended to screen claims . . . at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation."[100] Where a defendant had relatively little involvement in the alleged wrongdoing, class proceeding legislation provides "numerous tools to the case management judge to manage the process to address some of this concern."[101] Increasing the evidentiary requirements at the certification stage or changing the rules to provide for pre-certification discovery would only drive up the expenses to both defendants and plaintiffs in arguing certification. Canadian courts have recently commented on the

96 *Microsoft* SCC, above note 5 at para 102.
97 *Ibid* at para 105.
98 See *Parsons v Canadian Red Cross Society* (2000), 49 OR (3d) 281 at para 13 (SCJ); *Kranjcec v Ontario* (2006), 33 CPC (6th) 290 at para 24 (Ont SCJ).
99 *Lavier v MyTravel Canada Holidays Inc,* 2008 CanLII 44697 at para 15 (Ont SCJ).
100 *Robertson v Thomson Corp* (1999), 43 OR (3d) 389 at para 4 (Gen Div).
101 *2038724 Ontario Ltd v Quizno's Canada Restaurant Corporation* (2009), 96 OR (3d) 252 at para 146 (Div Ct).

costs of the certification motion getting out of control.[102] A higher burden at the certification stage would only exacerbate this issue.

4) Expert Evidence in Indirect Purchaser Class Actions

At the certification stage, the plaintiff is not tasked with showing actual loss to the class; however, the plaintiff must "demonstrate that there is a methodology capable of doing so."[103] In an indirect purchaser action, this means that the methodology must be capable of establishing that the overcharge was passed through to the indirect purchaser level of the distribution chain.[104] The expert methodology "must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement."[105] This requires that the methodology offer "a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at trial of the common issues, there is a means to demonstrate that it is common to the class (i.e. that passing on has occurred)."[106] The methodology "cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case . . . ."[107] There must be "some evidence of the availability of the data to which the methodology is to be applied."[108]

Given the ruling that the court is not to engage in a weighing of competing evidence, it is possible (albeit unlikely) that defendants will choose not to submit their own expert evidence. There has not yet been a case where the defendants' expert was preferred, and, given the current state of the law, it is difficult to see how that would happen.

The Supreme Court decisions do not require evidence to establish that each individual class member suffered harm. It is sufficient to show that harm was suffered at each level of the distribution chain.[109]

Another contentious point will likely be the evidence required to show the availability of data. We expect that defendants will focus their attention on this issue. In most cases, defendants will be an important source of data. For reporting and business reasons, companies will typ-

102 *Crisante v DePuy Orthopaedics*, 2013 ONSC 6351 at para 1; *Westminster Mutual Insurance Company v TYC Brother Industrial Co* (6 March 2014 and corrigendum 11 March 2014), London 62732CP at para 5 (Ont SCJ) [*Westminster*].
103 *Microsoft* SCC, above note 5 at para 115.
104 *Ibid*.
105 *Ibid* at para 118.
106 *Ibid*.
107 *Ibid*.
108 *Ibid*.
109 *Ibid* at para 115.

ically retain costs and sales data and, in some circumstances, will track downstream prices. Another source of data might be industry reporting or government data. To date, no competition law case has failed at the certification stage due to concerns that the requisite data might not be available.

The Supreme Court rejected the "robust or rigorous" standard adopted in the United States, noting that in Canada, unlike the United States, pre-certification discovery does not occur as a matter of right.[110] Had the Supreme Court adopted this approach, the costs and complexity of certification motions would have been driven up.

In Quebec, the evidence required at the authorization (certification) stage is not as extensive, and expert evidence is not a requirement. The evidentiary requirement at the authorization stage is that of "establishing an arguable case."[111] Expert evidence is not the norm at the authorization stage, and a requirement that applicants adduce such evidence and advance a sophisticated methodology capable of demonstrating pass-through would be inconsistent with the requirements under article 1003 of the *Code of Civil Procedure*.[112] The allegations of pass-through, coupled with guilty pleas and settlements reached with antitrust authorities in the United States and Europe attesting to an international conspiracy, are sufficient to support an inference that class members "arguably" suffered the alleged injury.[113]

Under the current legislation, companies with more than fifty employees cannot be included as plaintiffs in a Quebec class action.[114] The National Assembly of Quebec recently sanctioned Bill 28, *An Act to establish the new Code of Civil Procedure*.[115] The amendments, which are expected to come into force in late 2015, eliminate the fifty-employee exclusion. Once these amendments are effective, we could see plaintiffs taking advantage of the lower evidentiary requirements in Quebec, and more authorization motions being advanced in Quebec.

110 *Ibid* at para 119.
111 *Option consommateurs* SCC, above note 6 at para 125.
112 *Ibid* at para 128.
113 *Ibid* at para 134.
114 Art 999 CCP.
115 1st Sess, 40th Leg, Quebec, 2014, art 571 (assented to 21 February 2014), SQ 2014, c 1.

5) Aggregate Damages Provisions

One of the most contentious issues in recent years has been the impact of three cases not dealing with competition law — in Ontario, *Markson*[116] and *Cassano*[117] and, in British Columbia, *Knight*.[118] Plaintiffs in Ontario relied on *Markson* and *Cassano* to argue that the aggregate damages provisions were available upon a finding of potential liability. In British Columbia, plaintiffs relied on *Knight* to argue that the aggregate damages provisions could be relied upon to prove damages and fact of harm concurrently. The Supreme Court likely put this debate to rest, holding that a finding of liability is required before resorting to the aggregate damages provisions. The question whether aggregate damages are available is a proper common issue. However, this common issue is only determined after a finding of liability has been rendered. The ultimate decision as to whether the aggregate damages are available rests with the common issues trial judge.[119]

6) Other Issues

The Supreme Court commented on a number of other issues that, while not the main focus of the appeals, will impact price-fixing cases going forward.

a) Constructive Trust

The Supreme Court struck the constructive trust claim on the basis that the claim did not show a link to specific property or explain why a monetary award would be insufficient. These claims had previously been successfully pursued in *Infineon* CA.[120]

b) Identifiable Class Requirement and the "Substitution Problem"

In *Sun-Rype*, certification was denied because it failed to meet the identifiable class requirement. The evidence before the Court was that, during the relevant period, high fructose corn syrup (the allegedly price-fixed product) had been used interchangeably with liquid sugar; in many cases, the labels did not reflect which sweetener had been used, and the representative plaintiff did not know whether the products she had purchased

116 Above note 23.
117 Above note 24.
118 Above note 3.
119 *Microsoft* SCC, above note 5 at para 134.
120 *Infineon* CA, above note 2.

during the class period actually contained high fructose corn syrup. The majority held that the plaintiff had not provided "some basis in fact" that at least two class members can be identified.[121]

The minority held that the record provided sufficient evidence to establish the existence of a class. Direct purchasers of high fructose corn syrup had used it extensively in products that had been widely sold to retailers and consumers. The class proceeding legislation creates a remedy that recognizes damages to the class as a whole, even where proof of individual class members' damages is impractical.[122]

This aspect of the decision might result in plaintiffs' leading more evidence regarding identification of the price-fixed product, particularly where the price-fixed product has been incorporated into other products as part of the distribution chain. Some evidence about the identifiable class requirement might originate from defendants or experts. For example, in *Crosslink*, the court noted that there was a market for the relevant product in Canada, therefore implying that there were other purchasers of the product besides the plaintiff. The court also observed that the defendants' customer list disclosed ninety-eight direct purchaser customers.[123] Expert evidence might be used to show that there was no substitute product available, meaning that class members necessarily would have purchased the price-fixed product.

c) Jurisdiction

In early price-fixing cases, defendants opposed jurisdiction on the basis that the unlawful conduct occurred abroad.[124] These arguments were rejected, and for several years no new additional jurisdictional challenges were asserted. However, in recent years, there has been a resurgence in objections to jurisdiction of the British Columbia and Ontario courts.[125] It is likely that the Supreme Court has put these challenges to rest. In *Sun-Rype*, the Court held that it was not "plain and obvious" that the Canadian courts do not have jurisdiction over the alleged anticompetitive acts. The conduct, while perpetrated by foreign defendants, allegedly involved the defendants' Canadian subsidiaries acting as their agents. Moreover, there is some suggestion in Canadian law that Canadian courts

121 *Sun-Rype* SCC, above note 5 at paras 58–69.

122 *Ibid* at paras 105 and 107.

123 *Crosslink*, above note 10 at para 96.

124 See *VitaPharm Canada Ltd v F Hoffman-La Roche Ltd* (2002), 20 CPC (5th) 351 (Ont SCJ).

125 See *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, 2012 ONSC 4425; *Fairhurst v De Beers Canada Inc*, 2012 BCCA 257.

have jurisdiction in situations where the defendants conduct business in Canada, make sales in Canada, and conspire to fix prices of products sold in Canada.[126]

In *Option consommateurs*, one of the central issues was jurisdiction. The Supreme Court concluded, relying on article 3148 of the *Civil Code of Quebec*, that the Quebec courts had jurisdiction.[127] That article defines the scope of jurisdiction under private international law to include cases where a fault was committed in Quebec, damage was suffered in Quebec, an injurious act occurred in Quebec, or one of the obligations arising from a contract was performed in Quebec. In *Option consommateurs*, economic damage was suffered, not merely recorded, in Quebec. It is an independent connecting factor, and there is no need for the alleged conspiracy to have occurred in Quebec. Moreover, the Quebec *Consumer Protection Act* defines the contract at issue as a "distance contract"[128] and provides that the contract is deemed to be entered into at the address of the consumer, which was in Quebec.[129]

The Supreme Court recently granted leave to appeal in *Meeking v Cash Store Inc*.[130] This case raises issues about the certification of national classes and what conditions must be met for a provincial court to enforce a class action judgment issued by a court in another province.

D. POST-TRILOGY DECISIONS

There have been three competition law certification decisions issued since the trilogy: *Crosslink*,[131] *Watson v Bank of America Corporation*,[132] and *Fairhurst v Anglo American PLC*.[133] In *Crosslink*, which had been argued before the Supreme Court ruled in the trilogy but was decided after, Rady J held that *Microsoft* underscored that the motion judge is not to resolve conflicts between experts. She stated that it would be "exceedingly difficult to do so unless the inadequacy of the expert's opinion were patently obvious."[134] At the certification stage, the court is ill-equipped to resolve conflicts, particularly on the basis of a paper record and without

126 See *Sun-Rype* SCC, above note 5 at paras 46–47.
127 *Option consommateurs* SCC, above note 6 at para 43.
128 RSQ, c P-40.1, ss 54.1 & 54.2.
129 *Option consommateurs* SCC, above note 6 at paras 45–49.
130 2013 MBCA 81, leave to appeal to SCC granted, [2013] SCCA No 443.
131 Above note 10.
132 2014 BCSC 532 [*Watson*].
133 2014 BCSC 2270 [*Fairhurst*].
134 *Crosslink*, above note 10 at para 110.

the benefit of live testimony. Justice Rady considered the meaning of the word "plausible" as defined in the *Concise Oxford English Dictionary*: "apparently reasonable or probable, without being necessarily so."[135] In her words, "Put another way, the expert evidence raises a triable issue."[136] Justice Rady also held that in a claim for tortious economic loss it is not necessary to show a methodology that can demonstrate harm to all class members. It is sufficient that harm can be shown to have been suffered by some class members.[137]

In *Watson*, a contentious issue was whether a breach of the *Competition Act* can be relied upon as the "unlawful act" for the purposes of the tort of conspiracy.[138] In Ontario, the courts have held that a breach of the *Competition Act* is an "unlawful act" for the purposes of the tort of conspiracy.[139] In *Wakelam v Wyeth Consumer Healthcare*, the British Columbia Court of Appeal held that the *Competition Act* is a complete code and cannot be relied upon as the "unlawful act" for the purposes of a tort claim.[140] The certification judge in *Watson*, noting the binding nature of *Wakelam*, similarly held that the *Competition Act* is a complete code.[141] The plaintiff's claims under the *Competition Act* could not constitute the foundation for other causes of action; the claim in "unlawful means" conspiracy must fail because it was based exclusively on a breach of the *Competition Act*.[142] Although successful on certification, the plaintiff has cross-appealed in respect of this issue as this finding is contrary to previous jurisprudence. While the claim in conspiracy to injure was certified, the certification judge noted the difficulty that the plaintiff might have in establishing such a claim.[143]

When the Supreme Court decided *Microsoft* SCC, its decision in *AI Enterprises Ltd v Bram Enterprises Ltd*,[144] which focused on the tort of intentional interference with economic interests, was under reserve. In *Microsoft* SCC, the Court held that it was open to the defendant to seek

135 *Ibid*.
136 *Ibid*.
137 *Ibid* at para 66(8).
138 Above note 132.
139 See *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp* (2009), 96 OR (3d) 252 at paras 76–81 (Div Ct), rev'g (2008), 89 OR (3d) 252 (SCJ), aff'd 2010 ONCA 466.
140 2014 BCCA 36 at para 90 [*Wakelam*], leave to appeal to SCC refused, [2014] SCCA No 125.
141 Above note 132 at paras 172 and 189.
142 *Ibid* at paras 189–90.
143 *Ibid* at paras 192 & 193.
144 2014 SCC 12 [*Bram*].

the motion court's directions with respect to the causes of action in unlawful means conspiracy and intentional interference with economic interests following the Court's decision in *Bram*.[145] In *Bram*, which was decided one day after *Wakelam*, the Court clarified the bounds of the tort of intentional interference with economic interests, which it termed the "unlawful means tort."[146] The Court held that a statutory breach could not provide the basis for an unlawful means tort.[147] Referencing its previous decisions in *Cement LaFarge v BC Lightweight Aggregate*[148] and *Hunt v Carey Canada Inc*,[149] the Court held that a statutory breach could supply the unlawful element of the tort of unlawful means conspiracy.[150] The Court recognized that the unlawful means tort and the tort of unlawful means conspiracy developed separately and was careful to limit its findings to the unlawful means tort.[151]

Subsequently, the defendants in *Microsoft* sought to strike portions of the statement of claim based on the findings in *Bram* and *Wakelam*.[152] The defendants argued that *Wakelam* foreclosed a tort claim based on breaches of the *Competition Act*.[153] The motion court held that *Wakelam* dealt only with statutory breaches and the restitutionary remedies arising therefrom.[154] Reliance on a statutory breach as the basis of unlawful means conspiracy was not before the court in *Wakelam*, and to the extent that *Wakelam* is interpreted as affecting tort claims, it would be in conflict with *Bram*.[155] In *Fairhurst*, the most recent competition law certification decision, the motion court adopted the findings in *Microsoft* SC2 with respect to the tort of unlawful means conspiracy.[156] While the plaintiff's claims for restitution, to the extent based on breaches of the *Competition Act*, were not viable, the plaintiff's claims in tort, which relied on the same alleged statutory breaches, were certified.[157]

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145 *Microsoft SCC*, above note 5 at para 83.
146 *Bram*, above note 144 at para 2.
147 *Ibid* at para 45.
148 [1983] 1 SCR 452.
149 [1990] 2 SCR 959.
150 *Bram*, above note 144 at paras 63–64.
151 *Ibid* at paras 68–69.
152 *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2014 BCSC 1280 at paras 1 and 3 [*Microsoft* SC2].
153 *Ibid* at para 54.
154 *Ibid* at para 56.
155 *Ibid* at paras 58–60.
156 *Fairhurst*, above note 133 at paras 14–15.
157 *Ibid* at para 15.

E. CONCLUSION

In some ways, the law with respect to certification in competition law cases has evolved substantially in just over a decade. In other ways, the law has come full circle. The Supreme Court has provided some welcome guidance on important matters in Canadian antitrust law. The Court closed the door on the passing-on defence and held open the door on indirect purchaser claims. The Court endorsed the approach of including all levels of purchasers in a single proceeding. This is the preferable system of redress. It permits all persons injured by anticompetitive conduct to recover for their losses without creating the potential for duplicative recovery and inconsistent findings. It also minimizes the burden on the judiciary.

The Supreme Court maintained the "some basis in fact" evidentiary threshold. In doing so, the Court has helped to keep the costs of the certification motion from spiralling even further out of control. In price-fixing conspiracy certification motions, it is not unusual for parties to spend hundreds of thousands of dollars on expert fees alone.

At the same time, the Supreme Court shut down any arguments that the aggregate damages provisions are available upon a finding of potential liability or can be used to concurrently prove fact of loss and aggregate damages. Accordingly, at the certification stage, plaintiffs will have to continue retaining experts to analyze the market and pass-through. This could preclude plaintiffs from bringing small cases, as the cost of litigation could exceed any recovery in the action. In one recent case, the court questioned whether this was what the legislature intended.[158] Accordingly, access to justice remains an ever-present concern for plaintiffs in these cases.

Without doubt, over the next decade, the law as it relates to competition law class actions will continue to evolve. We expect to see more competition law cases actively litigated beyond the certification stage, including at a common issues trial. We could also see more Supreme Court decisions — possibly one in *Watson*.

158 *Westminster*, above note 102 at para 5.