

THE CERTIFICATION OF COMPETITION-RELATED CLASS ACTIONS IN CANADA

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A. INTRODUCTION

Although the first class action legislation was enacted in Canada more than twenty-five years ago¹ and class proceedings are now a national phenomenon, Canadian courts still have not stated clearly the manner in which certification principles will be applied to class proceedings alleging antitrust violations. As the Court of Appeal for Ontario has stated, “the question of whether and how consumers will be able to use class actions to obtain relief from price fixing ... remains an open one in this jurisdiction.”²

The primary reason for the continuing uncertainty appears to be the limited opportunity the courts have had to develop this area of the law. To date, certification has been contested in only one intended Canadian class proceeding alleging an antitrust conspiracy³ and in one action based on allegations of price maintenance.⁴ In both cases certification was refused.

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1 *An Act Respecting the Class Action*, S.Q. 1978, c. 8, now Art. 1003, *Code of Civil Procedure*. See also *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *The Class Actions Act*, S.S. 2001, c. C-12.01; *Class Actions Act*, S.N.L. 2001, c. C-18.1; *The Class Proceedings Act*, C.C.S.M. c. C130; Federal Court Rules, 1998, SOR/1998-106 (as am. SOR/2002-417), Rules 299.1-299.42; *Class Proceedings Act*, S.A. 2003, c. C-16.5.

2 *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.) at para. 65, aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.), rev'g (1999), 45 O.R. (3d) 29 (S.C.J.), leave to appeal refused, [2003] 2 S.C.R. vi [*Chadha*].

3 *Ibid.*

4 *Price v. Panasonic Canada Inc.* (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.) [*Price*]. Certification has also been contested in proceedings involving allegations of misleading advertising contrary to s. 52(1) of the *Competition Act*: *Carom v.*

Several antitrust class actions have been certified for settlement purposes in recent years, but the decisions in these cases do little to illuminate the courts' approach in cases where defendants resist certification. While the judicial approach to certification of class proceedings generally continues to evolve, until the courts have had a further opportunity to explore the unique issues that arise when certification of an antitrust conspiracy class action is sought, it will remain unclear whether and under what circumstances claims arising out of alleged antitrust violations will be certified.

In this article we examine the Canadian experience with antitrust class proceedings to date and highlight some of the areas requiring additional judicial guidance. We explore the following issues:

- (1) the private right of action,⁵ under section 36 of the *Competition Act*,⁵ including the elements that must be proven to establish this cause of action, the evidentiary problems that frequently arise and the American "solutions" to these problems;
- (2) the developing Canadian approach to the unique challenges presented by antitrust class proceedings, analyzed through the framework of the certification criteria; and
- (3) the different standards that are applied and issues that arise when antitrust class actions are certified for settlement purposes.

B. SECTION 36 — THE PRIVATE RIGHT OF ACTION

Section 36(1) of the *Competition Act* confers a private right of action on victims of anti-competitive conduct. Under this section, any person who has suffered loss or damage as a result of the commission of one of the criminal offences in Part VI of the statute (or a failure to comply with an order of a court or the Competition Tribunal) may sue for and recover the actual loss suffered and the costs of investigating the misconduct and bringing the action.

Section 36 does not authorize claims for punitive damages or injunctive relief.⁶ As a result, claims under this section frequently are combined

Bre-X Minerals Ltd. (1998), 20 C.P.C. (4th) 163 (Ont. Gen. Div.). Developments under the misleading advertising provisions are beyond the scope of this article.

5 R.S.C. 1985, c. C-34.

6 See *Wong v. Sony of Canada Ltd.* (2001), 9 C.P.C. (5th) 122 (Ont. S.C.J.) at para.

with tort claims such as civil conspiracy and unlawful interference with economic interests that do allow for these and other remedies.

Conspiracy contrary to section 45(1) of the *Competition Act* is an offence under Part VI. This section makes it a criminal offence to conspire, combine, agree, or arrange with another to restrain or injure competition unduly. The provision is intended to prevent and punish cartel-like activity that confers market power on the members of the conspiracy, enabling them to fix prices, limit supplies, divide markets, or engage in other anti-competitive practices.⁷

The purpose of the *Competition Act* is “to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy ... and in order to provide consumers with competitive prices and product choices.”⁸ The private right of action under section 36 is designed to further this purpose by deterring antitrust violations and providing compensation for victims.⁹ Class proceedings seem naturally complementary to section 36: they are also intended both to compensate victims and to modify behaviour.¹⁰ But although several competition class actions have been commenced,¹¹ it is not clear that class actions will be an effective tool for the enforcement of competition legislation.

The problems presented by claims under section 36 arise from the requirements of the section itself. To maintain a private action under sec-

17 and *Price v. Panasonic Canada Inc.*, [2000] O.J. No. 3123 (S.C.J.) at paras. 10–11.

- 7 Stikeman Elliott LLP, eds., *Competition Act and Commentary*, 2004 ed. (Markham: LexisNexis Canada Inc., 2004) at 33. Other offences under Part VI giving rise to a private right of action include price discrimination and other illegal trade practices (section 50), false or misleading advertising (section 52(1)) and price maintenance (section 61). Unlike in the United States, which allows private actions to recover losses suffered due to monopolistic practices contrary to section 2 of the *Sherman Act*, 15 U.S.C. §§ 1–7, a private action may not be brought for abuse of dominant position in Canada.
- 8 *Competition Act*, above note 5, s. 1.1.
- 9 Gordon Kaiser, “The New Competition Law: Stage One” (1976) 1 *Can. Bus. L.J.* 147 at 192.
- 10 *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at 170 [Hollick].
- 11 See *Chadha*, above note 2; *Vitapharm Canada Ltd. v. F Hoffmann-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.); *Always Travel Inc. v. Air Canada*, [2003] F.C.J. No. 288 (T.D.); *Bona Foods Ltd. v. Ajinomoto U.S.A. Inc.* (2004), 2 C.P.C. (6th) 15 (Ont. S.C.J.) [*Bona Foods*]; *Mura v. Archer Daniels Midland Co.*, [2003] B.C.J. No. 1086 (S.C.) [*Mura*]; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.); *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*, [2001] O.J. No. 6028 (S.C.J.).

tion 36, a plaintiff must establish (1) an offence under the statute, and (2) loss or damage suffered as a result. Difficulties can arise under both of these elements.¹²

1) Proof of Commission of the Offence

One factor frustrating the growth of antitrust class proceedings may be the difficulties involved in establishing the commission of an offence where there has been no prior criminal conviction. In these circumstances, the plaintiff's burden of proof in a section 36 proceeding is higher than the civil standard of balance of probabilities, although somewhat lower than the criminal burden of beyond a reasonable doubt. The plaintiff must "offer substantial proof." The court has stated:

Since s. 36(1) is a remedial section providing a civil remedy for a very serious public crime which provides for a heavy penalty on conviction and where there has been no conviction of the defendant under s. 45(1) nor a prosecution commenced it is incumbent upon the plaintiff to offer substantial proof that the activity prohibited by s. 45(1) has, indeed, taken place.¹³

Section 36(2) of the *Competition Act* makes it easier for a plaintiff to succeed where there has been a prior criminal conviction. It creates a rebuttable presumption in civil litigation that an offence was committed:

... the record of proceedings in any court in which that person was convicted of an offence under Part VI ... is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI ... and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in an action.

12 These problems cannot be avoided simply by tacking on causes of action in tort to supplement the statutory claim under section 36. The torts of civil conspiracy and unlawful interference with economic interests also require that plaintiffs establish on a balance of probabilities both that the wrong occurred and that they have suffered loss or injury as a result of that wrong: *Chadha* (Div. Ct.), above note 2 at 542–43; *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 (C.A.) at 159, leave to appeal to S.C.C. refused (1998), 138 O.A.C. 197 (note) (S.C.C.).

13 *Janelle Pharmacy Ltd. v. Blue Cross of Atlantic Canada* (2003), 217 N.S.R. (2d) 50 (S.C.) at para. 97.

Not surprisingly, the majority of antitrust class actions commenced to date have followed criminal convictions, typically based on guilty pleas.

Given the advantage conferred on plaintiffs by section 36(2), efforts to contest liability by a defendant convicted of an offence under Part VI are unlikely to succeed. Arguably, however, in the case of a conviction following a plea, the more limited evidentiary record may allow the presumption to be rebutted if the defendant adduces “any” evidence to the contrary.¹⁴

In both of the competition-related class proceedings that have proceeded to contested certification motions, there had been no prior criminal conviction.¹⁵ In both, certification was refused. This reflects a pattern that is also apparent from a review of the antitrust class actions that recently have been certified for settlement purposes. Where there has been a prior conviction, class proceedings are more readily brought but are typically settled. Where there has not been a prior conviction in Canada, problems of proof seem to be deterring plaintiffs from commencing claims.

2) Proof of Loss or Damage

In order to succeed in a private action under the *Competition Act*, the plaintiff must also demonstrate actual loss suffered as a result of the defendant’s conduct. This element of section 36 poses a significant challenge for proposed antitrust class proceedings, in part because it must be met for each member of the class.

In proceedings under section 36, establishing that a loss was suffered and who it was suffered by can give rise to difficult issues of proof. Consumers, for example, may face significant hurdles in sustaining an action to recover a loss suffered as a result of an unlawful overcharge. Products may be distributed to consumers through different distribution channels, and many variables may influence the prices at which retailers sell products to consumers. In these circumstances, establishing the consequences of anti-competitive conduct, and particularly that an individual consumer paid an excessive price for a certain product, can be an extremely complicated undertaking.¹⁶

14 Simon V. Potter *et al.*, “The Perspective of Defence Counsel on the Interplay Between Civil Class Action Claims and Criminal Prosecutions” in *Annual Fall Conference on Competition Law 2000* (Ottawa: Juris Publishing, Inc., 2001) at 107.

15 *Chadha*, above note 2 and *Price*, above note 4.

16 *Price*, *ibid.*

The case law on conspiracy class actions, particularly those brought by classes made up in whole or in part of indirect purchasers, further highlights these evidentiary challenges. The plaintiff in a conspiracy class action typically alleges that the conspiracy resulted in higher, non-competitive prices. Where a claim is brought on behalf of indirect purchasers under section 36 of the *Competition Act*, the plaintiffs must establish on a balance of probabilities that they paid an overcharge resulting from the artificial price increase — that is, that the overcharge was not absorbed by direct purchasers, but passed on to them.¹⁷ A plaintiff who is an indirect purchaser therefore must: (1) trace the product through the distribution chain to establish that it purchased the product, a complex matter where the product was altered or used as an ingredient in another product at some point in the chain; (2) prove that the overcharge was passed on at every stage of the distribution chain; and (3) demonstrate that the loss resulting from the overcharge affected its stage of the distribution chain. To the extent that the price increase is absorbed along the distribution chain, the loss suffered by each subsequent indirect purchaser will be reduced accordingly, or even eliminated.¹⁸

In the United States, the Supreme Court has created rules intended to address these evidentiary difficulties. The combined effects of these rules are both to preclude indirect purchaser class actions and to concentrate the benefits of private actions in the hands of direct purchasers.

The first rule — that a direct purchaser may recover damages even if it passes on some or all of the overcharge — was established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,¹⁹ a treble-damages action under section 4 of the *Clayton Act*.²⁰ In this case, Hanover Shoe asserted that a shoe machinery manufacturer had engaged in monopolistic behaviour by refusing to sell it certain machines. Hanover Shoe sought in damages

17 Indirect purchasers are purchasers one or more steps removed in the chain of distribution from the persons alleged to have engaged in the anticompetitive conduct. For example, in a case involving an alleged conspiracy to fix prices between manufacturers or distributors of a product, the direct purchaser may be a wholesaler, who in turn sells to retailers, who in turn sell to end-users or consumers. In this example, both the retailers and the consumers would be indirect purchasers of the product.

18 Kent E. Thomson & Linda M. Plumpton, “The Certification of Class Proceedings Involving Antitrust Claims by Indirect Purchasers” in *Annual Fall Conference on Competition Law 2000* (Ottawa: Juris Publishing, Inc., 2001) at 76.

19 392 U.S. 481 (1968) [*Hanover Shoe*].

20 15 U.S.C. § 12–27.

the difference between the amount it had paid in machine rentals and the amount it would have paid had it been able to purchase the machines. The defendant argued in response that any loss suffered by Hanover Shoe had simply been passed on to its customers and that the company therefore had suffered “no legally cognizable injury.”²¹

The United States Supreme Court rejected this use of the “passing on” defence and held that a direct purchaser may recover damages even if it passes on some or all of the overcharge to customers in the form of higher prices. The court noted that the evidentiary hurdles associated with establishing that there was no injury to the direct purchaser as a result of the impugned activity would be insurmountable, and would complicate, lengthen, and generally overburden the litigation. The court further held that the passing on defence would reduce the effectiveness of private antitrust enforcement, since it would create a disincentive for direct purchasers to sue. The end result would be an increased risk that antitrust violators would retain the “fruits of their illegality.”²²

Nearly a decade later, the United States Supreme Court created a second rule that addressed one of the problems created by the *Hanover Shoe* doctrine — the risk of overlapping recovery by direct and indirect purchasers. In *Illinois Brick Co. v. Illinois*,²³ a variety of government agencies asserted claims against concrete block manufacturers to recover damages arising from a price-fixing conspiracy. The plaintiffs all owned buildings containing the blocks, and were therefore indirect purchasers at the final stage of a lengthy distribution chain. They relied on the argument that the overcharge had been passed on at each stage of the chain. However, the United States Supreme Court expressed concern at the prospect of overlapping or duplicative recovery by direct and indirect purchasers. It confirmed its earlier conclusion that tracing an overcharge through each level in a chain of distribution and then apportioning it among claimants would require enormously complex evidence.²⁴ It concluded that limiting standing to direct purchasers would advance the objective of deterrence, since this class of purchasers had the greatest incentive to sue, and, in light of *Hanover Shoe*, the greatest chance of recovery.²⁵ The court therefore precluded class action claims by indirect purchasers for damages from a conspiracy to fix prices.

21 *Hanover Shoe*, above note 19 at 487.

22 *Ibid.* at 492–94.

23 431 U.S. 720 (1977) [*Illinois Brick*].

24 *Ibid.* at 732.

25 *Ibid.* at 746.

Illinois Brick has been the target of substantial criticism. In response to the decision, a number of states enacted “repealer” statutes intended to grant standing to sue to indirect purchasers. However, this legislative response gives rise to its own problems, since defendants continue to be barred from asserting a passing-on defence. Inevitably this creates risks of double recovery and is an unsatisfactory solution to the indirect purchaser problem.

In Canada, the courts have so far chosen not to adopt the rigid doctrines established in *Hanover Shoe* and *Illinois Brick* to respond to the unique challenges posed by antitrust class proceedings. From the few cases decided, however, it is clear that our courts must grapple with the same issues. For example, although the courts have declined to use the *Illinois Brick* doctrine to preclude class actions by indirect purchasers, no claim of this kind has to date survived a contested certification motion. Indirect purchaser actions may yet prove viable, as we discuss below, but it remains to be seen whether plaintiffs will be able to marshal the evidence necessary to prove damage on a class-wide basis.

Thus far, Canadian courts have also declined to import the principles from *Hanover Shoe* that bar defendants from arguing that any overcharge paid by direct purchaser plaintiffs was passed on to purchasers further down the distribution chain. It appears that direct purchasers who claim to have suffered a loss as a result of anti-competitive conduct must still prove actual damage. However, two recent appellate court decisions in non-competition law cases raise questions about the future of the passing on defence in the competition law context.

The Court of Appeal for Ontario discussed the passing on defence in a case involving claims of negligent misrepresentation and breach of contract by a provincial law society against its auditor and actuary.²⁶ The defendants sought to strike out a claim against them on the basis that any damages suffered by the plaintiff law society had been passed on to its members through increased premiums and levies. The motions judge ruled that the passing on defence had been recognized in Canadian law only in the limited context of a taxpayer claim for recovery of taxes paid under *ultra vires* legislation. He effectively determined that the passing on defence was not otherwise available in Canada and dismissed the motions. On appeal, the Court of Appeal ruled that “it is not plain and obvious, as a matter of law, that the passing on defence does not consti-

26 *Law Society of Upper Canada v. Ernst & Young* (2002), 59 O.R. (3d) 214 (S.C.J.), rev'd (2003), 65 O.R. (3d) 577 (C.A.), leave to appeal to S.C.C. refused (2003), 195 O.A.C. 400 (note) (S.C.C.).

tute a reasonable defence.”²⁷ It therefore let the pleading of the passing on defence stand.

A more recent decision of the Supreme Court of Canada, *British Columbia v. Canadian Forest Products Ltd.*, suggests that it is inclined to take a more definitive view against the availability of the passing on defence.²⁸ The case involved a claim by the province of British Columbia for, among other things, loss of revenue from harvestable trees as a result of a forest fire that was largely caused by a forest company. The forest company argued that the province had suffered no loss because the operation of the provincial pricing system for harvested trees had resulted in increases in amounts paid for other trees, leaving the province with the same overall amount of revenue. The province submitted in response that the company should not be entitled to assert that the loss was passed on to other licensees of harvestable land through the pricing system.

The majority, six of the nine judges, was sceptical of the passing on defence. It stated:

Almost any business will have to “pass on” the impact of a business loss to its clients or customers. It is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been “passed on” by the plaintiff. Such an argument would require the court to engage in “the endlessness and futility of the effort to follow every transaction to its ultimate result ...”²⁹

However, the majority ultimately determined that since the province had suffered no lost revenue, the passing on defence was irrelevant and did not need to be analyzed further.

The dissenting judges, who would have found that the province had suffered a loss, were more trenchant in their criticism of the defence. They echoed the concerns expressed by courts in the United States that led the Supreme Court to adopt the *Hanover Shoe* doctrine.³⁰ They expressed the view that the defence

must not be allowed to take hold in Canadian jurisprudence. Although the plaintiff does indeed bear the burden of proving that he or she has suffered an actual loss, the plaintiff need only establish loss in the proximate sense. The courts need not go on to consider whether the

27 *Ibid.* (C.A.) at para. 50.

28 [2004] 2 S.C.R. 74.

29 *Ibid.* at para. 111.

30 *Ibid.* at paras. 204–5.

plaintiff was able to recoup his or her losses by accessing other sources of revenue or exercising contractual or statutory rights.³¹

When the views of both the majority and the dissent are taken into account, there seems to be little prospect that the Supreme Court of Canada would give effect to the passing on defence in a common law tort claim. The only serious remaining question is whether the defence would be recognized in a statutory claim founded on section 36 of the *Competition Act*.

As discussed above, it is prerequisite to recovery under section 36 that a plaintiff have “suffered loss or damage,” and recovery is limited to “an amount equal to the loss or damage proved to have been suffered by him.” It could be argued that these statutory requirements to prove damage preclude recovery where no net damage has actually been suffered because any loss has been passed on. It seems likely, however, that the Supreme Court of Canada would conclude that these requirements can also be met by proving “loss in the proximate sense.” To treat the statutory cause of action as requiring a higher level of proof of damage than a tort cause of action for the same anti-competitive conduct would be ironic, since Parliament’s aim in enacting section 36 was to facilitate, rather than create barriers to, civil claims. To adopt a higher level of proof would likely be futile in any event: plaintiffs would simply recast their claims as common law claims, foregoing reliance on section 36. Accordingly, defendants to antitrust class proceedings will now likely encounter serious difficulty in using the passing on defence as a basis for resisting certification of a direct purchaser class action or a judgment at trial.

C. THE CANADIAN APPROACH TO CERTIFICATION OF COMPETITION CLASS ACTIONS

With so few cases yet decided, considerable uncertainty remains as to the approach Canadian courts will adopt toward competition class actions at the certification stage. Only one price-fixing case — *Chadha v. Bayer Inc.*³² — has addressed head-on the requirements for certification of a class of indirect purchasers. *Chadha* involved an alleged conspiracy to fix the price of iron oxide pigments used to colour concrete bricks and paving stones that were used in the construction of homes and buildings and

31 *Ibid.* at para. 197.

32 *Chadha*, above note 2.

in landscaping. The increase in iron oxide prices allegedly contributed to an increase in the price of these bricks and paving stones. The plaintiffs, homeowners who alleged that they had suffered damage as a result, brought an action under section 36 of the *Competition Act*.

The motions judge certified a class with the following description:

All homeowners or other end users in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition in the pigment market; in particular, all homeowners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Canada and Norpico or where applicable, their corporate predecessors between 1985 and 1992.³³

However, this decision to certify was reversed by the Divisional Court, and the reversal was upheld by the Court of Appeal for reasons that are discussed below.

In addition to *Chadha*, a price maintenance case, *Price v. Panasonic Canada Inc.*,³⁴ is also of assistance when considering the future likelihood of certification of a competition-related class action. *Price* involved allegations that over a period of almost twenty years the defendant sought to maintain resale prices of various audio-visual products, in breach of the former section 28 of the *Combines Investigation Act*³⁵ and of section 61 of the *Competition Act*. The motions judge denied certification, a decision which was not appealed. In what follows, we discuss the current state of competition class actions in Canada with particular reference to these two decisions, analyzed within the framework of the mandated elements of the certification inquiry.

1) The Certification Test

The certification motion is a critical step in a class proceeding. It defines the class and establishes the framework for the class action as it proceeds.³⁶ In most cases, certification will lead to settlement, since very few certified class proceedings to date have proceeded to trial. On the other

³³ *Ibid.* (S.C.J.) at 35.

³⁴ *Price*, above note 4.

³⁵ R.S.C. 1970, c. C-23.

³⁶ Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law Inc., 2003) at 117.

hand, failure to certify will typically lead to the abandonment of the action, since there is little incentive to pursue individual claims.

The test for certification is fairly consistent across Canadian class action legislation. It generally provides that the court shall certify an action as a class proceeding if:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims 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 who
 - (i) would fairly and adequately represent the interest 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 that is in conflict with the interests of other class members.³⁷

The question to be determined on the certification motion is not whether a proposed class proceeding is likely to succeed on its merits, but whether the claims asserted are properly advanced by way of class proceeding. To satisfy the certification criteria, the proposed class representative must show some basis in fact for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action.³⁸ The defendant to a proposed class proceeding must then decide whether and what additional or responding evidence needs to be led.

37 See, for example, the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1). See also British Columbia's *Class Proceedings Act*, above note 1, s. 4; Saskatchewan's *The Class Actions Act*, above note 1, s. 6; Newfoundland and Labrador's *Class Actions Act*, above note 1, s. 5; Manitoba's *The Class Proceedings Act*, above note 1, s. 4; and Alberta's *Class Proceedings Act*, above note 1, s. 5. The threshold for certification is considerably lower in the province of Quebec, and this article does not address the certification requirements of the Quebec legislation.

38 *Hollick*, above note 10 at 172; *Chadha (C.A.)*, above note 2 at para. 29; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.) at 380–81.

2) Disclosure of Cause of Action

Whether the pleadings disclose a cause of action is to be determined solely on the basis of the allegations in the pleadings.³⁹ The ultimate merits of the claim pleaded are not relevant.⁴⁰ The analytical principles are essentially the same as those applied in motions to strike out a claim for failure to disclose a reasonable cause of action. The threshold is fairly low and will be satisfied unless it is “plain and obvious” that the plaintiff cannot succeed.⁴¹

The proposed class in *Chadha* included only end-users and other indirect purchasers. The defendants attempted both in a pre-certification motion to strike and at the certification stage to rely on *Illinois Brick* as authority for the proposition that a claim asserted on behalf of a class of indirect purchasers disclosed no cause of action. This argument was rejected both at first instance and in the Divisional Court on the basis that this American authority was inapplicable in Canada.

In *Price*, in dealing with the first element of the certification test, the Superior Court ruled that the plaintiff had adduced “sufficient evidence to surpass the plain and obvious test as far as a cause of action being disclosed in the pleadings.” However, the court went on to state that “even if the Plaintiffs succeed in establishing acts of price maintenance, this determination would only be the beginning of the liability inquiry.”⁴² The court noted that under both the *Competition Act* and the *Combines Investigation Act* each proposed representative plaintiff would also have to individually prove loss caused by the conduct of the defendants in order to establish liability. This requirement was relevant, the court noted, both

39 *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.) at 242.

40 *Price*, above note 4 at para. 25.

41 *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 and *Peppiatt v. Nicol*, [1998] O.J. No. 3370 (Gen. Div.). This test was articulated in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at 469 as follows:

- (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
- (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
- (c) The novelty of the cause of action will not militate against the plaintiffs; and
- (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

42 *Price*, above note 4 at paras. 26–27.

in assessing the complexity of the proceeding and in analyzing whether a class action was a viable and preferable procedure.

As the court observed in *Price*, there is an interrelationship between the first part of the test for certification and the other criteria. The nature of the claims advanced greatly affects the size of the class and the potential for complications that might render a class action inappropriate.⁴³

3) Identifiable Class

The second part of the certification inquiry requires an identifiable class of two or more persons. The class definition serves three purposes: (1) it identifies the potential individual claimants; (2) it defines the parameters of the litigation so as to identify those persons bound by the result; and (3) it prescribes who is entitled to notice.⁴⁴ Both the plaintiff and the defendant must file affidavit evidence of their best information on the number of members of the class.⁴⁵ The plaintiff has an obligation to show that the proposed class is not unnecessarily broad and that it could not be defined more narrowly without arbitrarily excluding some people.⁴⁶

Defining a class that is simply too large and unwieldy for the action to be fairly and efficiently tried as a class proceeding may result in a decision not to certify. A large proposed class, therefore, may provide the defendant with arguments against certification.⁴⁷ Issues that require individual determination, such as differences in causation between class members or differences in injuries and damages suffered, as well as differences in the applicable law, are magnified where the class is large.

The definition of the class must also be neutral with respect to the merits of the claim. The class proposed (and initially certified) in *Chadha* included end-users “who have suffered loss or damage” as a result of the defendants’ conduct. The defendants objected to this definition because, by including only individuals to whom the defendants might ultimately be liable, it turned on the merits of the case. The motions judge rejected the argument that problems of self-identification of potential class

43 *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.) at para. 84 [Pearson].

44 *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.).

45 *Ontario Class Proceedings Act, 1992*, above note 37, s. 5(3).

46 *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 45, leave to appeal S.C.C. refused (*sub nom. M.C.C. v. Canada (A.G.)*), [2005] S.C.C.A. No. 50 [Cloud].

47 See, for example, *Price*, above note 4.

members rendered the class definition unacceptable because he did not consider under-inclusion to be a problem.⁴⁸ However, both the Divisional Court and the Court of Appeal found that the class definition was not objective and that it violated the statutory policy that the merits are not to be decided at the certification stage.⁴⁹

4) Common Issues

This part of the test requires that the claims of the proposed class members raise common issues. An issue is considered “common” where its resolution is necessary to the resolution of each class member’s claim. It is not necessary that common issues predominate over individual issues. The court must examine the significance of the common issues in relation to the individual issues in deciding whether this part of the test is satisfied.⁵⁰

Courts have stated that the commonality question should be approached purposively. The underlying question is whether allowing the action to proceed will avoid duplication of fact-finding and legal analysis.⁵¹ The resolution of the proposed common issues must move the litigation forward to a sufficient degree so as to justify the certification of the action as a class proceeding.⁵²

In both *Price* and *Chadha*, the commonality requirement proved insurmountable. In each case, the plaintiffs were unable to demonstrate that proof of loss, an essential component of liability under section 36 of the *Competition Act*, was a common issue capable of being established on a class-wide basis.

In *Chadha*, the motions judge determined that there were three common issues. Disregarding the concerns raised in *Illinois Brick* about indi-

48 Homeowners would have been unable to determine whether their houses contained building materials using the pigments supplied by the defendants, rendering individual identification of plaintiffs impossible. The motions judge ruled that it seemed unlikely that damages would be assessed on an individual basis and therefore that the inefficiency of identifying individual class members was not a bar to certification: *Chadha* (S.C.J.), above note 2.

49 *Chadha* (Div. Ct.), above note 2 at 550 and *Chadha* (C.A.), above note 2 at 46.

50 Linda M. Plumpton & Amanda M. Kemschaw, “Evidence and the Certification Motion: A Defendant’s Perspective” in *Key Developments in the Law of Evidence: An Essential Update for Trial Lawyers* (Nova Scotia: Canadian Bar Association, 2004) at 13.

51 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534.

52 *Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770 (S.C.J.) at 779, aff’d (2003), 67 O.R. (3d) 795 (Div. Ct.).

rect purchaser actions, the motions judge found that the common issues were (1) whether the defendants had entered into a price-fixing agreement; (2) whether the defendants were liable to the members of the class for conspiracy; and (3) if so, the appropriate measure of damages. The motions judge concluded that liability, including loss, could be proved on a class-wide basis, relying in part on section 24 of the *Ontario Class Proceedings Act, 1992*,⁵³ which he determined could be used to assess and distribute damages on an aggregate basis without the need for individual damages hearings.⁵⁴ In support of their position on the commonality of establishing loss, the plaintiffs had filed the evidence of an expert who deposed that the alleged conspiracy had a “measurable price impact” on the end-users of the building products containing iron oxide pigment. The motions judge accepted this as sufficient evidence to establish that loss could be proved on a class-wide basis.

The Court of Appeal for Ontario rejected the analysis of the motions judge on the issue of proof of loss. The court determined that the plaintiffs had failed to put forward sufficient evidence to demonstrate how loss could be proven on a class-wide basis. Noting that the plaintiffs’ expert’s model was based on the assumption of a full pass-through of the price increase to homeowners, the court stated that this was “the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.”⁵⁵

In analyzing the complexities inherent in proof of loss for indirect purchasers, the Court of Appeal undertook a detailed examination of the decision of the United States Court of Appeals for the Third Circuit in *In re Linerboard Antitrust Litigation*,⁵⁶ a case involving an alleged conspiracy in the corrugated cardboard market. Justice Feldman, writing for the court in *Chadha*, noted that the plaintiffs in *Linerboard* adduced substantial expert evidence (including models, studies, company records, industry data, and articles) to support their argument that all purchasers of *Linerboard* products would have paid a higher price. This evidence established that the fact of loss was common to all class members, so that only the quantum of loss would vary. The court contrasted this evidence

53 Section 24(1) sets out the circumstances in which the court may determine the aggregate or a part of a defendant’s liability to class members and give judgment accordingly. Section 24(2) states that the court may order that all or part of such an award be applied so that some or all individual class members share in the award on an average or proportional basis.

54 *Chadha* (S.C.J.), above note 2 at 37.

55 *Chadha* (C.A.), above note 2 at para. 30.

56 305 F.3d 145 (3rd Cir. 2002) [*Linerboard*].

with that introduced by the plaintiffs in *Chadha*, which failed to substantiate the pass-through analysis. Rather, the plaintiffs' expert assumed the pass-through and did not suggest a methodology for proving it. This did not, in the court's view, provide a sufficient basis for concluding that proof of loss could be presented as a common issue.

The Court of Appeal also rejected the argument that section 24 of the *Class Proceedings Act, 1992* set out a method for proof of class-wide loss. It held that this provision could be resorted to only once liability has been established, providing a method of assessing the quantum of damages on a global basis but not of establishing the fact of damage. The court ultimately held that the evidence presented by the plaintiffs did not satisfy the commonality requirement, and on this basis the proceeding could not be certified.

Similarly, in *Price* the motions judge confirmed that each member of the proposed class had to prove actual loss or damage. He did not view this requirement as necessarily barring certification. Relying on the decision of the Court of Appeal in *Anderson v. Wilson*,⁵⁷ he observed that it should not be assumed "that there cannot be a certification or a common issue if the claimant's evidence is individually necessary."⁵⁸ However, the motions judge stated that the common issues must be analyzed in the context of the claims as a whole to determine whether the claim is properly prosecuted as a class action — in other words, whether a class action is the preferable procedure for the resolution of the matter. He determined that the evidentiary burden that the individual plaintiffs faced in establishing loss presented a major stumbling block to meeting the preferable procedure requirement. He stated:

In relation to judicial economy, I find that the common issue relating to the breach of the competition statutes or the commission of the torts pleaded is relatively minor in relation to the individual issues that must be proved. When the court considers the numerous variables in relation to the price paid by the end purchasers and the determination of whether the electronic product is a "Named Product" distributed by a PCI authorized dealer, it is readily apparent that the resolution of the one common issue (the breach of a statute or commission of a tort) does not significantly advance the litigation.⁵⁹

57 (1999), 44 O.R. (3d) 673 (C.A.).

58 *Price*, above note 4 at para. 40.

59 *Ibid.* at para. 44.

Although the presence of individual issues will not be fatal to certification, where the individual issues could overwhelm the action completely and necessitate individual trials for virtually each class member, a class action may be completely unmanageable.⁶⁰ As the Divisional Court stated in *Chadha*, where the trial of the individual issues would make the class proceeding a “monster of complexity,” certification should be denied.⁶¹

A recent decision of the Court of Appeal for Ontario decided after *Chadha* may make it easier for courts to certify claims involving an abundance of individual issues. In *Cloud v. Canada (A.G.)*,⁶² the court treated the common issues requirement as calling for a qualitative, not a quantitative, assessment. It determined that this criterion should be a “low bar” and that the certification analysis should not be driven by the mere number of individual adjudications that remain after the common trial. Justice Goudge emphasized this point, stating:

An issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided on resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than elucidate the various individual issues which may remain common after trial.⁶³

It remains unclear whether and how *Cloud* will affect the analysis of the commonality requirement in class actions brought in the antitrust context. Given the basis on which the courts in *Chadha* and *Price* decided not to certify those actions, the implications of this “lower bar” could be significant.

5) Preferable Procedure

The preferable procedure analysis is generally the heart of the certification motion. It requires consideration of the three goals of the class action

60 *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) at 73 [Mouhteros]. This case involved a claim against a school for misrepresentations about the marketability of its students after graduation. The class definition was viewed as being over-inclusive because it included students who had found work after graduation. See also *Price*, above note 4.

61 *Chadha* (Div. Ct.), above note 2 at 547.

62 *Cloud*, above note 46.

63 *Ibid.* at para. 53.

procedure: judicial economy, access to justice, and behaviour modification.⁶⁴ Canadian courts have established a two-part test on the preferable procedure issue: (1) whether a class proceeding offers a fair, efficient, and manageable way of determining the common issues presented by the claims of the proposed class members; and (2) whether the determination of these common issues will advance the proceeding in accordance with the policy objectives underlying the legislation.⁶⁵

The plaintiff bears the burden of satisfying the court that the elements of the certification test have been met.⁶⁶ However, it is still in the best interests of defendants to lead evidence as to whether the ultimate resolution of the issues raised by each member's claim would be better accomplished through other procedures, such as joinder, test cases, or simply allowing each claim to proceed individually.

Where there is a multiplicity of common issues, defendants can argue that individual trials are the preferable procedure.⁶⁷ Where the harm alleged varies widely among class members and there is a sizeable class, a strong argument may also be made that the proceeding will inevitably disintegrate into individual trials for the resolution of the myriad individual issues.⁶⁸

In both *Chadha* and *Price*, the court determined that the common issues advanced by the plaintiffs would be completely subsumed by individual issues. As in *Illinois Brick*, these issues would make a class proceeding completely unmanageable. In both cases, the court determined that the need to prove actual loss precluded treating liability as a common issue. In *Chadha*, this meant that each class member had to prove the pass-through of the higher iron oxide price along a lengthy distribution chain. Further, the court noted that “a massive record-tracing exercise” would be required just to establish the inclusion of iron oxide in any particular structure.⁶⁹ The “multitude of variables” affecting the final purchase price of a building created additional problems. Under the circumstances, the obstacles to an effective class proceeding overrode its potential benefits. In *Price*, the court also determined that the plaintiffs would have to succeed on numerous issues to establish liability, including

64 *Hollick*, above note 10 at 177.

65 *Ford v. F Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 41 [Ford].

66 *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.) at para. 72.

67 *Mouhteros*, above note 60 at 73.

68 *Pearson*, above note 43 at para. 119.

69 *Chadha*, above note 2 at para. 57.

whether they had purchased a particular product, whether the product was bought during the requisite time frame, whether it was purchased from an authorized dealer in Canada, what the price was at the time of purchase, and what the price should have been. Further evidence would also have had to be led on the many factors that influence the price at which dealers sell electronic products in particular transactions. The preferable procedure requirement could therefore not be met.

Although the courts in both *Chadha* and *Price* determined that the individual issues so overwhelmed the common issues that a class proceeding was not the preferable procedure, the door has not been closed to antitrust class actions involving proof of loss issues. As the Court of Appeal remarked in *Chadha*, “[i]n this jurisdiction it remains to be determined whether in a particular case a sufficient evidentiary record can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done is a question left open for future cases.”⁷⁰

Courts faced with proposed antitrust class proceedings will also now likely be influenced by the Court of Appeal’s decision in *Cloud*. In that case, the defendants objected to certification on the basis that the vast majority of the issues required individual resolution. The court acknowledged that the proceeding involved many individual issues relating to harm, causation, and limitation periods. However, the court also noted that the common issues relating to the nature of the legal duties owed and whether those duties were breached were of primary importance to the action as framed. This was sufficient to meet the preferable procedure requirement. Justice Goudge stated:

The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way.

The common issues are fundamental to the action. They cannot be described as negligible in relation to the consequential individual issues nor to the claim as a whole. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action.⁷¹

This decision suggests that the preferable procedure requirement will be met if the common issues advance the action in a “non-negligible” man-

70 *Ibid.* at para. 68.

71 *Cloud*, above note 46 at paras. 82–83.

ner.⁷² This threshold appears on its face to be much lower than that set out in *Chadha*. Adopting this threshold in an antitrust case would likely make certification easier than if *Chadha* alone governed the issue.

6) The Representative Plaintiff

The representative plaintiff advances the proceeding on behalf of the entire class. The Ontario *Class Proceedings Act, 1992* requires that, in order to discharge this role, the representative plaintiff must adequately represent the interests of the class, produce a workable litigation plan for advancing the proceeding, and not have any conflicts of interest with other class members.

To date, challenges by defendants to the adequacy of the proposed class representative have not been as vigorous as those in the United States.⁷³ In Canada the focus of attack generally has been on the adequacy of the litigation plan,⁷⁴ on any conflicts that can be identified between the representative plaintiff and class members, and on the ability of the representative plaintiff to fund the action. For example, in *Price* the plaintiff provided a sparse litigation plan, lacking in detail, which the court saw as an “unworkable” method of advancing the litigation. In complex litigation, the plaintiff cannot present the court with a bare-bones plan and assert that the court has the authority to fix or refine it at a later date.⁷⁵

The representative plaintiff criterion may have added importance in competition class actions where the proposed class includes both direct and indirect purchasers. In such a case, the court may determine that there is a conflict between the interests of the members of the class. While the indirect purchasers have an interest in asserting that higher prices were passed through the distribution chain, the direct purchasers’ interest lies in persuading the court that they absorbed the price increase and should be entitled to recover the entire loss. This conflict may be sufficient to deny certification of a combined purchaser class in a future case. Although sub-classes have been proposed as a means of resolving this problem, they are likely not a viable solution when the interests of the different sub-classes are directly opposed, at least where certification is contested.

72 *Ibid.* at para. 83.

73 See *Berger v. Compaq Computer Corporation*, 257 F.3d 475 (5th Cir. 2001).

74 See *Price*, above note 4 at para. 59.

75 *Ibid.* at para. 61.

D. CERTIFICATION FOR SETTLEMENT PURPOSES

Although contested antitrust certification motions are rare in Canada, a number of conspiracy-related class actions recently have been certified for settlement purposes.⁷⁶ Under class proceedings legislation, a class must be certified before settlement in order for the settlement to bind all of the members of the class.⁷⁷ The courts' approach to certification for settlement purposes has been much more relaxed than in cases where certification is contested. Certification has been granted in these cases even where a proposed class proceeding might not survive a contested motion. As one court has noted, "an issue that would lack commonality in contested proceedings may be a common issue when certification is requested in a settlement context."⁷⁸

The reason for the courts' general approach to certification for settlement purposes appears to be their view that, for policy reasons, settlements of class proceedings should be encouraged.⁷⁹ What motivates defendants to settle class proceedings where they might successfully resist certification (on the basis, for example, of class composition, preferable procedure or commonality) is less clear. Presumably, a desire to put an end to embarrassing and costly proceedings is one motivating factor. Another may be that the settlement is part of an effort to resolve litigation on a global basis. Many settlements negotiated in Canada follow similar settlements negotiated in the United States or elsewhere.

In the majority of settled antitrust class actions, courts have not engaged in any extensive analysis as to whether the requirements for certification have been met.⁸⁰ For example, in certifying for settlement purposes a class action involving an alleged conspiracy to fix the prices of

76 See, for example, *Bona Foods*, above note 11; *Mura*, above note 11; *Alfresh Beverages Canada Corp. v. Hoechst AG*, above note 11; *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*, above note 11; *Ford*, above note 65.

77 See Ontario's *Class Proceedings Act, 1992*, above note 37, s. 29(2) & (3); British Columbia's *Class Proceedings Act*, above note 1, s. 35; Saskatchewan's *The Class Actions Act*, above note 1, s. 38; Newfoundland and Labrador's *Class Actions Act*, s. 35; Manitoba's *The Class Proceedings Act*, above note 1, s. 35; and Alberta's *Class Proceedings Act*, above note 1, s. 35.

78 *Bona Foods*, above note 11 at para. 11.

79 *Ontario New Home Warranty Program v. Chevron Chemicals Co.* (1999), 46 O.R. (3d) 130 (S.C.J.) at para. 70; *Bona Foods*, *ibid.* at para. 10.

80 See, for example, *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*, above note 11; *Mura*, above note 11; *Alfresh Beverages Canada Corp. v. Hoechst AG*, above note 11.

monosodium glutamate and nucleotides in Canada, Justice Cullity stated that the settlement context affects the question of whether the requirements for certification are satisfied,⁸¹ indicating that

[i]f certification had been contested in this case, the plaintiffs may well have encountered difficulty in persuading the court that the requirement in section 5(1)(d) was satisfied and, in particular, that a manageable procedure could be established for proving loss on an individual basis if this were found not to be amenable to a trial of common issues ... The proposed settlement does, however, provide for a procedure that would avoid such problems and, if it is found to be fair to — and in the interests of — class members, I do not see why it should be ignored for the purposes of certification ... The goals of access to justice and behavioral modification will be advanced and, unlike the finding in *Chadha*, judicial economy will not be undermined.⁸²

Similarly, another court approving the certification of an antitrust class action for settlement purposes observed that where a proposed settlement represents a reasonable compromise to complex, expensive, risky, and potentially protracted litigation and the settlement benefits are substantial, certification will be granted in order to facilitate settlement.⁸³

In *Ford*, a recent decision certifying a settlement of several class actions involving competition in the market for vitamins, Justice Cumming of the Ontario Superior Court of Justice engaged in a more comprehensive analysis of the certification criteria.⁸⁴ However, even these proceedings may not have survived contested certification motions in the form in which they were certified for settlement purposes. The plaintiffs in these cases alleged a complex, global, multi-party price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. They sought damages on behalf of all purchasers of vitamins: direct, intermediate, or consumer.

The plaintiffs proposed that the court deal with these claims in two stages. At stage one, the plaintiffs sought to have the alleged conspirators found liable for the aggregate overcharge on all sales of vitamins in Canada. At stage two, the overcharge would be distributed to or for the

81 *Bona Foods*, above note 11 at para. 20.

82 *Ibid.* at para. 27.

83 *Alfresh Beverages Canada Corp. v. Hoechst AG*, above note 11 at para. 19.

84 *Ford*, above note 65. This settlement was the largest amount ever recovered in a class action relating to price-fixing in Canada, with an approximate recovery value of \$100 million.

benefit of all classes of purchasers along the distribution chain.⁸⁵ Although the plaintiffs asserted that this approach would avoid the fragmented approach to price-fixing claims adopted by courts in the United States, it does not appear that this approach would resolve the requirement that all claimants must prove that they suffered actual loss or damage as a result of the alleged anti-competitive conduct.

In reviewing the proposed settlement, the court acknowledged that the plaintiffs faced serious risk if certification had been contested, stating

[t]he novel nature of the actions and the theory pursued by Class Counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the Court would not assess damages in the aggregate. Quite probably, the Defendants would have argued that the decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* ... ought as precedent to preclude certification of the actions at hand.⁸⁶

However, for settlement purposes the court certified a class composed of direct purchasers, intermediate purchasers, and consumers. It stated that “the plaintiffs do not have on the common issue any interest in conflict with the interests of other class members. In conspiracy claims, every buyer and seller in the class has a common interest in proving the existence of the conspiracy and in maximizing the aggregate amount of class-wide damages.”⁸⁷

This statement seems to disregard the need for plaintiffs to prove actual loss in order to sustain a claim under section 36. The plaintiffs’ interests would inevitably come into direct conflict as each group sought to prove that some or all of the loss was suffered at its stage of the distribution chain. The court acknowledged that there were substantial difficulties associated with the determination of the actual damages suffered by indirect purchasers and that the complexity and administration costs associated with any distribution to these plaintiffs would be prohibitive,⁸⁸ but avoided engaging fully in the loss analysis. Instead, the court accepted the recommendation that the benefits available to intermediate

85 *Ibid.* at para 12.

86 *Ibid.* at para. 120.

87 *Ibid.* at para. 44. The court reached this conclusion by referencing *In re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493 (S.D.N.Y. 1996) at 513.

88 *Ford*, above note 65 at para. 80.

purchasers and consumers be paid on a *cy pres* basis to carefully selected consumer and industry organizations.⁸⁹

This solution to the indirect purchaser dilemma was also adopted in *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, where the Superior Court certified a class that included both direct and indirect purchasers.⁹⁰ The terms of the court-approved settlement called for an 85 percent/15 percent distribution of compensation as between direct purchasers on the one hand and intermediaries and end-users on the other. This breakdown was consistent with expert evidence as to the likely incidence of damage resulting from the alleged price-fixing conspiracy. The amounts allocated to direct purchasers were to be distributed from the fund on a *pro rata* basis on receipt of proof of purchase during the relevant period. The amounts intended to benefit intermediaries and consumers were to be distributed to trade organizations and community foundations across Canada.⁹¹ This plan of distribution focused on both compensation and the disgorgement of ill-gotten gains. Although accepted by the court in the settlement context, it is unlikely, given *Chadha*, that this kind of scheme, and a class containing members whose interests might well be in conflict, would be approved on a contested certification motion.

E. CONCLUSION

Although several antitrust cases have reached the certification stage in Canada, most were merely for the purposes of settlement. Despite the failure of the plaintiffs in both *Chadha* and *Price* to meet the criteria for certification, the two cases are among the few to provide insight into the approach of Canadian courts to antitrust class actions and guidance as to how they will be handled in the future.

Canadian courts have not yet clearly articulated an approach to certification in antitrust class actions to guide potential plaintiffs and defendants. Recent decisions of the Ontario Court of Appeal and the Supreme Court of Canada have raised further questions for antitrust class actions. The Court of Appeal appears to have made certification easier where individual issues predominate over common issues,⁹² a development of potential benefit to plaintiffs faced with the need to prove myriad indi-

89 *Ibid.* at para. 49.

90 *Bona Foods*, above note 11.

91 *Ibid.* at paras. 32–35. See also *Alfresh Beverages Canada Corp. v. Hoechst AG*, above note 11 at paras. 13–14.

92 *Cloud*, above note 46.

vidual issues in order to establish loss. The Supreme Court of Canada appears to have created further difficulties for defendants wishing to assert the passing-on defence.⁹³ Courts have yet to determine definitively whether the bar to certification in antitrust cases has been lowered and whether the passing on defence remains available. It also remains to be seen whether a class action brought by indirect purchasers can survive a contested certification motion. As Justice Feldman observed in *Chadha* in the context of an indirect purchaser class action, these are questions left open for future cases.⁹⁴

93 *Law Society of Upper Canada v. Ernst & Young*, above note 26. See also *Ford*, above note 65.

94 *Chadha* (C.A.), above note 2 at para. 65.