The Globalisation of Anti-trust: How the Internationalisation of Collective Redress is Changing the Game

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Introduction

Actions seeking damages for anti-trust, conspiracy and other competition-related offences often involve multi-national companies, global supply chains, and millions of consumers around the world who are potentially affected by the impugned conduct. Because many of these claims involve relatively small monetary injury to individual plaintiffs, they tend to engage issues of collective redress. However, owing to their multi-national scope, these claims also tend to be brought in multiple countries and raise issues about the treatment of similar claims in different jurisdictions.

These issues engage both procedural and substantive law in multiple jurisdictions. Important differences remain in how local jurisdictions approach the issues that arise in anti-trust, from both a substantive and procedural standpoint. These differences can be as basic as whether consumers have a common cause of action in multiple jurisdictions, or whether they can bring cases in multiple jurisdictions that arise from the same set of facts using similar procedures for collective redress.

The impacts of these differences are only beginning to emerge, as domestic institutions are being used to address multi-jurisdictional and even global legal disputes. This chapter aims to, at a high level, explore some of the themes and challenges that are emerging in the collective redress of anti-trust cases. What will remain unanswered is how domestic institutions, as well as plaintiffs’ and defendants’ counsel, will react to these challenges. Courts, legislatures, non-governmental entities and affected parties – plaintiffs and defendants alike – all have a role to play in shaping the variety of means by which to simultaneously permit and regulate collective proceedings in the face of multi-jurisdictional and even global classes.

Many of the themes emerging in multi-jurisdictional collective litigation resemble many of the domestic or municipal challenges of collective proceedings that already exist. Such themes include the question of consent and participation in collective litigation and the scope of a court’s powers to bind class members outside of its jurisdiction. As will be seen, the experiences of Canada and the United States provide a useful context to consider how these challenges might manifest on the international stage, especially with regard to the enforcement of orders that are multi-jurisdictional in scope.

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The Global Diversity of the Means of Collective Redress

The notion of collective redress itself is a term geared towards an international arena and can take many forms. The European Commission itself has defined it as “a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices”. [See Endnote 1.]

The introduction to this chapter has already noted the internationalisation of litigation resulting from the continued global integration of the marketplace. In addition, we are continuing to see more and more legislation to facilitate legal means of collective redress. [See Endnote 2.] For example, the government in the United Kingdom recently announced that it would expand its competition law enforcement regime by authorising “opt-out” class claims. [See Endnote 3.] The UK’s government believes this change will “make it easier and simpler for consumers and businesses to stand up for their rights”. [See Endnote 4.]

It can therefore no longer be said that legislation facilitating collective redress is either a phenomenon limited to the United States or that it is somehow a distasteful procedure. [See Endnote 5.] However, the means of collective redress are diverse in nature. Many forays into group litigation are limited to a particular substantive area of law, for instance in securities or financial services [see Endnote 6] or consumer protection. Netherlands, in contrast, has limited the provision of procedural tools relating to collective jurisdiction to the context of the settlement of mass claims. The availability of damages on a group-wide scale vary from jurisdiction to jurisdiction.

To be clear, means of collective redress, certainly in most cases, do not resemble the procedural mechanism known as the “class action” in the United States, Canada and Australia. In that sense, means of collective redress can arise in a variety of forms, with the two principal forms being either representative or aggregate actions.

Representative Actions - The Necessity of Procedural Safeguards

Representative actions occur where one individual or organisation brings a claim on behalf of class of individuals. The quintessential representative actions are class actions as understood in the United States, Australia and Canada. In a representative action, the role of the representative is, in some ways, the lynchpin of any such proceeding. The representative controls the litigation strategy of the class and the representative’s decisions can affect the rights and obligations of absent class members. Given the primacy of the representative, it is often the case that the court must approve the choice of representative before the case can proceed (a process known in those jurisdictions as “certification”). [See Endnote 7.] A court may consider a variety of criteria when deciding whether to certify an action as a class proceeding, including:

- in certain circumstances, whether the claim is frivolous (as a preliminary issue);
whether the class is numerous and identifiable and has a common interest;

■ whether there are common issues capable of common resolution [see Endnote 8] – that is, whether there are judicial efficiencies to be gained from resolving the claims together; and

■ whether the representative adequately protects and represents the interest of the class.

Underlying these criteria are the general goals of providing for means of collective redress, namely ensuring reasonable access to justice, protecting where necessary the rights of absent class members and taking the potential advantages of efficiency and reduction of judicial resources it would take to administer individual cases. [See Endnote 9.] Out of similar concern for class members who may not have direct say as to how the case is conducted, the court may also have the final say as to the approval of any settlement.

Representative actions can be “opt-out” or “opt-in”. [See Endnote 10.] In the case of opt-out actions, members of a class are presumed to be bound by the result of the decision, unless they specifically state that they do not want to be bound by the action. In the case of opt-in actions, individuals must specifically state that they wish to be part of the class otherwise they will neither benefit or be burdened by the subsequent decision.

In representative actions where there is a process of certification, once a class has been certified, further orders of the court will bind all the members of the class.

Before that transpires, however, a period must be provided for class members to opt-in or opt-out of the class action as the case may be (in some collective redress regimes, the period for affected individuals to opt into an action may take place after a decision has been made finding the defendant to be liable). In such circumstances, notice of the action must be provided to potential members to opt-in or opt-out of the class action as the case may be (in some collective redress regimes, the period for affected individuals to opt into an action may take place after a decision has been made finding the defendant to be liable). In such circumstances, notice of the action must be provided to potential class members so that they can be aware that the existence of a representative action may affect their legal rights and obligations. Such notices generally include information as to any recent developments in the case, its impact on the class members’ claims, the common issues addressed, and a deadline for opting out of or into the class action. [See Endnote 11.]

The safeguards described above may not be as necessary where a class is represented by bodies which have institutional mandates to pursue such actions (or even the state itself, as the case may be). Many jurisdictions, in fact, limit the authority to bring a representative action exclusively to such bodies. [See Endnote 12.] In such circumstances, any concerns regarding an ability to fairly represent the class may not be as severe: such organisations will often be not-for-profit and their very raison d’être will be to pursue such actions. In such circumstances, it might fairly be said that such organisations exercise a quasi-public function.

Other Forms of Collective Redress: Aggregate actions

Aggregate actions, or “mass actions” [see Endnote 13] constitute a much broader category of means of collective redress. They can basically refer to any means used to decide a number of matters together. The most traditional form in common law jurisdictions would be the consolidation of proceedings, which are permitted in many rules of court and institutional arbitration rules. However, they can also refer to representative actions that are “opt-in” but where all the class members have agreed to the representation prior to the commencement of the proceeding.

In the circumstances of aggregate actions, there will likely not be a stage of the proceeding whereby a court is asked to approve of the representation of class members. It might be the case, however, that a defendant would have the opportunity to object, if it, in fact, is not appropriate for the matters to be heard together (that is, they do not raise issues in common which would assist in the resolution of the claims on a class-wide basis or the action would be unmanageable or too complex).

Such collective proceedings are not limited to traditional courtroom litigation: they can also exist in international arbitration. For example, in the investor-state arbitration case of Abaslat v. Argentine Republic, eight Italian banks formed an association called TFA (Task Force Argentina) to pursue remedies under the bilateral investment treaty between Argentina and Italy after Argentina defaulted on approximately $100 billion (US) of its sovereign debt in 2001. While Argentina contested the propriety of the matters proceeding in a collective manner, the ICSID arbitral tribunal agreed, in a 2-1 decision, to let the arbitration go ahead in a collective capacity, describing the matter as a “hybrid” arbitration. [See Endnote 14.]

Why Diversity Matters

The challenges presented by the internationalisation of collective redress will depend, in part, on the types of collective redress which predominate. For instance, where all claimants in an aggregate action have expressly agreed to have their dispute resolved through such means – as was the case in the Abaslat case above – any subsequent objection about losing their rights to commence an individual claim are not likely to be well-received.

On the other hand, the prospect of a classic North American-style opt-out class action applied internationally may raise questions both in terms of fairness to claimants and the usurping of the sovereign rights of other courts and legislatures around the world. This is not a theoretical phenomenon, especially where the claimants’ counsel is retained on a contingency fee basis, there will be an incentive to seek the broadest class possible to maximise the class size.

The Challenges of Internationalisation

Together with this financial incentive to have a broad opt-out class is the desire to expand the geographical scope of the class as much as possible. Representative plaintiffs will often seek for their action to bind not only affected persons in their own jurisdiction but also beyond. This is often the case in securities class actions. For instance, in the case of Converium, the Amsterdam Court of Appeal declared an international collective settlement binding where only a few of the potential claimants were domiciled in the Netherlands. [See Endnote 15.] However, as discussed above there are more and more legal regimes providing for the means of collective redress. Where each forum may not necessarily limit the scope of their jurisdiction to the country or jurisdiction in which they are situated, various fora will have competing claims over various collective legal wrongs, leading to possible battles between jurisdictions.

The Question of Consent/Party Autonomy and Fairness

As discussed above, a combination of: (1) the facts underlying a prospective collective proceeding not being geographically constrained; and (2) there existing financial incentives to broaden a class as much as possible will often result in multi-jurisdictional or global classes being created, even in an opt-out context.

Once such cases are concluded – typically by way of settlement – affected jurisdictions with or without means of collective redress would have to consider whether to allow the enforcement of such expanded classes, especially for the purposes of precluding
individual actions in their own jurisdiction. Preconditions of natural justice and due process, which, at a bare minimum, would include the notion of notice, are arguably of universal acceptance in respect of the recognition or enforcement of foreign judgments. [See Endnote 16.]

Canadian jurisprudence provides helpful examples relating to issues regarding the adequacy of notice, both in terms of national class actions within Canada, and in terms of addressing American class actions and their impact within Canada. Subject to a number of defences (fraud, public policy, and lack of natural justice), Canadian courts will generally recognise and enforce foreign judgments where there is a “real and substantial connection” between the cause of action and the foreign court issuing the judgment. [See Endnote 17.]

In regard to foreign class proceedings, Canadian courts will put particular emphasis on “[r]espect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out” of the particular foreign class action. [See Endnote 18.] For a foreign class action to preclude litigation on the same issue in Canada, “[n]atural justice … requires that similarly situated litigants be accorded equal (although not necessarily identical) treatment”. [See Endnote 19.]

A number of decisions arising out of Québec reflect a reluctance to approve foreign settlements. While there is scant jurisprudence from that province regarding foreign class proceedings, numerous decisions have rejected Canadian settlements from other provinces. The Supreme Court of Canada considered this issue in Canada Post Corp. v. Lépine. [See Endnote 20.] The case concerned Canada Post’s advertisement and subsequent cancellation of lifetime internet access. Class proceedings were commenced on behalf of all customers living in Québec who had purchased the lifetime service. Simultaneous class proceedings were certified in Québec and Ontario, the latter of which led to an approved settlement agreement between the Ontario plaintiffs and Canada Post. The agreed terms of the settlement stipulated that it would apply to all Canadian residents except those residing in British Columbia. Following the approval of the Ontario settlement, Canada Post sought to have the Ontario judgment recognised by the Québec courts. [See Endnote 21.] Both the Québec Superior Court and the Québec Court of Appeal declined to recognise the Ontario judgment.

The Supreme Court of Canada ultimately agreed with the Québec courts below that the Ontario notice provided to Québec members was inadequate. The wording and timing of the notice were likely to confuse Québec members, which would contravene the fundamental principles of procedure under the Civil Code of Québec. [See Endnote 22.] For instance, the notice made it seem that the only class proceeding that had been commenced was in Ontario. [See Endnote 23.]

Similarly, in Hocking v. Haziza, [see Endnote 24] a Québec Court of Appeal decision decided before Lépine, a class action against HSBC Bank on behalf of HSBC customers who incurred penalties for early pay-outs of their mortgage, had been settled in Ontario. The Ontario order was not recognised in Québec because the judgment violated the fundamental principles of procedure: the Ontario court had not considered the interests of non-residents and the notice was inadequate.

At a bare minimum, the Canadian experience suggests a thorough but flexible scrutiny would be applied in respect of any notice that is provided to absent class members within its jurisdiction. What might be an overlooked procedural step domestically becomes a necessary but not necessarily sufficient criterion to ensure enforceability of a foreign settlement or judgment in Canada.

The Question of Sovereignty and Coordination

The examples cited above involved the process of enforcing one collective proceeding in another jurisdiction. But with the increasing internationalisation of collective redress, the question will arise as to how to – and whether to – coordinate competing collective actions across various jurisdictions. [See Endnote 25.] The question of balancing competing judicial authorities, while seemingly international in nature, has been a challenging phenomenon in Canada as a result of its lack of a federal court with sufficient substantive jurisdiction to adjudicate national class actions. Overlapping proceedings are often therefore commenced purporting to address the same claim. Provincial class actions legislation in Canada is currently ill equipped to address the jurisdictional problems and inefficiencies created by national class actions.

Canada is a federal jurisdiction where the authority to administer most legal actions – including class actions – lies in the provincial courts. As a result, each province has its own legislation or rules addressing the formation and maintenance of class actions. However, this has not prevented plaintiffs (and their counsel) from pursuing national (or international) classes in proposed class actions. [See Endnote 26.] As a result, there are often competing actions addressing similar or identical claims.

Due to the lack of coordination, it has been the case in Canada that multiple certification motions are held in respect of the same action in different provinces, an unnecessary expense for both litigants and the judiciary. [See Endnote 27.] However, counsel have developed informal ways to work around these issues, whether through carving out certain jurisdictions, [see Endnote 28] informally staying or postponing an action in one province so another “primary” action can proceed, or even forming a steering committee so class counsel in multiple provinces can coordinate their cases.

On the legislative front, some states/provinces have essentially sidestepped much of this controversy by expressly providing through legislation that class members outside of the jurisdiction can be joined into such litigation on an opt-in basis. [See Endnote 29.] In addition, Saskatchewan adopted a list of factors to contemplate when considering a multi-jurisdictional or proposed multi-jurisdictional class action elsewhere in Canada, including ensuring that the interests of all parties are given due consideration and, considering the basis of liability, the stage of each action, the viability of the plan for the proposed action, and the location of evidence of witnesses. [See Endnote 30.] In the United States there is the US Federal Court’s Judicial Panel on Multidistrict Litigation, which can select a particular district for the transfer of multi-district actions. The Judicial Panel is an unlikely global solution, but might be an appropriate regional one should the necessary coordination take place, such as in the European Union.

Domestic experience does not provide prescriptive solutions for how best to address the emerging issues arising from international collective proceedings, though it is apparent that many solutions are available. Domestic experience also suggests that the most successful solutions have involved the parties themselves coordinating, rather than having legislatures or courts resolving the possible. The Canadian experience also demonstrates that, in the absence of a solution, defendants can face a multiplicity of proceedings involving the same subject matter, notwithstanding the goal of collective redress to preclude duplicative litigation.

Of course, on the international scene, there are greater challenges than those presented in the Canadian context. For instance, the means of collective redress as discussed above can vary
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considerably, and of course the substantive laws from jurisdiction to jurisdiction can constitute a significant complicating factor to facilitate the international resolution of legal claims. [See Endnote 31.] Any coordinated solutions between parties on an international scale will also be much more difficult to achieve.

- **Who decides? Coordination Schemes**

An important issue for both counsel and the courts to consider is how issues of coordination are to be resolved as they arise.

Within Canada, the problems raised by a lack of coordination in respect of national class actions have led judges to call for changes. [See Endnote 32.] To this point, neither the courts themselves nor the legislatures have come to a solution in Canada. However, much progress has been made through soft law developed by the Canadian and American Bar Associations. [See Endnote 33.] The Canadian Bar Association has provided for a Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions. The protocol has been used in at least one proceeding in Canada in respect of the approval of a multi-jurisdictional settlement within Canada. Meanwhile, the ABA has provided for a “Protocol on Court-to-Court Communications in Canada – U.S. Cross-Border Class Actions” so that Canadian and U.S. courts can communicate with each other in respect of coordinating overlapping collective claims. A similar protocol has been used successfully in the context of cross-border insolvencies.

The International Bar Association has also been addressing transnational issues arising out of class actions through its Task Force on International Procedures and Protocols for Collective Redress. It authored the “Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress” (Guidelines). [See Endnote 340.] They provide suggested factors to consider in enforcing foreign collective redress judgments including whether the first court properly exercised jurisdiction, considerations relating to substantive law including damages and/or relief, required procedural rights and protections, and the enforceability of any costs awards as applicable. Also within the IBA, the Class Action/Collective Redress Working Group is currently considering the possibility of drafting court-to-court protocols similar to the CBA and ABA protocols discussed above. The European Parliament has also endorsed the prospect of establishing a European approach to multi-jurisdictional collective redress. [See Endnote 35.]

In Canada, there is a centralised web-based registry administered by the Canadian Bar Association in respect of national class actions as an attempt to minimise duplication and to increase the prospect of coordination. Updating this registry is now required practice in many provinces. A similar project might take place on an international scale – coordinated by a body such as the IBA.

### Case-study: US and Canadian Approaches to Certification and Anti-trust Class Actions

A comparison of the approach of the US and Canadian courts to certification standards and to the substantive law of anti-trust class actions provides a useful illustration of the points addressed above.

While both countries allow class actions, the courts in each jurisdiction have diverged sharply with respect to the requirements for certification. While US courts have been encouraged to engage with the merits of a case and conduct a rigorous analysis of the evidence before certifying the claim. This trend is apparent from the Court’s decisions in *Wal-Mart Stores Inc. v. Dukes*, [see Endnote 36] and *Comcast Corp. v. Behrend*. [See Endnote 37.]

In *Wal-Mart*, the Court was asked to certify what Justice Scalia, writing for the majority, described as “one of the most expansive class actions ever”, made up of more than 1.5 million women who alleged they were discriminated against on matters of pay and promotions. The case had been certified by the District Court and affirmed by the Court of Appeals for the Ninth Circuit. The Supreme Court reversed the lower courts and found that the case should not have been certified. In doing so, Justice Scalia held that the “commonality” criterion under Rule 23 required claims that were “capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”. [See Endnote 38.]

Justice Scalia went on to find that Rule 23 required a plaintiff to “affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.”. [See Endnote 39.] Scalia J. explained that this entailed a “rigorous analysis” that would involve some overlap with the merits of the underlying claim. To avoid any doubt on the matter, he indicated in a footnote that an earlier case suggesting that a court should not conduct an inquiry into the merits at the certification stage “is the purest dictum and is contradicted by our other cases”. [See Endnote 40.]

The Supreme Court again emphasised the importance of evidentiary analysis in its *Comcast* decision. Repeating much of his analysis from *Wal-Mart*, Justice Scalia, again writing for the majority, noted that the “predominance” test required for certification under Rule 23(b)(3) must be satisfied with evidence, and again suggested that certification was appropriate only after “rigorous analysis”. [See Endnote 41.]

Both of these cases indicate that, in the United States, plaintiffs seeking to have their actions certified as class proceedings must demonstrate two things: first, that they can prove damages, on a class-wide basis; and second, that liability for those damages arises from the same common factual and legal grounds.

- **The US Position on Certification: Rigorous Analysis**

Class actions in the US Federal Courts are authorised through Federal Rule of Civil Procedure 23. Recent decisions from the US Supreme Court interpreting this rule have emphasised that courts must engage with the merits of a case and conduct a rigorous analysis of the cases early, Canadian courts have been moving in a different direction.

The Supreme Court of Canada’s decision in *Hollick v. Toronto (City)* [See Endnote 42] remains a leading source of guidance. In *Hollick*, Chief Justice McLachlin held that “the question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action”. [See Endnote 43.] The Chief Justice went on to hold that the representative plaintiff was required to show “some basis in fact” for each of the certification requirements set out in the legislation.

One of the first cases to interpret the “some basis in fact” test was *Chadha v. Bayer Inc.* [See Endnote 44] and an Ontario action for damages arising from price-fixing. In that case, the Ontario Court of Appeal examined the competing expert opinions closely in forming its view on whether the case should be certified. While the motions judge in *Chadha* had concluded that the experts’ difference of opinion had to be settled by a trial judge, the Court of Appeal disagreed and, partially for this reason, did not certify the action. [See Endnote 45.]

Canadian courts are now backing away from this approach. One example is the Quizno’s class proceeding, which the Divisional Court certified on appeal after the certification motion had been dismissed at first instance. [See Endnote 46.] The motions judge had denied certification largely on the basis of his assessment of the expert evidence. The Divisional Court disagreed with this approach.
It is neither necessary nor desirable to engage in a weighing of this conflicting evidence on a certification motion. The plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent that they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader. Where the assumptions are debated by experts, these questions are best resolved at a common issues trial. A motions judge is entitled to review the evidentiary foundation to determine whether there is some basis in fact to find that proof of aggregate damages on a class-wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports. [See Ontario Endnote 47.]

The Ontario Court of Appeal affirmed the Divisional Court’s decision, though without commenting on this aspect of its reasons. [See Endnote 48.]

The BC Court of Appeal has made similar comments. In Stanway v. Wyeth Canada Inc., the Court rejected Wyeth’s contention that the trial judge should engage in “exacting scrutiny” of expert opinions. Instead, the Court endorsed the trial judge’s conclusion that “she was not to engage in weighing evidence that is clearly contradictory” and stated again that “on a certification hearing, the court is not to weigh the competing evidence”. [See Endnote 49.]

These decisions indicate that Canadian courts are taking a hands-off approach that is the opposite of that used by their US counterparts. Whether this approach accords with the court’s gatekeeping role envisioned by the various class proceedings statutes is questionable. Leaving the resolution of competing expert evidence to trial allows for the possibility that a trial judge may prefer a defendant’s evidence on issues like commonality, which would suggest the action should never have been certified in the first place.

### Approaches to Substantive Law Issues: Indirect Purchaser Claims in Canada and the US

While procedural differences between jurisdictions can impact the availability of collective redress, so too can differences in substantive law. One example of these differences is illustrated by the US and Canadian approach to civil actions arising from price-fixing.

Much competition-related class action litigation is brought on behalf of combined classes of both “direct purchasers” and “indirect purchasers”. Direct purchasers are those plaintiffs who purchased the allegedly price-fixed product directly from the defendants who allegedly engaged in anti-competitive activity. Indirect purchasers are one or more steps away from the direct purchasers in the distribution chain. Most consumers would qualify as indirect purchasers.

One of the main questions these cases raise for the courts is whether plaintiffs in class proceedings brought on behalf of indirect purchasers have standing to sue. The US Supreme Court decided in 1977 that, as a matter of US federal law, indirect purchasers had no standing to sue for alleged overcharges. By way of contrast, the law in Canada is less clear: the courts in British Columbia and Ontario have wrestled with this question over the past decade, with inconsistent results. The Supreme Court of Canada is currently considering the same question in two cases on appeal from the British Columbia Court of Appeal.

#### The American Approach: Illinois Brick

The US Supreme Court closed the door to indirect purchaser claims in the federal courts in its 1977 Illinois Brick v. Illinois decision. [See Endnote 50.] In that case, the State of Illinois brought an action on behalf of itself and local governments against masonry block manufacturers, alleging a conspiracy to fix the prices of concrete block. The plaintiffs were two steps removed from the manufacturers: the blocks were sold to masonry contractors, who in turn submitted bids to general contractors that were themselves bidding on construction jobs.

The defendants moved for partial summary judgment on the basis that only direct purchasers could sue for any alleged overcharge. The US Supreme Court agreed, mainly through an application of an earlier decision called Hanover Shoe. [See Endnote 51.]

In Hanover Shoe, the Court was called on to consider the reverse situation: whether it was a defence to a claim brought by direct purchasers that those purchasers had passed on any overcharge to their own customers. The Court rejected such a defence, and held that a direct purchaser bringing a civil claim had suffered injury within the meaning of s. 4 of the Clayton Act [see Endnote 52] by the full amount of the overcharge. [See Endnote 53.]

In Illinois Brick the Court held that it would be unfair to bar a defendant in a suit brought by direct purchasers from using a pass-on defence while allowing indirect-purchaser plaintiffs to assert their damages claims. [See Endnote 54.]

The Illinois Brick decision remains controversial, and many (though not all) US states have enacted laws that overrule it as a matter of state law. As a result, indirect purchaser claims can now be brought in some state courts.

#### The Canadian Position: A Swinging Pendulum

Canadian courts, particularly those in British Columbia and Ontario, have come to different conclusions about whether indirect purchaser claims should be permitted to be class members in competition class actions. The courts in those provinces have moved from refusing to certify indirect purchaser claims (though for different reasons than Illinois Brick) through to a more relaxed attitude to certification, and back again.

In 2003, the Ontario Court of Appeal decided in Chadha v. Bayer Inc., [see Endnote 55] discussed above, that the indirect purchaser claims in that case should not be certified, though for a different reason than the US Supreme Court in Illinois Brick. Chadha, which was Ontario’s first contested price-fixing certification motion involving a class of indirect purchasers, was also a case about concrete bricks (though this time the pigments used to colour them), and the defendants relied on Illinois Brick at first instance to argue that the plaintiffs’ claim disclosed no cause of action. The motions judge rejected that argument, holding that Illinois Brick was inapplicable in Canada and that the pleading did disclose a cause of action. [See Endnote 56.] Accordingly, he certified the issue of liability for damage as a common issue.

The Ontario Court of Appeal disagreed, and decided that the case should not have been certified. Feldman J.A. referred to Illinois Brick in her reasons, though focused on that case’s acknowledgment of the complexity of proving which actors throughout the distribution chain bore the loss caused by the conspiracy. [See Endnote 57.] Feldman J.A. concluded that the plaintiffs had not put forward sufficient evidence to show how any price increase would have flowed through the distribution chain. [See Endnote 580.] Therefore, the motions judge had erred in concluding that liability could be established on a class-wide basis. [See Endnote 59.] In addition, since liability would need to be proven through individual trials for each member of the class (estimated at 1.1 million people), the action would be unmanageable and a class proceeding was not the preferable procedure for resolving the claim. [See Endnote 60.]

For the Court of Appeal in Chadha, therefore, the indirect purchaser issue presented an evidentiary challenge, rather than a legal one. Feldman J.A. expressly left open the question of whether it was possible to prove liability as a common issue.

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By 2009, courts in Ontario and British Columbia appeared to conclude that it was possible, and certified class actions involving combined classes of direct and indirect purchasers. In *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [see Endnote 61] Justice Rady of the Ontario Superior Court certified a class action “on behalf of all persons in Canada who purchased hydrogen peroxide, products containing hydrogen peroxide or products using hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005”.* [See Endnote 62.] The Divisional Court denied leave to appeal. [See Endnote 63.] Similarly, in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [see Endnote 64] the BC Court of Appeal certified a class proceeding on behalf of a class of direct and indirect purchasers of dynamic random access memory chips (DRAM).

These courts’ decisions were widely debated by the Canadian bar, and viewed as an indication of a judicial attitude that favoured competition class actions.

This view may now be seen as premature in light of two April 2011 decisions from the BC Court of Appeal. While the motions judges in *Sun-Rype v. Archer Daniels Midland* [see Endnote 65] and *Pro-Sys Consultants Ltd. v. Microsoft Corporation* [see Endnote 66] had both concluded that the plaintiffs had demonstrated a methodology for proving harm on a class-wide basis, the BC Court of Appeal appeared to shut the door firmly on indirect purchaser claims, holding that indirect purchasers “have no cause of action maintainable in law”.

The majority’s reasons in the cases (which were heard together) echo those of the US Supreme Court’s in *Illinois Brick*. On the basis of two Supreme Court of Canada decisions considering the passing-on defence, Justice Lowry held that it is “clear beyond question” that the passing-on defence is not available in Canada and that indirect purchasers cannot maintain a cause of action in respect of any loss allegedly resulting from a conspiracy to raise prices. [See Endnote 67.] To hold otherwise would burden defendants with the prospect of double recovery: they would be liable to direct purchasers for the full amount of any overcharge, and also liable to indirect purchasers for the amount of overcharge that may have been passed on.

Despite the BC Court of Appeal’s view of indirect purchaser claims, in November 2011 the Quebec Court of Appeal certified a combined class of direct and indirect purchasers of DRAM chips. [See Endnote 68.] In doing so, the Court reversed the motion judge’s decision, who had made favourable comments about *Illinois Brick, Hanover Shoe,* and the BC Court of Appeal’s decisions in *Sun-Rype and Microsoft*. The Québec Court of Appeal engaged with these decisions as well, and rejected the majority’s reasons in *Sun-Rype and Microsoft*. Kasirer J.A. held that there was no unfair risk of double recovery in a situation where both direct and indirect purchasers had “banded together”, and that in any event, the potential complexity of proving the passing-on of losses to indirect purchasers was “an evidentiary concern that can be properly attended to as part of the burden of proof resting on the appellants when the case is considered on the merits”. [See Endnote 69.] Despite the plaintiffs’ substantial evidentiary challenge, the Court considered that “it would be inappropriate, once damage is alleged, to say that the class action should not proceed past the authorization stage because the challenge is too great”.

The Supreme Court of Canada granted the defendants’ applications for leave to appeal in *Sun-Rype and Microsoft*, and oral argument took place in October 2012. [See Endnote 70.] The case is now under reserve. The Supreme Court’s decision will have an immediate effect on competition class actions in Canada. If the Court dismisses the appeal, claims brought on behalf of indirect purchasers are likely to be eliminated, or at least substantially pared back. If the appeal is allowed, more such claims may be filed.

### Endnotes


2. Over 45 countries provide for class actions, group proceedings or other forms of collective litigation pursuant to either specific class actions legislation rules of civil procedure or other subject specific legislation. A few examples of recent developments include Israel’s *Class Action Law* 5766-2006, Finland’s *Group Action Act* (444/2007), South Africa’s Companies Act and Consumer Protection Act (2008), Italy’s *Consumer Law* (2009) (see Article 140(2)), Poland’s *Law on Class Actions* (2010) and amendments to Mexico’s *Federal Civil Code* and other statutes relating to substantive law (2012). For a review of the means of collective redress in South America, see Manuel A. Gómez, “Will the Birds Stay South? The Rise of Class Actions and Other Forms of Group Litigation Across Latin America” University of Miami Inter-American Law Review, Vol. 43, No. 3, 2012.

3. The announcement was made as part of the Government’s 2013 Budget. The distinction between “opt-out” and “opt-in” regimes is discussed below; see text accompanying note 10.


5. Despite the growth of collective procedures, however, there remains some caution in respect of American style class actions especially in Europe. See European Commission Staff Working Document, *Public Consultation: Towards a Coherent European Approach to Collective Redress* (4 February 2011) at 9, which describes “the risk of abusive litigation to an extent which is not compatible with the European legal tradition”.

6. See South Korea’s *Securities Class Action Act* (2005). There was also a proposed class action provision to be provided in the UK’s *Financial Services Act* which was ultimately withdrawn.

7. See for instance s. 5(1)(e) of the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6 and Rule 23 of the Federal Rules of Civil Procedure (USA). See also clause 4.03(v) of the IBA’s *Guidelines*, infra, note 33. In contrast, in Australia, there is no requirement for the representative member to be approved by the Court, the representative member does not have to be
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typical of other group members and common issues do not have to predominate over individual issues. See Professor Geoffrey Millar, ‘Some thoughts on Australian class actions in the light of the American experience’ (Speech delivered at the Investor Class Action Conference, Federal Court of Australia, 10 March 2009) in Kevin Lindgren (ed), Investor Class Actions (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2009), 4.

In sophisticated class actions jurisdictions, it is not uncommon for plaintiffs to deliberately plead their case so as to make it more amenable to collective redress. The Supreme Court of Canada has expressly permitted this practice: see Runley v. British Columbia 2001 SCC 69 at para. 30.

Many also note that collective proceedings provide a behavioural modification function or a form of deterrence (see, for instance, the Supreme Court of Canada decision of Hollick v. Toronto (City) 2001 SCC 68 at para. 27.). This does not necessarily have to be a goal of collective redress: it might be argued that such a goal should be reserved for regulatory as opposed to civil proceedings.

The new UK competition regime discussed above replaces the former “opt-in” procedure.

Guidance as to what should be contained in a notice is often provided in class actions legislation. See also the American Bar Association Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings. In the case of opt-out actions, the opt-out deadline is essential to precluding subsequent individual actions.

See, for instance, consumer law-related legislation in Italy which appears to be limited to consumer organisations.


Abacat v Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 August 2011.

Of particular interest is that the more notable securities settlements in the Netherlands have resulted from class actions commenced in the United States.

See the IBA’s Guidelines, infra note 33 at p. 23, and the municipal and international sources cited therein.

Beals v. Saldanha, 2003 SCC 72 at para. 32. The “real and substantial connection” test may not be the accepted test for enforcement in other common law jurisdictions: see Flightlease (Irl) Ltd (In Vol Liq) & Cos Act 2001 SCC 68.


Currie, supra at para. 43.

2009 SCC 16 (“Lépine”).

The representative plaintiff in the Québec action had rejected the settlement offers: Ibid. at para. 4.

Ibid. at paras. 44-46.

 Ibid. at para. 45.

2008 QCCA 800.

This issue has been considered by at least one Ontario judge: see Silver v. IMAX Corp., [2009] O.J. No. 5585 (Sup. Ct) (certification decision) and 2012 ONSC 1047 (decisions regarding form of notice for members of overlapping Canadian and American classes).


See, for example, litigation relating to the anti-inflammatory drug Vioxx, which took place in both Ontario and Saskatchewan, and proceedings relating to injuries allegedly caused by the testing and application of herbicides by a Canadian Forces base in New Brunswick, which have been heard in courts in Saskatchewan, New Brunswick, and Newfoundland.

For example, a national class action will be commenced in Ontario, but class counsel will carve out British Columbia and Québec because there are already existing actions there.

See, for instance, the BC Class Proceedings Act (s. 16(2)).

Section 6 of Saskatchewan’s Class Actions Act.

This issue is discussed in more detail below.

See, e.g., Tiboni v. Merck Frost Canada Ltd. (2008), 295 D.L.R. (4th) 32 (Ont. Sup. Ct.) at para. 41 (calling for a protocol among the provincial courts for dealing with carriage motions), and Canada Post Corp. v. Lépine, 2009 SCC 16 at para. 43 (pointing out that legislatures should design solutions for problems of coordination).

The protocols were also addressed in the decision of Silver v. IMAX Corp. 2012 ONSC 1047 at paras. 71-73.

Available online at http://www.ibanet.org.


Walmart, slip-op at 9.

Walmart, slip-op at 10 [emphasis in original].

Ibid. fn. 6.

Comcast, slip-op at 6.

2001 SCC 68.

Ibid. at para. 16.


See text accompanying note 58, below, for additional discussion of this point.

6038724 Ontario Ltd. v. Quiznos’s Canada Restaurant Corporation (2009), 96 OR (3d) 252 (Div. Ct.).

Ibid. at para. 102.


2012 BCCA 260 at paras. 47, 49, and 55.


Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15, provides: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

The Court did so out of concern that holding otherwise would unduly complicate such antitrust actions, and potentially allow...
conspirators to “retain the fruits of their illegality” because indirect purchasers would have a tiny stake in any lawsuit and therefore little incentive to sue. See *Illinois Brick* at 725-726.

54 *Illinois Brick* at 728.
56 *Chadha* at para. 10.
57 *Chadha* at paras. 43-44.
58 See, on this point, *Chadha* at para. 30: “That [expert] evidence does not address the issue of what method could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents’ iron oxide pigment overpaid for the buildings as a result.”
60 *Ibid.* at para. 56.
64 2009 BCCA 503.
65 2011 BCCA 187.
66 2011 BCCA 186.
67 2011 BCCA 187 at paras. 76 and 80-81.
68 *Option Consommateurs c. Infineon Technologies, a.g.*, 2011 QCCA 2116.
69 *Ibid.* at paras. 109 and 111.
70 Supreme Court of Canada Case Nos. 34282 (*Microsoft*) and 34283 (*Sun-Rype*).
71 See also Tanya J. Monestier, “Transactional Class Actions and the Illusory Search for Res Judicata” 86 Tul. L. Rev. 1 (2011-2012) whereby the author proposes an opt-in model to address foreign class members in American class actions.

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Torys LLP is a highly respected international business law firm with a reputation for quality, innovation and teamwork. Our enviable record of experience combined with insight and creative problem solving have made us our clients’ choice for their largest and most complex transactions and major disputes.

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With considerable expertise in all aspects of Canadian and U.S. class actions, Torys’ class actions practice includes advising clients on Canadian aspects of U.S. class actions, and providing expert opinion evidence in U.S. class actions concerning various aspects of Canadian law. Our litigators have impressive trial experience: we have defended two of Ontario’s five major commercial class action trials and have significant experience defending class action trials in Quebec. With offices in Toronto, New York, Calgary and Montréal, the quality of our case experience and our team’s agility working across Canada and on cross-border matters through our New York office has grown a practice unique in interregional cohesion and capacity.