Antitrust Class Actions: A Tale of Two Countries

BY MICHAEL A. EIZENGA, DANY H. ASSAF, AND EMRYS DAVIS

ANTITRUST CLASS ACTIONS confront companies in a wide range of industries with high stakes litigation, and the continued globalization of commerce has increasingly given rise to simultaneous exposure and potential liability in multiple jurisdictions. The United States and Canada exemplify this modern reality: both authorize private parties to assert antitrust class action claims and successive free trade agreements have led to extensive cross-border commerce between the two countries. So it is not surprising that parties to antitrust class action cases increasingly are involved in proceedings in both jurisdictions at the same time.

Where trade is essentially seamless and business practices are similar, it is important to identify and understand when seemingly similar circumstances can result in materially different antitrust liabilities, such as in the class action realm. Statutes and court rules in Canada and the United States reflect both similarities and important differences in class certification requirements and civil procedure,[1] and recent developments in Canada have significantly altered the landscape for Canadian antitrust class action cases.

In June 2010, three Canadian appellate courts issued decisions that confirmed what had previously been described in an article in this magazine as an emerging trend:[2] a new liberal and pro-certification approach to antitrust class actions.[3] Each case was a complex and multifaceted antitrust class action, in which the issue of classwide damages was front and center on certification, yet a class was certified in each case with minimal scrutiny of competing expert economic evidence related to classwide damages. Indeed, each court avoided rigorous analysis of evidence and ruled that kind of analysis unnecessary.

Michael A. Eizenga is a partner and co-chair of the Class Actions Practice Group, Dany H. Assaf is a partner in the Competition Law Practice Group and managing partner of the Middle East practice, and Emrys Davis is an associate and member of the Class Actions and Competition Law Practice Groups in the Toronto office of Bennett Jones LLP.

These appellate decisions and the lower-court decisions that they affirmed have ignited a firestorm of commentary, primarily from the Canadian defense bar and for the most part critical of the decisions.[4] Prior to this shift, the apparent advantage in Canada lay with defendants on certification in antitrust cases.[5] Nevertheless, while the rulings in these cases are not surprising given the historically liberal approach to certification in Canada, they underscore the need to understand important differences in class certification and civil procedure that confront parties in cross-border antitrust class actions in Canada and the United States.

The Evolution of Canada's Low Certification Threshold

Ontario is Canada's most populous province and in 1993 it became the first common law province to adopt a class proceedings statute.[6] With no national equivalent to U.S. Federal Rule of Procedure 23, most class actions proceed in the provincial courts. Ontario's statute was adopted after reports by two advisory bodies: the Ontario Law Reform Commission[7] (LRC) and the Advisory Committee of the Attorney General.[8] Ultimately, the more recent Advisory Committee's report, not the LRC's report delivered eight years earlier, was the foundation of Ontario's Class Proceedings Act.[9] Both the LRC and the Advisory Committee recommended that Ontario enact legislation to authorize private class actions, and identified three important policy objectives:[10] judicial economy, access to justice, and behavior modification.[11]

Despite similarities in the recommendations of these advisory bodies, two key differences (the LRC's recommendations were closer to U.S. Federal Rule of Civil Procedure 23) fundamentally shaped Canada's low certification threshold.

First, the LRC recommended a preliminary merits test for certification that would require the proposed class representative to show a reasonable possibility that the material questions of fact and law common to the class would be resolved at trial in favor of the class. The Advisory Committee, on the other hand, stated that certification should focus solely on the form of the action, and thus did not recommend a preliminary merits test.

Second, the LRC proposed draft legislation which, like Rule 23, required that common issues predominate over individual issues in order for a court to certify the action. Critically, this recommendation was left out of the Advisory Committee's report. As a result, the Ontario legislature, which relied on the Advisory Committee's report, included neither a preliminary merits[12] test nor a predominance test[13] when it introduced its class proceedings statute.

These basic propositions—that the statute ought to be interpreted in light of the three objectives of class proceedings, that certification is a matter of procedure only, and that there is no predominance test—are universally cited by Canadian courts, and led the Supreme Court of Canada to direct "that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that

gives full effect to the benefits foreseen by the drafters."[14]

Acting on this guidance, Canadian courts have broadly interpreted provincial class proceedings legislation and rejected arguments that the courts should apply an American-style predominance requirement.[15] Additionally, in addressing whether a class action is the preferable procedure—the criterion in Ontario and other provinces that most closely resembles a predominance test—Canadian courts have construed the requirement broadly with a view to the importance of the common issues in relation to the claims as a whole.[16] Accordingly, although the formal language used to describe certification requirements in Canada and the United States is similar, the Canadian regime displays a substantially lower threshold for certification.[17]

Other Differences Between Canada and U.S. Procedure

The policy objectives of class actions and the low certification threshold have informed several other aspects of Canadian class action procedure that differ from their U.S. counterparts.

Post-Certification Litigation. Because of the low threshold for certification, Ontario's CPA envisions significant post-certification motion practice and even significant litigation within the class action case to deal with individual issues following the common issues trial.[18] There is no counterpart for such proceedings under Rule 23. Ontario courts have relied on this difference to distinguish American decisions in which courts on similar facts have denied certification due to the predominance of individual issues,[19] and the Ontario CPA provides common issue courts with extensive powers and discretion to fashion manageable procedures to deal with individual issues.

Low Evidentiary Threshold for Certification. The low threshold for certification and procedural focus have also informed the Canadian judiciary's view of the evidentiary requirements for certification. Whereas American decisions reflect a growing trend toward rigorous fact-based scrutiny on certification,[20] Canadian plaintiffs must only provide a minimum evidentiary basis for certification[21] to satisfy the "some basis in fact" test, i.e., to establish some basis in fact that there is an identifiable class, that there are common issues, that a class proceeding is the preferable procedure, and that the representative is appropriate.[22]

The "some basis in fact" threshold is low, resembling the "some showing" standard rejected by a U.S. court in *In re Initial Public Offering Securities Litigation*.[23] Although the scope of this test is sometimes difficult for courts to define and apply, the test does not require the class plaintiff show that the action is likely to succeed, that a prima facie case has been made out, or even that there is a genuine issue for trial.[24] Accordingly, the material filed by plaintiffs in support of certification will normally consist of a series of brief affidavits of the representative plaintiff, class counsel, and a qualified expert in appropriate cases.

Canadian courts also apply the "some basis in fact" test to analyze expert evidence tendered at the certification stage, and do not engage in rigorous scrutiny of such evidence once the court determines that the evidence is admissible.[25] Because such expert evidence is being used at the certification stage—which is procedural only—it cannot be subjected to a level of rigorous scrutiny. Further, because such expert evidence is prepared prior to formal discovery, the nature of investigation and testing that experts can undertake as a basis for preliminary opinions cannot be as extensive as for opinions to be given at trial.[26] Canadian courts have pointedly held that the motions judge is not well equipped to conduct an analysis of competing expert evidence at the certification motion.[27] Rather, such analysis is to be left to the common issues trial judge. This approach has important implications for class certification proceedings, which are discussed more fully below.

Discovery. Unlike American procedure where, barring a stay or protective order, discovery requests may commence early in the action and may cover merits issues,[28] discovery in Canadian class action cases does not commence until after the defendant files a statement of defense, which in class proceedings does not usually occur until after certification.[29] Thus, the parties in Canadian class actions do not normally have a right to formal discovery (oral or documentary) until after certification has been granted. Parties do have a right to cross-examine witnesses who file affidavits on the certification motion, but only on matters that relate to the (procedural) matter of certification.[30]

Pre-Certification Motions. The certification motion typically is the first litigation event in a proposed class proceeding. Although the CPA contemplates the service of certification motions materials within ninety days of all defendants appearing to defend the claim, certification motions usually proceed one to two years after the claim begins. Case management courts set schedules for cross-examinations, delivery of legal briefs, and other materials, which typically vary by case. Those courts have occasionally allowed pre-certification challenges to pleadings, motions to challenge the adequacy of the record filed by one of the parties, and summary judgment motions (e.g., challenging the jurisdiction of the court), but such proceedings are allowed only on a case-by-case basis and pre-certification motions practice is simply not extensive in Canada. Challenges to the sufficiency of the plaintiff's claim usually are addressed in connection with the certification motion, because the test of whether pleadings disclose a cause of action is the same under the Ontario CPA (i.e., is it "plain and obvious" that the plaintiff's claim is bound to fail?) and the Ontario civil procedure rules.

Application to Antitrust Cases

The greater willingness of Canadian courts to certify classes in antitrust cases with parallel proceedings in which U.S. courts have denied certification is not surprising given Canada's low legal and procedural thresholds for certification,

the procedural focus of the certification hearing, the low scrutiny of case facts and expert evidence on the certification motion, the lack of extensive pre-certification discovery rights, and the extensive powers of the common issues judge to create procedures to manage individual issues.

Three Canadian courts certified antitrust classes in 2010, issuing decisions that confirmed the trend emerging in lower court decisions: (1) the Supreme Court of Canada denied leave to appeal in *Infineon* (the DRAM action); (2) the Ontario Court of Appeal dismissed the appeal in *Quizno's* (price-fixing allegations in the context of a franchisor-franchisee relationship); and (3) the Ontario Divisional Court denied leave to appeal in *Irving Paper* (the hydrogen peroxide action). Prior to these important appellate decisions, practitioners could not be certain that lower courts' relaxed scrutiny of class certification motions and the plaintiff's expert evidence in support of those motions were acceptable for antitrust cases. The appellate decisions confirmed that the general legislative policies and judicial standards for class certification, and in particular the low evidentiary threshold needed to support a certification motion, applied equally to antitrust and other types of class action claims.

Although each of the three cases decided in 2010 involved different industries and facts—*Quizno's*, for example, included claims only for direct purchasers whereas the proposed classes in *Infineon* and *Irving Paper* included both direct and indirect purchasers—the certification motions in each case focused on similar issues. In each case the plaintiff alleged violations of the Canadian Competition Act as well as civil conspiracy, and proof of loss is an element of liability for both causes of action. Until these decisions, antitrust plaintiffs had encountered difficulties demonstrating at certification that actual damages and loss could be proved on evidence common to the class.[31] Both sides typically marshaled competing expert economic evidence to opine on the potential for a workable methodology to determine proof of loss. If the court was not satisfied with the plaintiff's expert evidence, it would deny certification. *Infineon*, *Quizno's*, and *Irving Paper* reshaped the way courts interact with plaintiffs' expert economic evidence in three significant ways.

First, in *Infineon* the British Columbia Court of Appeal held that aggregate damages provisions[32] in that province's class proceedings statute could be used to establish the *fact* of loss for purposes of the plaintiffs' claims.[33] This decision was not reviewed by the Supreme Court of Canada and has since been followed in British Columbia's lower courts.[34] It remains to be seen how that province's courts will deal with this issue in the context of a common issues trial on liability rather than simply in the certification context.

Second, although Ontario courts rejected the B.C. position that aggregate damages provisions can be used to establish the fact of loss,[35] they nevertheless adopted a very low threshold for scrutinizing expert evidence in support of a theory of proof of loss. The Ontario courts applied the "some basis in fact" test often used in non-antitrust cases, and held that plaintiffs need only demonstrate a "viable"[36] or "credible and plausible"[37] methodology to establish the fact of loss on a classwide basis. The courts also discouraged any detailed evaluation or weighing of conflicting expert reports.[38]

Third, going even further, Ontario courts held in certain cases the plaintiff may not be required to establish a methodology for proving loss in order to prevail on class certification. In *Quizno's*, the Divisional Court held that proving some elements of the alleged Competition Act violations was a "substantial ingredient of liability" which would advance the claim of the class, even in the absence of proof of loss.[39] Similarly, the court held that proof of four elements of the tort of conspiracy (the fifth is the fact of loss) would also advance the class claim and avoid duplication and waste.[40] Because the claims of the class members could be advanced together, the fact that damages might have to be proved individually at some point in the future did not detract from the value in certifying the action. Thus, the Divisional Court would have certified the class even if the plaintiff had not demonstrated a workable methodology for proving the fact of loss on a classwide basis.

The Court of Appeal upheld the Divisional Court's decision and commented that "it is unnecessary at this stage to engage in the debate about the relative strengths and weaknesses of the expert evidence."[41] The court's comment may imply that, in some cases, expert evidence may not be necessary at the certification stage,[42] although the principle's broader application remains uncertain.[43] Plainly, the court's apparent willingness to dispense altogether with the requirement that the class plaintiff show common proof of loss differs markedly from recent rulings by U.S. courts denying class certification due to a lack of evidence of common impact, and engaging in rigorous fact-based analysis of expert evidence on this element of antitrust class claims.[44]

Ultimately, the rulings in *Infineon*, *Irving Paper*, and *Quizno's* were products of the principles underlying the Canadian class action regime. Each court approached the case before it considering the procedural nature of the certification motion, the historically low evidentiary threshold for certification, and the goals of judicial economy and behavior modification. By any measure, the result was a lowered bar for plaintiffs in certifying antitrust class actions, which brings them more in line with certification motions in other types of Canadian class action cases and less in line with current U.S. practice.

The American Context and Competition Act Amendments

At the same time Canadian courts lowered the bar for plaintiffs in certifying antitrust class actions, American courts grew more conservative in certifying antitrust class actions and significant amendments to the Canadian Competition Act came into force.

The Stricter American Approach. Previous articles in this magazine have traced the evolution of a standard of rig-

orous review of certification requirements in American antitrust class actions.[45] One noteworthy example of this trend that stands in stark contrast with Canadian jurisprudence is the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litigation*,[46] which dealt with the same subject matter as *Irving Paper*. While it appears that Canadian plaintiffs need only demonstrate that *some* elements of their claim are common, the Third Circuit held that *each* essential element of a cause of action must be capable of proof at trial through evidence that is common and not individual.[47] Similarly, the court required a showing that loss is capable of proof at trial through common evidence.[48] The contrasting result in *Quizno's* points to the Canadian regime's apparent tolerance of follow-on proceedings to resolve individual issues in class litigation, although to date there have been no common issues trials in Canadian antitrust cases, let alone follow-on proceedings to resolve individual issues.

The Third Circuit also rejected the proposition that expert evidence at the certification motion should be subject to a reduced level of scrutiny, holding instead that expert evidence, like all evidence on a certification motion, must be subjected to rigorous analysis.[49] The court pointedly rejected as "erroneous" the lower court's assumption that it could not weigh the competing expert opinions for the purpose of deciding whether the requirements of certification had been met.[50] The Third Circuit went on to hold that the demonstration of a merely plausible or workable methodology to prove classwide damages was insufficient when the methodology is genuinely disputed. In stark contrast with the rulings by Canadian courts, the court held that it is not only appropriate but necessary to weigh competing expert opinions and to resolve conflicts in the evidence at the certification stage. Of course, the Canadian "wait and see" approach to expert evidence on proof of loss and other elements of a claim that may present individual issues in antitrust class actions remains to be tested in the context of a common issues trial.

Canadian Competition Act Amendments—Lowering the Threshold. Recent changes to the Competition Act effective in March 2010 are an additional important factor that may increase the number of antitrust actions in Canada. Under the Act, agreements between competitors to fix prices, affect production or supply levels, or allocate sales, customers, or territories, are now per se criminal offenses, replacing the previous criminal conspiracy provisions.[51] The Act no longer requires proof that such agreements would be likely to unduly lessen or prevent competition.[52] Instead, once there is proof of a prohibited agreement, a defendant can avoid liability only by demonstrating on a balance of probabilities that the agreement was ancillary and necessary to a broader agreement which does not contravene the conspiracy offense.

Because violations of the Act's criminal provisions trigger a civil right of action, the amendments not only make criminal prosecution of offenders easier for the Canadian government, but also make it easier for civil plaintiffs to prove criminal violations of the Act and thus trigger civil liability for the offenders under the Act's civil damages provisions.[53] Under the old statutory regime, the burden of proving an undue impact on competition was a practical barrier to launching class actions before a formal guilty plea was entered, which typically occurs only after a lengthy investigation by the Canadian Competition Bureau. Under the Act, a guilty plea was used as evidence of proof of conspiracy and undue lessening of competition in civil cases. Now, a private plaintiff no longer has this burden, and need only prove the existence of an agreement and resulting damages. That burden entails far less cost and risk of adverse outcomes, which in turn should reduce the time period between when allegations of criminal misconduct become known and private plaintiffs are able to commence class action cases. Plaintiffs need no longer await the conclusion of a Bureau investigation and entry of a formal guilty plea on criminal charges.

Practical Implications and Future Prospects

Cross-border practitioners now must confront the strategic implications of recent Canadian court rulings that herald a pro-certification regime of antitrust class actions, with a low evidentiary threshold for plaintiffs, minimal scrutiny of expert evidence, and a general deferral of detailed analysis of the plaintiffs' case beyond the class certification stage.

More Canadian Antitrust Class Actions. As noted above, the low bar for certification of antitrust class actions in Canada and recent amendments to the Competition Act should reduce plaintiffs' pre-certification litigation costs and risks and therefore give rise to more antitrust class action cases in Canada. In contrast, the more stringent U.S. approach may deter U.S. plaintiffs from filing antitrust class actions even in cases involving similar alleged conduct in both jurisdictions, or U.S. plaintiffs may fail to achieve class certification where Canadian plaintiffs prevail in parallel cases.

More Focus in Canada on Post-Certification Evidence. As a matter of practice, defendants in Canadian class actions may now increasingly choose to focus their litigation efforts on the post-certification stage. With such low scrutiny of the plaintiff's expert evidence on certification, it is likely that many defendants will choose to keep most elements of their evidence and case, including their expert evidence, in reserve for post-certification litigation, including the common issues trial. Many will now consider exposing an expert to pre-certification cross-examination to be without value. Where actions proceed in both Canada and the United States, this means that a defendant's expert evidence in Canada (at trial) will almost always follow its introduction in the U.S. proceeding (at certification). This should be desirable for American practitioners who do not want to expose expert evidence to scrutiny in a smaller Canadian proceeding before using it in the larger U.S. action where the stakes are higher.

Likewise, with a low bar on certification, many plaintiffs may choose to "keep their powder dry" and present only as much of their factual evidence as required to get over the low certification bar.

More Trials. Defendants may be prepared to take antitrust actions to trial in Canada on the expectation that more complete records and greater scrutiny will expose the flaws in the plaintiffs' expert economic evidence. Defendants may gain confidence to risk a trial if, in applying more rigorous scrutiny, American courts have rejected for class certification the same type of expert evidence that a Canadian class plaintiff seeks to use under the "credible and plausible test."[54] Such strategies may be ominous for Canadian plaintiffs in the more exacting context of a common issues trial, and Canadian plaintiffs' counsel may respond by developing a panel of economic experts to assist in presenting their cases at trial rather than simply for class certification. Certainly, the nature of the expert evidence required at a common issues trial will need to be much more robust than that currently developed by plaintiffs in Canada.

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Although the lowered bar for certification in Canada may reduce up-front cost and risk for plaintiffs to file antitrust class actions, post-certification litigation may entail higher costs and risks, and the potential cost and risk associated with individual issue trials may overwhelm some plaintiffs who cannot prove damages with common evidence.

Staging of merits trials will present one of the greater challenges for parties and counsel who face simultaneous U.S. and Canadian class actions. With lower stakes (i.e., smaller claims) in Canada and the dangers of subjecting a full range of witnesses to cross-examination, it is unlikely that U.S. counsel and their clients will want a common issues trial to proceed in Canada while courts in parallel U.S. cases have yet to rule on class certification, in particular where the same fact or expert witnesses will testify in both jurisdictions.

Higher Settlement Values? To date, most settlements in Canadian price-fixing cases have been reached pre-certification, and for fairly modest values. Whether plaintiffs' counsel will now push past certification in an attempt to achieve greater settlement values remains to be seen, but given the lowered bar for certification, it seems likely that plaintiffs will look to settle post-certification for higher values. Of course, values will remain a fraction of U.S. settlements.

Defendants should consider whether an early settlement in Canada will have an impact on settlement values in the United States, although given the growing differences between the Canadian and U.S. certification regimes, there is no reason they should. Further, on a long-term basis, Canadian settlement values, as well as their importance for U.S. cases, are not likely to be established until Canadian courts and litigants develop a track record of common issues trials.

More Post-Certification Motions. Post-certification motions for summary judgment and decertification remain available to defendants, and it is likely that there will be more robust post-certification motions practice in Canadian antitrust class actions. Ontario recently passed amendments to its civil procedure rules designed to make summary judgments more accessible.[55] American and Canadian counsel in parallel cases will need to consider strategic issues regarding the timing of such motions, and the parties in Canadian cases may use evidence marshaled for U.S. class certification motions to support or oppose motions to decertify a class or for summary judgment.

Given that plaintiffs may have difficulty actually demonstrating proof of loss on a classwide basis when their expert evidence is subjected to a higher level of scrutiny than that applied at certification, defendants may see decertification and summary judgment as viable alternatives to the certification motion to advance these arguments. Narrowing the class size or claims may be attractive results for defendants, but they also must consider that decertification and summary judgment motions present limitations and challenges that warrant careful consideration by counsel.

For example, the court in *Quizno's* held that proof of the fact of loss may not be required to certify antitrust class actions, and this ruling may present an obstacle to future decertification motions as well. Although a court will scrutinize competing expert evidence more rigorously on the decertification motion, if resolution of some "substantial ingredients" of liability supports certification, the court may be inclined to deny decertification regardless of the expert evidence tendered on the proof of loss issue. Likewise, decertification may be difficult in British Columbia, where it will be difficult to show that the action is not manageable as a class proceeding when the plaintiff can rely on the aggregate damages provisions of the statute to prove liability.

The full implications of the *Quizno's* and *Infineon* decisions are still uncertain, and more developed evidentiary records may reveal that particular antitrust class actions are unmanageable despite the apparent procedural advantages for plaintiffs under the rulings in *Quizno's* and *Infineon*. As a result, it remains to be seen whether antitrust class action defendants will pursue decertification motions in selected cases or as a matter of course.

Defendants also will give careful consideration to summary judgment motions, which are most likely to be used in antitrust class actions in one of two scenarios where the

motion could significantly narrow the class. First, the defendants may submit evidence that direct purchasers passed on any price increase to indirect purchasers. Such evidence might include proof that direct purchasers priced their products at a consistent multiple of the price of the input product from the defendants. If successful, this motion would end the claim by the direct purchasers, but leave the indirect purchasers' claim. Second, the defendants may submit evidence that the entire price increase was absorbed by direct purchasers and thus that indirect purchasers did not suffer any damage. If successful, this motion would end the action of the indirect purchasers, but leave the direct purchasers' claim. Summary judgment motions of this type are unlikely to end the action, but if successful would significantly reduce the size of the class facing defendants, and either reduce total potential liability or at least avoid the risk of duplicative damages recoveries.

Summary judgment motions are largely untested in Canadian antitrust class actions, and given the result in *Infineon*, defendants should be aware that the Canadian doctrine of waiver of tort and principles of unjust enrichment may pose unique challenges to such motions.

The waiver of tort doctrine allows a tort victim, after establishing tortious conduct, to choose to receive the tortfeasor's gains (e.g., the defendants' unlawful profits from price fixing), in lieu of the victim's own damages. Similarly, principles of unjust enrichment suggest that defendants may not be allowed to keep unlawful profits. Canadian courts have not yet ruled on whether the plaintiff must show a corresponding deprivation to require a tortfeasor to disgorge unlawful profits.[56] In *Infineon*, the British Columbia Court of Appeal held that, by pleading guilty to conspiracy charges and agreeing to pay fines calculated as a function of the pecuniary gain derived from the crime, the defendants admitted to engaging in wrongful conduct and receiving a wrongful gain, and that such pleas are sufficient to trigger liability to third parties for common law claims of restitution.[57]

If this ruling is followed by other courts, defendants who plead guilty to conspiracy charges in any jurisdiction may face waiver of tort and unjust enrichment claims by private plaintiffs in Canadian courts. Class plaintiffs who cannot prove their loss on a classwide basis may need to resort to individual issues proceedings after a common issue trial for their Competition Act and conspiracy violations, but both direct and indirect purchasers may be able to recover damages on a classwide basis for these common law claims.

Canadian courts have discussed waiver of tort and unjust enrichment principles only in the context of procedural decisions. The substantive application of these principles remains open to question, and may be squarely confronted on a summary judgment motion in the antitrust context. In addition to prevailing in a common issues trial, a class plaintiff would still need to establish that the defendants earned a wrongful gain through Canadian sales rather than foreign sales.

Awaiting the Common Issues Trial

In many ways, the *Irving Paper*, *Quizno's*, and *Infineon* decisions have produced as many questions as answers, and the prospects for Canadian antitrust class action plaintiffs to sustain class certification for direct and indirect purchasers in cases with multi-layered distribution channels may not be known until Canadian courts gain experience with common issue trials in such cases. To date, there have been no common issues trials in antitrust actions in Canada, but recent developments discussed above virtually assure that this will change.

For parties and practitioners engaged in cross-border antitrust class actions, the immediate result of recent developments appears to be that Canadian actions may proceed through class certification much more quickly and with greater prospects for success by plaintiffs than parallel U.S. cases, where discovery and expert analysis are likely to take much more time and effort. Thus, the focus in Canadian actions may shift to post-certification proceedings, while elevated scrutiny on certification in the United States will keep the focus of parties in U.S. cases on the class certification stage. Consequently, American and Canadian practitioners will have to adapt to an environment in which Canadian cases are proceeding to merits discovery and common issues trials (or settlement) while parallel U.S. cases remain focused on class certification.

With such divergent standards on certification, timing differences between the pace of parallel U.S. and Canadian cases should have little impact on U.S. certification battles. Instead, U.S. and Canadian parties and their counsel must (1) consider the impact of early settlements in Canada on U.S. proceedings, (2) manage merits discovery in Canada either alongside or in some cases before U.S. discovery, (3) use post-certification motions practice to seek decertification and/or summary judgment in Canada, and (4) prepare for a strong challenge at the common issues trial, where defendants may have greater chance of success than in opposing initial class certification. ■

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[1] The class actions laws of Canada's common law provinces adopted many of the elements of Rule 23, twenty-five years their predecessor. Commentary has focused on the lower threshold for certification in Canada. *See, e.g.*, Philip Anisman & Garry Watson, *Some Comparisons Between Class Actions in Canada and the U.S.: Securities Class Actions, Certification, and Costs*, CAN. CLASS ACTION REV., July 2006, at 467; Amy Wilson, *Typicality, Preferable Procedure, and Superiority: Ontario Class Proceedings Act, 1992 and Rule 23 of the U.S. Federal Rules of Civil Procedure*, CAN. CLASS ACTION REV., Dec. 2005, at 375.

[2] Ellen Meriwether & Andrew J. Morganti, *Emerging Trends in Certification of Antitrust Class Actions in Canada*, ANTITRUST, Summer 2010, at 71.

[3] Pro-Sys Consultants Ltd. v. Infineon Techs. AG (*Infineon*), 2009 BCCA 503, [2010] 98 B.C.L.R. 4th 272 (C.A.) (overturning the court below and granting class certification), *rev'g* 2008 BCSC 575 (B.C.S.C.), *leave to appeal denied*, 2010 CarswellBC 1361 (S.C.C. June 3, 2010) (WL); Irving Paper v. Atofina Chems. Inc. (*Irving Paper*), [2010] 99 O.R. 3d 358 (Ont. C.A.), *leave to appeal denied*, 2010 ONSC 2705 (Ont. S.C.); 2038724 Ontario Ltd. v. Quizno's Can. Rest. Corp., [2010] 100 O.R. 3d 721, *aff'g* 96 O.R. 3d 252 (*Quizno's Appeal*).

[4] Brian N. Radnoff, *A Brave New World: Certification of Competition Class Actions*, 7 CLASS ACTION 486 (2010); James Sullivan, Cathy Beagan-Flood & Sara Knowles, *Case Commentary:* Irving Paper Limited et al. v. Atofina Chemicals *and* Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 7 CLASS ACTION 493 (2010) 493; Kent E. Thomson, Adam Fanaki & Davit D. Akman, *Competition Class Actions in Canada—Has the Bar Been Lowered for Certification of Indirect Purchaser Class Actions?*, 11 CORP. LITIG. 658 (2010); John B. Laskin & Justin G. Necpal, *Defending Competition Class Actions in Canada: New Challenges and Next Steps*, Presented at the 2010 Annual Fall Competition Law Conference (Sept. 30–Oct. 1, 2010); Charles M. Wright, Andrea DeKay & Linda Visser, *The Rise and Fall of* Chadha v. Bayer, Presented to the 2010 Annual Fall Competition Law Conference (Sept. 30–Oct. 1, 2010).

[5] Attempts to certify antitrust class actions, particularly indirect purchaser actions, whether based on statutory or common law claims, were largely unsuccessful, primarily because plaintiffs were unable to adequately demonstrate the ability to prove the fact of loss using evidence common to the class. The decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.*, [2003] 63 O.R. 3d 22 (C.A.), required the plaintiffs to submit expert evidence to demonstrate that loss could be proved based on common evidence. A series of certification denials followed Chadha in price-fixing cases, leading some to openly question whether competition class actions were dead in Canada. James Sullivan & Sara Knowles, *Are Competition Class Actions Dead in Canada?*, 7 CLASS ACTION 446 (2009); *see also* John Laskin, Linda Plumpton & Amanda Kemshaw, *The Certification of Competition-related Class Actions in Canada*, 3 CAN. CLASS ACTION REV. 219 (2006).

[6] Today, eight of the nine common law provinces have passed similar class action statutes. Quebec is Canada's only civil law province and has had a class actions regime since 1978: Code of Civil Procedure, R.S.Q. c. C-25, ss. 99-1026.

[7] 1 Ontario Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions* (1982) [hereinafter *Commission*].

[8] Ontario Minister of the Attorney General, Policy Development Division, *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990) [hereinafter *Advisory Committee*].

[9] Class Proceedings Act (CPA), 1992, R.S.O. 1992, c. 6.

[10] The Supreme Court of Canada later endorsed these same purposes. W. Can. Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, ¶¶ 27–29 (Can.).

[11] The LRC referred to behavior modification as an "essentially inevitable, albeit important by-product of class actions." *Commission*, *supra* note 7, at 145–46. The Advisory Committee went somewhat further, at least in tone, and spoke of the important objective of generating a "sharper sense of obligation to the public by those whose actions affect large numbers of people." *Advisory Committee*, *supra* note 8, at 17.

[12] Hollick v. City of Toronto, [2001] 3 S.C.R. 158, ¶ 16 (Can.).

[13] *Id.* ¶ 30.

[14] *Id.* ¶ 15.

[15] *See, e.g.*, Cloud v. Canada (Att'y Gen.), [2004] 73 O.R. 3d 401 (S.C.J); Pearson v. Inco Ltd., [2006] 78 O.R. 3d 641 (S.C.J.); Hickey-Button v. Loyalist Coll. of Applied Arts & Tech., [2006] 211 O.A.C. 301 (C.A.).

[16] Markson v. MBNA Can. Bank (2006), [2007] 85 O.R.3d 321 (S.C.J.).

[17] Also noteworthy is that a decision refusing certification may be appealed as of right whereas a decision granting certification may only be appealed with leave of the court. *See* CPA § 30.

[18] Subsection 25(1) of the CPA states that "[w]hen the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues . . . the court may determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court" or may use a range of other procedures.

[19] *See, e.g.*, Tiboni v. Merck Frosst Can. Ltd., [2008] 295 D.L.R. 4th 32, ¶ 107 (Ont. S.C.J.) (certifying a class of Vioxx users despite the decision in *In re Vioxx Prod. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006), denying certification in the United States).

[20] *See, e.g.*, Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, ANTITRUST, Summer 2007, at 61 [hereinafter *Without Presumptions*]; Ian Simmons & Alexander P. Okuliar, *Rigorous Analysis in Antitrust Class Certification Rulings: Recent Advances on the Front Line*, ANTITRUST, Fall 2008, at 72 [hereinafter *Rigorous Analysis*].

[21] Taub v. Mfrs. Life Ins., [1998] 40 O.R. 3d 379 ¶ 4 (S.C.J.), *aff'd*, 42 O.R. 3d 576.

[22] The other requirement that the pleadings disclose a cause of action is governed by the rule that a pleading should not be struck unless it is "'plain and obvious' that no claim exists." Hollick v. City of Toronto, [2001] 3 S.C.R. 158, ¶ 25 (Can.).

[23] Miles v. Merrill Lynch & Co. (*In re* Initial Pub. Offering Sec. Litig.), 471 F.3d 24 (2d Cir. 2006).

[24] Glover v. City of Toronto, [2009] O.J. No. 1523, ¶ 15 (S.C.J. Apr. 15, 2009) (QL).

[25] The jurisprudence does not suggest that the test for admissibility of expert evidence is relaxed.

[26] Griffin v. Dell Can. Inc., [2009] O.J. No. 418, ¶ 76 (S.C.J. Feb. 3, 2009) (QL).

[27] Irving Paper Ltd. v. Atofina Chems. Inc., [2008] 99 O.R. 3d 358, ¶ 119 (S.C.J.); Hague v. Liberty Mut. Ins. Co., [2004] O.J. No. 3057 (S.C.J. June 14, 2004) (QL); Cloud v. Canada (Att'y Gen.), [2004] 73 O.R. 3d 401, ¶ 50 (S.C.J.).

[28] FED. R. CIV. P. 26.

[29] Rules of Civil Procedure, SOR/1990-194 § 29.1. Technically, the Ontario rule states that discovery occurs after the "close of pleadings," that is, when both sides have finished exchanging the prescribed documents setting out the material facts of their claims and defenses.

[30] Sauer v. Canada (Att'y Gen.), [2008] O.J. No. 3419, ¶¶ 48–49 (S.C.J. Sept. 3, 2008) (QL).

[31] *See* Laskin et al., *supra* note 5; Sullivan & Knowles, *supra* note 5.

[32] Aggregate damages provisions enable the court to use statistical methods to quantify class members' damages on a classwide basis. *See, e.g.*, CPA § 24.

[33] Pro-Sys Consultants Ltd. v. Infineon Techs. AG, [2010] 98 B.C.L.R. 4th 272 ¶¶ 34–41, 70 (C.A.).

[34] Pro-Sys Consultants v. Microsoft Corp., 2010 BCSC 285, ¶ 125.

[35] 2038724 Ontario Ltd. v. Quizno's Can. Rest. Corp., [2009] 96 O.R. 3d 252 ¶ 118 (S.C.J. – Div. Ct.) [hereinafter *Quizno's Div. Ct.*], *aff'd*, 2010 ONCA 466, 100 O.R. 3d 721; *Irving Paper*, 2010 ONSC 2705, 89 O.R. 3d 578, ¶ 45.

[36] *Irving Paper*, 89 O.R. 3d, ¶ 55.

[37] *Id.* ¶ 62. The British Columbia Court of Appeal adopted this same level of scrutiny in *Infineon*, [2002] 98 B.C.L.R. 4th 272, ¶ 68.

[38] *Irving Paper,* 2010 ONSC 2705, 89 O.R. 3d, ¶ 51; *Quizno's Div. Ct.*, [2009] 96 O.R. 3d, ¶ 102.

[39] *Quizno's Div. Ct.*, [2009] 96 O.R. 3d, ¶ 70.

[40] *Id.* ¶ 81.

[41] 2038724 Ontario Ltd. v. Quizno's Can. Rest. Corp., 2010 ONCA 466, 100 O.R. 3d 721, ¶ 45.

[42] Prudent plaintiffs will almost certainly continue to submit expert evidence in most if not all cases.

[43] It remains to be seen how courts will interpret and apply this portion of *Quizno's*. It is arguably an appropriate result in price maintenance cases, where agreements by their nature would almost always cause losses to purchasers through supracompetitive prices, but inappropriate in other cases where the fact of loss may be more of a live issue. Of note, the price maintenance provisions of the Competition Act were repealed.

[44] *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008); Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005).

[45] *See, e.g.*, Simmons et al., *Without Presumptions*, *supra* note 20; Simmons & Okuliar, *Rigorous Analysis*, *supra* note 20.

[46] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

[47] *Id.* at 311 ("'If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.'" (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001)).

[48] *Id.* at 311–12 ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.").

[49] *Id.* at 316.

[50] *Id.* at 322.

[51] Budget Implementation Act, 2009, S.C. 2009, c. 2. Section 45 as amended, relating to agreements between competitors, states:

> Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

[52] Previously, section 45 stated:

> Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Competition Act, R.S.C. 1985, c. C-34.

[53] Section 36 of the Competition Act, R.S.C. 1985, c. C-34, enables civil litigants to recover for losses caused by a person's violations of the criminal offense provisions in the Act (such as price fixing). Section 1 reads:

> Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[54] The Third Circuit rejected the plaintiffs' expert evidence after careful scrutiny in *In re Hydrogen Peroxide*, 552 F.3d 305 (3d Cir. 2008). That same expert provided evidence in *Irving Paper*, 2010 ONSC 2705, 89 O.R. 3d 578, which satisfied the court's "credible and plausible" methodology test.

[55] O. Reg. 438/08, amending Reg. 194 of R.R.O. 1990, and O. Reg. 394/09, amending Reg. 194 of R.R.O. 1990. The amendments came into force on January 1, 2010.

[56] See Serhan Estate v. Johnson & Johnson, [2006] 85 O.R. 3d 665 (S.C.J. – Div. Ct.), *leave to appeal denied*, [2006] S.C.C.A. No. 494; *see also* Heward v. Eli Lilly & Co., [2008] 91 O.R. 3d 691 (S.C.J. — Div. Ct.).

[57] Pro-Sys Consultants Ltd. v. Infineon Techs. AG, [2010] 98 B.C.L.R. 4th 272 ¶ 33 (C.A.).