Supreme Court of Canada Allows Indirect Purchaser Class Actions for Antitrust Claims

John Bodrug, Adam Fanaki and Chantelle Spagnola

On October 31, 2013, the Supreme Court of Canada (SCC) released three decisions that authorized indirect purchasers to bring antitrust class actions.[1] In doing so, the SCC chose not to follow the reasoning of the U.S. Supreme Court in its 1977 *Illinois Brick* decision.[2] The SCC also adopted a more lenient standard for proof of damages at certification than that of the U.S. Supreme Court in *Comcast*.[3]

Particularly for parties or counsel dealing with conduct that raises potential claims in both the United States and Canada, it is important to understand the factors that could potentially lead to certification of a claim in Canada that might not be certified in a U.S. federal court, and the implications of such a certification in Canada. Those factors include: the recent recognition by the SCC of indirect purchaser class actions; less rigorous scrutiny of the plaintiffs' proposed methodology for proof of loss on a class-wide basis at the certification stage; and the absence of a requirement to show predominance of common issues. In this article we examine the SCC's rationales for allowing indirect purchaser class actions and question whether many such actions will be workable in practice, particularly in light of the SCC's clear position that trial courts should strive to avoid double recovery.

In addition, the relatively less rigorous evaluation of the plaintiffs' methodology for proving loss on a class-wide basis at the certification stage in Canada appears to be driven largely by the absence of pre-certification discovery as of right. Nevertheless, the SCC raised the prospect of a court re-visiting an initial certification decision later in the proceedings (presumably after discovery), so that an initial class certification may prove to be not as definitive an event in Canada as in the United States. In any event, subsequent judicial interpretation and application of the SCC's recent trilogy of decisions, combined with actual experience with trials of certified indirect purchaser class actions, may well lead to further shifts in the approach to class certification in Canada.

Background

Private antitrust litigation, particularly class actions, have grown in importance in Canada over the last 15 years. Increasingly, Canadian antitrust class actions have been brought on behalf of "indirect purchasers," such as retailers and consumers, who are one or more steps removed from original suppliers in the chain of distribution and claim they were harmed when their suppliers, such

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[1] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57 (Can.); Sun-Rype Prods. Ltd. v. Archer Daniels Midland Co., 2013 SCC 58 (Can.), Infineon Technologies AG v. Option consommateurs, 2013 SCC 59 (Can.).

[2] Ill. Brick Co. v. Ill., 431 U.S. 720 (1977).

[3] Comcast Corp. v. Behrend, 569 U.S. 6 (2013).

as wholesalers or retailers, passed on prices that were artificially raised by anticompetitive conduct, and seek to recover damages or restitution.[4]

The *Microsoft* case, one of the three indirect purchaser cases recently decided by the SCC, illustrates such a claim: the proposed class was composed entirely of purchasers who indirectly acquired a license for a Microsoft operating system or application software, e.g., by purchasing a new computer pre-installed with Microsoft software. The plaintiffs alleged that Microsoft had engaged in anticompetitive conduct that resulted in overcharges which were passed through by computer manufacturers to end customers.

The causal connection between the alleged illegal conduct and the alleged damages or restitution in indirect purchaser cases is often fraught with evidentiary challenges, including how a court can determine the extent to which an initial price increase was passed along the supply chain and incorporated in a higher price paid by users of an end product. Some supply chains have numerous participants operating in distinct markets. At some points in the supply chain, it may be possible to pass on some or all of a particular price increase to the next purchaser, but at other points, some or all of the price increase may be absorbed by the distributor. This economic reality may make it difficult for courts to determine which participants along the supply chain have actually suffered a loss or damage as a result of the alleged conduct, and the amount of any price increase that was ultimately passed on through the distribution chain.

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Canadian Approach to Antitrust Class Actions

To certify an antitrust class action in Canada, plaintiffs must satisfy the same certification criteria applicable to other types of class proceedings. Although the test varies slightly from province to province, plaintiffs must generally establish that:

- the pleadings disclose a cause of action;
- there is an identifiable class of two or more persons;
- the claims of the class members raise common issues;
- a class proceeding is the preferable procedure for resolving the claims;[5] and
- there is an appropriate representative plaintiff.

The primary difference between the Canadian and U.S. federal criteria for certification is that the Canadian certification test does not require plaintiffs to show that common issues will predominate over individual issues.

Prior to the recent SCC decisions, Canadian lower courts applied differing standards for allowing indirect purchaser class actions, and differing evidentiary standards for certifying a class of

[4] Such actions typically rely on tort and restitution claims, as well as Section 36 of the Competition Act, R.S.C. 1985, c. C-34 (Can.), which provides that any person who has suffered loss or damage as a result of conduct contrary to certain offences in the Competition Act may sue for and recover such losses or damages and certain costs.

[5] In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, ¶¶ 111–112 (Can.), the SCC found common issues related to both the existence of the cause of action and the loss to the class members, such that there was a realistic prospect of establishing loss on a class-wide basis. The SCC found that resolving the common issues would significantly advance the action. This was a sufficient basis for the certification judge to determine that a class action was the preferable procedure.

indirect purchasers.[6] In 2011 the judicial attitude moved in a decidedly defendant-friendly direction as a result of the British Columbia (B.C.) Court of Appeal's decisions in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*[7] and *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*[8] In those two cases, the B.C. Court of Appeal refused to certify proposed class actions on behalf of indirect purchasers on the ground that indirect purchasers have no cause of action maintainable in law. These decisions brought Canadian law into line with U.S. federal law as reflected in the above-noted *Illinois Brick* decision, where indirect purchasers of concrete blocks brought a claim against the manufacturers of those concrete blocks for alleged antitrust violations. The U.S. Supreme Court found that, because there was no defense of "passing-on" to a claim for price-fixing brought by direct purchasers, indirect purchasers could not assert a claim for damages on the basis that an illegal overcharge had been passed on to them by direct purchasers. The Court emphasized the potential complexity involved in calculating damages that may have been "passed-on" by direct purchasers to those further down the distribution chain, as well as the potential for indirect purchaser claims to impair deterrence by diluting incentives to sue for damages. The decisions in *Sun-Rype* and *Microsoft* were appealed to the SCC and heard together, along with the *Option consommateurs* case, on October 17, 2012.

The Supreme Court of Canada's Recent Decisions

In the decisions released on October 31, 2013, the SCC took a more plaintiff-friendly tack. Contrary to the B.C. Court of Appeal decisions in *Microsoft* and *Sun-Rype*, and the established U.S. federal law as reflected in *Illinois Brick*, the SCC ruled that indirect purchasers are entitled to assert antitrust claims.

First, the SCC confirmed that, under Canadian law, it is not a defense to a claim by direct purchasers that these purchasers passed on any price increases to their customers and, accordingly, did not suffer any damages.[9] Microsoft had argued that, if it could not defend a case on the basis that the direct purchasers passed on all of the alleged price increase, then it follows that indirect purchasers should not be entitled to rely on such passing-on to maintain a cause of action. Otherwise, defendants could face the impermissible prospect of double recovery (*i.e.*, defendants could be liable to direct purchasers for all of the overcharge they paid, but could also be liable to indirect purchasers for whatever amount of the overcharge may have been passed on).[10]

The SCC rejected each of Microsoft's arguments. The Court stated that trial judges are equipped to guard against the prospect of double or multiple recovery, such as by denying or modifying damages awards to avoid any overlapping recovery.[11] The SCC noted that a defendant can bring

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[6] *Compare* Irving Paper Ltd. v. Atofina Chems. Inc. (2009), 99 O.R. (3d) 358 (Can. Ont. Super. Ct. J.) *with* Chadha v. Bayer Inc. (2003), 63 O.R. 3d 22 (Can. Ont. C.A.). In *Chadha v. Bayer Inc.*, the Ontario Court of Appeal refused to certify a class of indirect purchasers. The Court's decision in this regard was based in large part on the plaintiffs' failure to put forth a methodology capable of establishing loss on a class-wide basis, an essential element of the cause of action. Contrast this approach with the decision of the Ontario Superior Court in *Irving Paper Limited v. Atofina Chemicals Inc.*, where Justice Rady certified a class comprising both direct and indirect purchasers. Commenting on the evidence put forth by the plaintiffs to establish loss on a class-wide basis, Justice Rady held that courts are ill-equipped at the certification stage to reconcile competing expert reports, and was of the view that a court need only be convinced that a methodology *may* exist for the calculation of damages, notwithstanding any expert evidence to the contrary.

[7] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2011 BCCA 186 (Can.).

[8] Sun-Rype Prods. Ltd. v. Archer Daniels Midland Co., 2011 BCCA 187 (Can.).

[9] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶¶ 18–29 (Can.).

[10] *Id.* ¶¶ 30–35.

[11] *Id.* ¶ 37.

evidence of a risk of double recovery to the trial judge and ask the trial judge to modify a damages award accordingly: "If the defendant is able to satisfy the judge that the risk [of double recovery] is beyond the court's control, the judge retains the discretion to deny the claim."[12] The SCC further noted that a trial judge may do the same when faced with parallel proceedings in multiple jurisdictions, where a judge "may deny the claim or modify the damage award in accordance with an award sought or granted in the other jurisdiction in order to prevent overlapping recovery."[13]

While this principle seems clear in theory, it may in practice prove difficult for trial judges to guard against the prospect of double recovery. It may be challenging to determine the full scope of damages or claims for the various different classes of purchasers, particularly where the alleged cartel involves numerous different levels in a distribution chain, or involves distributors that operate across several different jurisdictions. Given the wide scope of jurisdiction over foreign defendants with no presence in Canada, as found by the SCC in the *Option consommateurs* case,[14] and similarly wide or uncertain jurisdictional scope in the United States and elsewhere, it could take years for defendants to identify and quantify the full scope of damages for an alleged multi-national cartel agreement.

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The SCC further dismissed Microsoft's concerns about the complexity of tracing losses to indirect purchasers that are several levels removed from direct purchasers, pointing to Justice Brennan's dissenting opinion in *Illinois Brick*. Justice Brennan noted that concerns regarding complexity can be raised in most antitrust cases and should not preclude indirect purchasers from having the opportunity to make their case.[15]

Microsoft pointed out that the majority in *Illinois Brick* concluded that antitrust laws would be more effectively enforced by concentrating the full recovery of the overcharge in the direct purchasers. Although direct purchasers have been active litigants in the antitrust area in Canada, the SCC rejected this argument, noting that in some cases the direct purchasers might not be inclined to sue their direct supplier for fear of jeopardizing their business relationship.[16]

The SCC also commented that "allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge."[17] However, in some class action claims, it is reasonably clear from the initial filing that actual purchasers are unlikely to receive any payment from an award to the class (e.g., because the purchases were very small or the sales are very difficult to trace) so that any resulting order is likely to be a cy-près award, often consisting of payments to charities. In such cases, it is difficult to see how the outcome of the class action would advance resti-

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[12] *Id.* ¶ 39.

[13] *Id.* ¶ 40; *see also* Sun-Rype Prods. Ltd. v. Archer Daniels Midland Co., 2013 SCC 58, ¶ 21 (Can.).

[14] *See* Infineon Technologies AG v. Option consommateurs, 2013 SCC 59 (Can.), where the SCC also dealt with an issue of jurisdiction particular to the Province of Québec. In that case, the certification judge dismissed the action on the basis that the Québec court had no jurisdiction over the defendants, noting that the defendants had no offices in Québec and did not operate in that Province. The Québec Court of Appeal reversed this decision on the basis that the contract by which the end user acquired the product from a retailer had been entered into in Québec, and, pursuant to Québec consumer protection legislation, this was a sufficient nexus to ground jurisdiction in the Québec courts, even though none of the defendants was party to a contract with an end user. The SCC adopted the Court of Appeal's reasoning in its entirety.

[15] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶ 44 (Can.).

[16] *Id.* ¶¶ 46–57.

[17] *Id.* ¶ 50.

tutionary objectives. In any event, where cy-près remedies are the only realistic option, domestic or foreign government prosecutions in respect of the challenged conduct that result in fines based on volume of commerce and calculated to ensure that the defendant does not profit from the crime would appear to achieve the same objective as intended by a cy-près award, such that a cy-près award could lead to the type of double or multiple counting that the SCC indicated should not occur.

Finally, the SCC noted that in this case the Canadian Competition Bureau was not pursuing any action against Microsoft. As a result, the SCC said that if the class action did not proceed, the objectives of deterrence and behavior modification would not be addressed at all.[18] It is not clear how much weight is to be given to this factor. On the one hand, the Bureau may not be pursuing a case because the Commissioner of Competition, the head of the Bureau, believes that the case has no merit. Conversely, if the Bureau is pursuing a case or has obtained a conviction, it remains to be seen whether that would be a factor that weighs against certification, particularly if there is no realistic prospect for class members actually receiving any monetary compensation because only a cy-près remedy is feasible.

The SCC acknowledged that its approach in the three decisions of October 31, 2013 differs from that of the U.S. Supreme Court in *Illinois Brick*, but noted that (1) many U.S. state "repealer" statutes permit indirect purchaser claims,[19] (2) there have been calls for legislative amendments to overturn *Illinois Brick* at the U.S. federal level, and (3) a significant body of U.S. academic authority supports repealing the decision in *Illinois Brick* to further the objectives of antitrust laws.[20]

Some courts and commentators recognize that the *Illinois Brick* repealer statues are inconsistent with the "no double recovery" policy articulated in *Illinois Brick*. For example, shortly after the enactment of some of these state repealer statues, the Ninth Circuit held that state indirect purchaser claims conflicted with federal policy because they allowed for double recovery.[21] However, in the 1989 decision in *California v. ARC America Corp.*,[22] the U.S. Supreme Court refused to strike down state repealer statues, notwithstanding the possibility that double recovery could result.[23] While the risk of double recovery remains in certain U.S. states, the repealer statutes may reflect the emphasis on deterrence in U.S. antitrust policy, which is exemplified by the availability of treble damages for antitrust offenses.

With respect to remoteness of damages, some state legislatures have created statutory shortcuts that essentially eliminate indirect purchasers' need to prove the extent of their loss. For example, each of Kansas, South Carolina, Tennessee, Colorado, Wisconsin, and Indiana have "full consideration" statutes, which allow an indirect purchaser to recover its entire payment from the defendant once the purchaser can show that it suffered some effect from the anticompetitive con-

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[18] *Id.* ¶ 141.

[19] *See* Michael A. Lindsay, *Overview of State RPM*, ANTITRUST SOURCE, www.antitrustsource.com (Supplementary Materials), which identifies 25 U.S. states that have statutes which permit recovery for indirect damages suffered as a result of the violation of state antitrust laws.

[20] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶¶ 55, 59 (Can.).

[21] *See In re* Cement and Concrete Antitrust Litig., 817 F.2d 1435, 1445–46 (9th Cir. 1987).

[22] 490 U.S. 93 (1989).

[23] *Id.* at 103–06.

duct in question.[24] The Canadian statutory cause of action does not go that far, and instead limits its damages to actual losses suffered by indirect purchasers.[25]

Required Methodology to Establish Loss and Damages

In its three recent decisions, the SCC acknowledged the importance of the gatekeeper function of the certification judge and reaffirmed "the importance of certification as a meaningful screening device."[26] To satisfy the requirement that there be "some basis in fact" for concluding that damages can be proved on a class-wide basis, the SCC found that "some assurance is required that the questions are capable of resolution on a common basis" and expert evidence is normally used to satisfy this requirement.[27] The SCC held that expert evidence "must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e., that passing-on has occurred)."[28] To satisfy the court that there is a method by which impact can be proved on a class-wide basis, the plaintiffs must provide a "credible and plausible methodology." "[This] methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question."[29] The Court noted that "[e]vidence has a role to play,"[30] but not on a "balance of probabilities" standard. Rather, a court need not "resolve conflicting facts and evidence at the certification stage," but must engage in more than a superficial analysis.[31] The SCC declined to resolve conflicts between the experts at the certification stage, noting that the trial judge will have the benefit of the full record to resolve such conflicts.[32]

Canadian courts have resisted the U.S. approach of a "robust analysis of the merits at the certification stage" . . .

The SCC found that it was not necessary or appropriate to subject the proposed methodology for calculating damages to rigorous scrutiny at the certification stage. Given that, unlike in the United States, plaintiffs are not entitled to pre-certification discovery as of right, the SCC considered that a defendant cannot insist on such scrutiny for certification.[33] In this regard, the SCC expressly noted that Canadian courts have resisted the U.S. approach of a "robust analysis of the merits at the certification stage,"[34] which may involve some weighing of the evidence and deeper assessment of the economic theory.

However, the SCC trilogy of cases does appear to establish a stricter standard for evaluating the plaintiffs' proposed methodology for calculating damages at the certification stage than that found in some earlier Canadian decisions. In particular, the SCC's standard would allow for

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[24] Kan. Stat. Ann. §50-115; S.C. Code Ann. § 39-3-30; Tenn. Code Ann. § 47-25-106; Colo. Rev. Stat. § 6-4-121; Wis. Stat. Ann. § 133.14; Ind. Code Ann. § 24-1-1-5 (West).

[25] Competition Act, R.S.C. 1985, c. C-34, § 36 (Can.).

[26] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶ 103 (Can.).

[27] *Id.* ¶ 114. However, the SCC found that a lower standard applies in the province of Québec where the Civil Code requires only that plaintiffs present an arguable case and expert evidence is not normally provided at the certification stage. *See* Infineon Technologies AG v. Option consommateurs, 2013 SCC 59, ¶¶ 127–128 (Can.).

[28] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶ 118 (Can.).

[29] *Id.* ¶¶ 103–104.

[30] *Id.* ¶ 100.

[31] *Id.* ¶ 102.

[32] *Id.* ¶ 126.

[33] *Id.* ¶ 119.

[34] *Id.* ¶ 105.

greater scrutiny of the proposed methodology of calculating damages than that applied by the Ontario Superior Court in *Irving Paper*[35] insofar as it now appears to be necessary for the plaintiffs to establish that the proposed methodology accords with sound principles of economics. While, under the new SCC standard, a court may not be required to weigh all of the competing evidence advanced by the parties, it appears open to defendants to challenge conceptual flaws in the evidence put forward by the plaintiffs in support of certification, including evidence with respect to the ability to prove a class-wide impact from the challenged conduct. However, the extent to which Canadian certification courts will consider evidence put forth by defendants challenging the plaintiffs' satisfaction of such criteria remains to be seen.

Common Issues

The SCC confirmed a number of aspects of the need for plaintiffs to identify common issues. Unlike the standard in U.S. federal courts, the common issues need not predominate over issues affecting only individual members for the class to be certified by a Canadian court. To be "common," an issue must be necessary to the resolution of each class member's claim. The factual basis for the claims need not be identical, although the class members' claims must share a "substantial common ingredient." All class members must benefit from a successful prosecution of the action, although not necessarily to the same extent.[36]

Respondents in the appeals before the SCC argued that including indirect purchasers in the same proceedings as direct purchasers created the potential for a conflict between the class members. The SCC noted, however, that "to the extent that there is conflict between the class members as to how the aggregate amount is to be distributed upon awarding of a settlement or upon a successful action, this is not a concern of the respondents and is not a basis for denying indirect purchasers the right to be included in the class action."[37] For example, the plaintiffs' expert in *Sun-Rype* provided evidence that the presence or absence of pass through should be ascertainable statistically at each industry/distribution level, based in part on information that was likely to become available in the discovery process relating to the industry, price/cost margins, industry concentration, and elasticity of demand at each level of distribution. He also suggested that class members at a distribution level with a very low profit margin are likely to pass through a relatively high percentage of a price increase.[38]

The requirement that all class members must benefit from a successful prosecution would seem to imply that a class cannot include members who fully passed on a price increase and suffered no loss. However, courts have accepted that just because some class members may not ulti-

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[35] *See* Irving Paper Ltd. v. Atofina Chems. Inc. (2009), 99 O.R. (3d) 358 (Can. Ont. Super. Ct. J.) (holding that it was not necessary or appropriate to subject the plaintiffs' proposed methodology to rigorous scrutiny, or even to decide whether it accords with sound principles of economics, as a condition to certification).

[36] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶ 118 (Can.).

[37] Sun-Rype Prods. Ltd. v. Archer Daniels Midland Co., 2013 SCC 58, ¶ 20 (Can.).

[38] Expert report of Dr. Jeffrey Leitzinger, Econ One Research, Inc., June 19, 2009, filed with the Supreme Court of British Columbia in the *Sun-Rype* case, ¶ 60.

mately be able to establish their claim on the merits, they are not barred from inclusion in the class at the certification stage.[39]

The SCC recognized that there may well be a multitude of variables among the class that present a significant challenge at the merits stage, but for certification the plaintiffs need establish only common questions and that a class action is the preferable procedure.[40] The SCC found that if material differences emerge following certification, courts can deal with them when the time comes,[41] including potentially by decertifying the class. The SCC indicated that a court's gatekeeper function extends past an initial decision to certify, observing that

> the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. . . . After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) [of the B.C. Class Proceedings Act ("CPA")] continue to be met. It is for this reason that enshrined in the CPA is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).[42]

The SCC decisions depart from the trend in U.S. federal courts of requiring a thorough and rigorous analysis at the class certification phase . . .

While there have been few decertification motions to date in Canada, lower courts could take the SCC's comments as an invitation to be more proactive in considering decertification in light of new facts emerging in discovery, for example.

Comparison to the U.S. Approach to Certification

The SCC decisions depart from the trend in U.S. federal courts of requiring a thorough and rigorous analysis at the class certification phase, including the weighing of conflicting expert testimony, to determine whether each of the requirements for certification in Rule 23 of the U.S. Federal Rules of Civil Procedure have been satisfied. In *Comcast Corp. v. Behrend*, the U.S. Supreme Court directed trial courts to conduct a rigorous analysis of the criteria for class certification before certifying an action, and expressly recognized that this analysis will frequently overlap with the merits of the plaintiffs' underlying claim because the certification criteria are enmeshed in the factual and legal issues comprising the plaintiffs' cause of action.[43]

While the Canadian standard for certification is clearly more plaintiff-friendly than that in the United States, even under the SCC's approach in its recent trilogy, certification is not a fait accompli. Indeed, the facts of *Comcast* may well provide an example of a case that would still not be certified in Canada. In *Comcast*, the claim was brought on behalf of more than two million current and former Comcast cable subscribers. The plaintiffs alleged that a series of acquisitions "clustering" Comcast's operations within a geographic region had enabled Comcast to withhold local sports programming, reduce the level of "benchmark" competition on which cable customers compare prices, increase Comcast's bargaining power relative to content providers, and reduce the level of competition from adjoining cable companies that "overbuild" into areas in which Comcast

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[39] *See* Bywater v. Toronto Transit Comm'n, [1998] O.J. No. 4913, ¶ 11 (Can. Ont. Gen. Div.). Note also that the SCC did find that a calculation of damages on an aggregate basis cannot be used to establish liability because the relevant provincial class action legislation was not intended to allow a group to prove a claim that no individual could. Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶¶ 131, 133 (Can.). This finding resolved a debate in the case law about whether plaintiffs were allowed to use provisions in provincial class proceedings legislation allowing damages to be calculated in the aggregate as a means to show loss on a class wide basis.

[40] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶ 111 (Can.).

[41] *Id.* ¶ 112 (citing Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, ¶ 54 (Can.)).

[42] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2013 SCC 57, ¶ 105 (Can.).

[43] Comcast Corp. v. Behrend, 569 U.S. 6 (2013).

operates as the incumbent cable provider. The district court had rejected all but the "overbuilding" theory of antitrust impact on Comcast subscribers and certified a class of subscribers seeking damages on only this theory of liability.

In reversing certification, the U.S. Supreme Court held that the plaintiffs' regression model did not even attempt to measure damages attributable to only the "overbuilder" theory. Instead, the model compared actual prices in the relevant market to hypothetical prices that would have prevailed but for all of Comcast's allegedly anticompetitive activities, without isolating the damages resulting from the one surviving theory of harm. As a result, the U.S. Supreme Court found that the model could not possibly establish that damages are susceptible to measurement across the entire class. As such, the plaintiffs' model was not consistent with its liability claim.[44]

It might be questioned whether the SCC would have upheld certification on the facts of *Comcast* under the less robust "some basis in fact" standard. In particular, it is not clear whether there was some basis in fact for finding that the questions at issue were capable of resolution on a common basis. The difficulty with the class in *Comcast* was conceptual and did not seem to require a weighing of the evidence put forward by the opposing party. In any event, the U.S. Supreme Court's reasoning in *Comcast* did not require a more in-depth consideration of factual issues than that which was undertaken by the SCC in *Sun-Rype*, wherein certification was denied on the basis that the plaintiffs had not put forth evidence to establish that any potential class member could demonstrate that he or she had in fact purchased a product containing high-fructose corn syrup, which was the defining characteristic of the class.[45]

Post-*Comcast* cases in the United States are also instructive in a comparison of the Canadian and U.S. approaches to class certification. The D.C. Circuit Court cited *Comcast* in deciding to vacate certification of a class action alleging a price fixing conspiracy among freight railroads because the defendants demonstrated defects in the plaintiffs' regression and damages models presented as evidence that injury and overcharge were capable of common proof. In particular, the defendants argued that the plaintiffs' models generated false positives and yielded similar results for both shippers who experienced rate increases and shippers subject to legacy contracts whose rates did not change during the alleged conspiracy period. The district court had certified the class on the basis that the plaintiffs' models were "plausible," but the court of appeals commented that a "hard look" at the soundness of statistical models was mandated as a result of the *Comcast* decision, and the case law was "far more accommodating to class certification" before the *Comcast* decision.[46]

Also, in *In re High-Tech Employees Antitrust Litigation*, the Northern District of California cited *Comcast* and examined the expert evidence of both the plaintiffs and the defendants, including regression analyses and studies of common factors and compensation movements.[47] The plain-

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[44] *Id.* at 6–11.

[45] In *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, ¶ 20 (Can.), the SCC declined to certify the proposed class. With respect to the claims of indirect purchasers, the SCC found that the plaintiffs had failed to establish an identifiable class of at least two persons who suffered a loss. The proposed class consisted of consumers of products that contained high-fructose corn syrup (HFCS) who purchased those products between 1988 and 1995. However, the plaintiffs failed to put forth evidence demonstrating that it was possible for consumers to determine whether products they purchased contained HFCS rather than some other form of sweetener. The SCC noted that the labels on relevant products sold in Canada did not identify which type of sweetener was used, sugar being a significant alternative. In these circumstances, the plaintiffs had failed to establish some basis in fact that there was an identifiable class of two or more indirect purchasers who could prove that they actually suffered a loss.

[46] *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013).

[47] *In re* High-Tech Employees Antitrust Litig., 289 F.R.D. 555 (N.D. Cal, San Jose Div. 2013).

tiffs alleged that a number of employers had violated Section 1 of the Sherman Act by agreeing not to solicit each other's employees and sought to certify a class comprised of all of the defendants' salaried employees. Following a detailed review of the expert reports, the court was satisfied that the plaintiffs had met the burden of demonstrating a plausible method for providing an estimate of damages.[48] However, the court had concerns about the capacity of the plaintiffs' evidence and proposed methodology to prove an impact on all class members.[49] Nevertheless, the court granted the plaintiffs leave to amend their pleadings to permit them to benefit from discovery that had occurred subsequent to the certification motion.[50] After a further hearing on a supplemental motion, the Court certified a narrower class of technical employees.[51]

It seems apparent from the foregoing that both the SCC and U.S. courts are influenced by the degree of discovery (if any) that has occurred prior to the date of the certification hearing and are wary of holding plaintiffs to a higher standard in the absence of discovery. If Canadian courts were to take up the SCC's above-noted comment that courts can appropriately revisit an initial certification decision at a later stage in the proceedings, the Canadian approach could move closer to the U.S. model. In other words, it may be open to Canadian courts in the future to treat the initial certification decision as an interim certification (which must pass the "some basis in fact" test and stand up to conceptual scrutiny), but also entertain more rigorous scrutiny on a post-discovery motion. It would be consistent with the principles of judicial economy and fairness to permit a further "gatekeeping" analysis after discovery rather than force defendants to expend significant time and costs, under the threat of potentially material or even crippling damage awards, and defend to trial a class action claim that is based on theories that do not meet a rigorous test comparable to that applied in *Comcast*.

[D]efendants may well face certified class actions in Canada with respect to alleged cross-border cartels for which certification would not be available (or may have been denied) to indirect purchasers in the U.S. federal courts . . .

Implications

While the Supreme Court's recent trilogy of cases has provided direction in some areas, such as the ability of indirect purchasers to assert claims in antitrust class actions, the decisions also leave other questions unresolved, such as the appropriate standards and methodologies for resolving the complex evidentiary issues inherent in indirect purchaser claims, exactly what level and type of assessment of a class and its claims is to take place at the certification stage, and what types of evidence defendants can introduce on these points. Future cases may also require Canadian courts to deal with the risk of multiple recovery by different indirect purchaser plaintiffs in different countries or at different levels of a distribution chain.

It is not clear how certification and trial judges will grapple with and resolve these complex issues, and whether courts will be prepared to decertify class actions at later stages of a proceeding, such as after discovery but before trial, on the basis of a more rigorous evaluation of the expert evidence such as that applied by U.S. courts following *Comcast*. In any event, defendants may well face certified class actions in Canada with respect to alleged cross-border cartels for which certification would not be available (or may have been denied) to indirect purchasers in the U.S. federal courts, because of either *Illinois Brick*, the more rigorous scrutiny engaged in by U.S. courts at the initial certification stage, or the absence of a need in Canada to demonstrate pre-

[48] *Id.* at 570.

[49] *Id.* at 582.

[50] *Id.* at 584.

[51] *In re* High-Tech Employees Antitrust Litig., 2013 U.S. D. LEXIS 15372 (N.D. Cal. San Jose Div. 2013).

dominance of the common issues. Although the full impact of the decisions on competition policy and class actions remains to be determined, these three SCC decisions will undoubtedly be a focal point of debate in future cases for years to come and experience with actual trials of indirect purchaser class actions could expose practical issues that could potentially persuade Canadian judges to limit damage claims, or even decertify class actions. In effect, the approach to class certification in Canada could potentially move closer to the U.S. federal approach. ●