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• KICKING THE CERTIFICATION CAN DOWN THE ROAD: THE EVOLUTION OF JUDICIAL DISCRETION IN CLASS ACTION LITIGATION – A WESTERN PERSPECTIVE •

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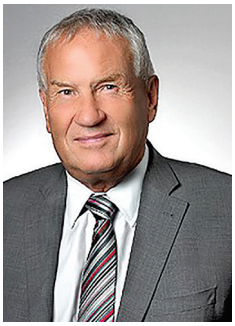

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• In This Issue •

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In certifying a class, the certification judge must proceed in a "flexible and liberal manner, seeking a balance [of considerations] of efficiency and fairness".[1] Despite this purposive approach, however, the certification process requires the court to undertake an analysis of whether the proposed class action accords with the purpose of class action legislation through a five-part statutory test. In conducting this analysis, the court will consider whether:

- the pleadings disclose a cause of action;
- there is an identifiable class of two or more persons;
- the claims or defences of the various class members raise common issues;
- a class proceeding is the preferable procedure for the fair and efficient resolution of common issues; and
- there is a suitable representative plaintiff.[2]

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Of these five criteria, the two that tend to receive the most judicial scrutiny are the existence of a cause of action and the element of commonality.[3] While the various class criteria are inherently interrelated,[4] commonality and cause of action are uniquely linked. In fact, commonality may be grounded on the mere existence of a common cause of action.[5] More generally, and to the extent that a common issue exists, the cause of action sets its parameters; to the extent that a cause of action can proceed as a class action, commonality is a necessity.[6] In tandem, these two elements distinguish class-based litigation from the slew of individual actions that would otherwise inundate the court. Further highlighting the interrelatedness of the certification criteria is the fact that the existence of common issues will frequently inform the assessment of whether a class action is the preferable means of resolving a dispute.

Traditionally, a "finding that commonality exists must be made by the motion judge and not at the trial".[7] Certification judges cannot simply defer questions of certification or, more discretely, questions of commonality, to the trial judge — they must resolve these issues themselves. The determination of commonality must:

> be completed at the certification stage and not left for later. As the phrase implies, the judge presiding over the "common issues trial" is there in the role of arbiter of issues that have already been set out. That role is to make findings with respect to issues certified for trial, rather than to decide what issues are to be resolved. *Setting the issues for trial is the role of the motions judge on certification*.[8]

Recent developments in Alberta and British Columbia, however, suggest that appellate courts may be chipping away at this procedural limitation, permitting certain issues related to certification and commonality to be determined at trial.

This article reviews four recent cases that either affirm or appear to depart from the orthodox rule, seeking to understand what has motivated this apparent new approach. Ultimately, it remains unclear whether courts are deliberately subverting the procedural requirement for a pre-trial determination

of commonality. That said, one of the features of our common law system is its ability to craft flexible solutions to rigid rules that do not always respond to the realities of legal dispute resolution. Accordingly, both plaintiff and defendant — side class action litigators should remain aware of these developments as they may represent the first rumblings of a shift in Canadian class action litigation.

PART ONE: THE TRADITIONAL APPROACH TO COMMONALITY

As mentioned, commonality is an issue that frequently determines whether a class action can proceed or not. It makes sense that the existence of common issues, the determination of which can meaningfully advance the litigation, ought to be determined before the litigation begins in earnest. Class action legislation defines "common issues" as: i) common but not necessarily identical issues of fact; or ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.[9]

I) What are Common Issues?

Common *facts* predicate commonality[10] — even when the question is one of law. Unfortunately, motions judges, situated as they are at the outset of a case before discovery has occurred, lack the necessary tools to engage in a robust fact-finding process.[11] In recognition of this shortcoming, Canadian courts have asserted that the evidentiary burden borne by proposed classes is low: the "class representative must show [merely] **some basis in fact** for each of the certification requirements".[12] The certification stage is therefore not a test of the merits of the action; rather, a court will assess the form of the action and whether it can support the claims of an entire class.[13] Given its emphasis on form, "fact-finding is … not intended to be a feature of certification … "[14] and the scrutiny that a certification judge will apply to the evidence underlying commonality is correspondingly low. It is a "minimum evidentiary basis" that promotes a liberal and purposive approach to certification.[15]

A simple review of class action case law will reveal that the "categories" of common issues are well established. Issues that courts frequently accept as common to a class include: i) whether the defendan's conduct *caused* a particular harm to the class as a whole (also known as the causation issue); and ii) whether damages are an adequate remedy for the members of the class.[16] What is less clear, however, is what facts will support the inference that the issues are common to the class.

II) The Lack of a Clear Test for Commonality

While each proposed class must be assessed on its own facts, Canadian courts have stopped short of articulating a more comprehensive measure of commonality than the hollow observation that the evidentiary basis must be "sufficient".[17] The Supreme Court of Canada has affirmed this approach across two decisions, a decade apart.[18] However, one of the better explanations of a sufficient "basis in fact" comes from Lax J. of the Ontario Superior Court:

> [the standard] is an elastic concept and its application can be vexing. It is sometimes easier to articulate what it isn't, rather than what it is. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a prima facie case has been made out. It is not a requirement to show that there is a genuine issue for trial.[19]

Western Canadian courts followed this "orthodox"[20] rule. In both *Andriuk v. Merrill Lynch Canada Inc.*[21] and *Charlton v. Abbott Laboratories Ltd*,[22] the Alberta and British Columbia appellate courts emphatically stated that the lack of some evidence of commonality at the certification stage is fatal to the class proceeding. To the extent that a proposed class wishes to litigate issues of common causation or damages, they bear the burden of adducing evidence to show a methodology exists that can determine the proposed common issues across the class.[23] If plaintiffs fail to adduce such evidence, they cannot proceed with those issues.

PART TWO: ADHERENCE TO THE ORTHODOX APPROACH IN WESTERN CANADA

In *Andriuk*, the plaintiff sought to establish commonality by alleging that he and other investors had suffered damages due to the defendant brokerage firm's conduct in relation to their financial investments in a start-up biotechnology company. The defendant opposed certification, arguing that the plaintiffs had not provided any evidence of a plausible methodology that would enable them to demonstrate that the defendant's conduct caused the alleged loss. In denying certification, Martin J. (as she then was) expressly recognized that the orthodox approach did not permit the plaintiff class to wait until discovery to determine commonality.[24] As a result, the plaintiff had not established a workable methodology capable of both supporting the key common issue of loss causation and moving the litigation forward.[25] On appeal, the court affirmed the certification judge's decision.[26]

In *Charlton*, the legal issues before the court were substantially similar to those the Alberta courts encountered in *Andriuk*: where causation grounds commonality, there must be some evidence of a methodology that will enable the plaintiff to prove causation on a class-wide basis.[27] In the absence of such evidence, a certification judge following the orthodox approach cannot certify the proposed class.

The *Charlton* court followed the approach of the Supreme Court of Canada in *Pro-Sys*, reframing the focus of the inquiry to one that looks for "some basis in fact upon which the certifying judge could have concluded questions were capable of resolution on a common basis".[28] This formulation of the test suggests the question is whether there is a factual basis upon which they can conclude that the methodology will demonstrate common impact.[29] It is therefore not necessary to establish conclusively that a methodology exists; rather, the class must "provide some basis in fact *to think that there was some method to do so*".[30] Because the plaintiff class failed to adduce sufficient evidence, the court affirmed the certification judge's decision to deny certification.

Considering *Andriuk* in light of the British Columbia Court of Appeal's reasoning in *Charlton*, it is arguable that, had the plaintiff provided evidence indicating there was a methodology that could establish common damages once the parties completed discovery, they would have succeeded on the commonality requirement. Despite coming to a decision firmly in line with the orthodox method, the *Charlton* court appears to have contemplated the possibility that commonality need not be established at certification. In some circumstances, it is appropriate to proceed on the grounds that a mechanism by which commonality can be established may exist.

This subtle — and possibly unintended — shift opens the door to delaying the determination of matters related to certification, and further reinforces the notion that elastic concepts without clear parameters are not necessarily ideal. In some circumstances, the orthodox rule is a directionless compass, failing to provide a process whereby class litigants can establish their claims. Some courts have responded by extending the liberal and purposive approach to class proceedings such that there appear to be limited circumstances in which commonality is properly determined at trial.[31]

PART THREE: KICKING THE CAN — AN APPARENT WILLINGNESS TO SOFTEN CLASS ACTION PROCEDURE

In *Watson v. Bank of America Corp*,[32] the British Columbia Court of Appeal once again had the opportunity to consider the question of commonality — this time in the context of a price-fixing conspiracy among credit card companies. In this case, the plaintiff class sought certification of an action against a number of credit card providers and banks. The proposed common issues were numerous, touching on anti-competitive acts, conspiracy, interference with economic relations, unjust enrichment and damages.[33] As the certification judge pointed out, the potential to establish commonality lay in both the existence of a common cause of action and common losses.

The class of plaintiff merchants successfully obtained certification of its action. On appeal, the Court allowed limited amendments to the certification order in favour of both the plaintiff class and the defendants.[34] While the court's discussion and application of the law is interesting and thorough, this case is notable in the present discussion for two reasons. First, as regards the commonality of the loss — related issue, both the certification judge and the Court of Appeal allowed certification despite the fact that the plaintiff class' expert did not provide a clear method to quantify the loss across the class.[35] The certification judge instead accepted that there *might* be a methodology capable of demonstrating loss, and if the methodology proved unworkable, the trial court could decertify the class.[36] The Court of Appeal did not disturb this finding.[37]

Second, the Court of Appeal's decision regarding one of the defendants, Fédération des caisses Desjardins du Québec ("Desjardins") expressly defers the determination of commonality to trial.[38] Desjardins argued that the theory of commonality advanced by the plaintiff class was inapplicable to its business model, which differed from those of the other defendants.[39] In his reasons, the certification judge did consider whether the evidence of a methodology capable of supporting commonality was "less useful" when applied to Desjardins; however, he nevertheless elected to certify the class despite this possible deficiency:

> … on certification the only issue is the existence of a methodology, not its results (*Microsoft* at paras. 118-119). Dr. LaCasse's analysis is accordingly premature. If a methodology applies to a defendant and to the class as a whole, it meets the requirements from *Hollick* and *Microsoft*, regardless of whether the result of applying that methodology to that defendant at trial produces a unique result, or an unfavorable result from the plaintiff's point of view.[40]

These comments disclose (but fail to answer) an unresolved question resting at the heart of the commonality inquiry: what happens if a court needs further evidence to determine whether a certain methodology applies to a defendant? While *Charlton* allows that the threshold is merely "some evidence" of the existence of a methodology, an expert may need additional information that can only be obtained through discovery before they can even develop the methodology. Alternatively, a court may need additional information to identify or resolve a question of law relevant to certification.

The Court of Appeal appears to have been attuned to this question, holding that the certification judge's reasons failed to adequately address the substance of Desjardins' basic argument — that commonality had not been demonstrated because the proposed methodology was inappropriate.[41] Considered another way, is it appropriate to certify an action where the contemplated methodology may not even capture the alleged issue? Arguably not, and this is precisely what the Court of Appeal held. More interesting, however, is the fact that the Court of Appeal deferred the issue of commonality regarding Desjardins to trial.

This decision appears contrary to the orthodox approach, recognizing that the certification judge may have improperly accepted a proposed methodology on the basis of inadequate fact — finding power, and that a trial court would be better equipped to resolve the commonality question. It is also likely that "kicking the can down the road" in this case enhances the twin aims of efficiency and access to justice: it permits an otherwise valid class action to proceed and subjects a more difficult factual question to enhanced scrutiny at trial.

The Alberta Court of Appeal took a similar approach in *LC v. Alberta*.[42] In that case, two intimately connected plaintiff classes — the "Child" class and the "Relative" class — filed a class action against the Crown for unlawfully keeping children in state care from their families. The combined classes claimed negligence, breach of fiduciary duty, misfeasance, a number of *Charter* violations, and argued that the Crown was under an obligation to sue itself. The case management judge initially certified the action for both classes. On appeal, the Crown argued that the plaintiff class failed to raise a common issue capable of advancing the action for all class members.[43]

While the appellate court agreed with the Crown that the case management judge improperly concluded

there were common issues among the members of the Child and Parent classes for a particular 21-month period, it also recognized that the scope of the fiduciary duty grounding the claims of both classes was a matter to be determined at trial:[44]

> The respondents *assert a general fiduciary obligation to safeguard the legal interests of the Child class members from which the Relative class members derive a benefit* and of which the duty to sue themselves is but one example. The *scope of the fiduciary duty is a matter to be determined at trial*.[45]

In leaving this legal question for the trial judge to resolve, the court effectively deferred a conclusive finding on the nature of the action and, by extension, the common issues, to trial. It is now impossible to determine whether a common issue binds the Child and Relative classes until the trial court determines the existence of the issue itself. Even though the court did not expressly defer a determination of commonality, its decision had the effect of doing so.

Elsewhere in its decision, the court found commonality amongst the Child and Relative classes on the grounds that the factual matrix between the two was shared.[46] But finding commonality in this way failed to account for the possibility that conflicts amongst the various class members with respect to damages may arise from the shared facts, thereby undermining the common issues. In addressing this concern during its discussion of whether certification was a preferable procedure, the court (much as the *Watson* courts did) simply relied on the trial judge's discretion to amend or decertify the class action if needed.[47]

CONCLUSION

The preceding discussion leads to the following observations:

- The flexible and liberal approach to certification may permit a certification judge or an appellate court, limited as they are by the early stage of a certification hearing, to defer the determination of discrete matters related to certification to trial.
- Having regard to the circumstances of a case and the aims of class-based litigation, it may sometimes be preferable to certify a class despite the plaintiff's inability to provide some evidence of commonality.
- This flexibility aligns with the spirit of existing procedural mechanisms, such as orders for further disclosure and the possibility of later decertification.
- Given that the broader class in both *Watson* and *LC* successfully obtained certification, it is possible that this procedural flexibility may only apply to discrete subsets of a class that has already been certified.
- The circumstances in which a trial court might be more adequately prepared to determine commonality are likely limited to: i) identifying the evidence needed to support a proposed methodology; and ii) resolving a question of law that will establish the existence of the cause of action and, by extension, the common issue itself.

Class litigation is still a relatively recent phenomenon in Canada and its rules, despite legislative guidance, remain fertile ground for disagreement. While the orthodox approach to certification and commonality continues to guide the judiciary's approach to class litigation, there are quiet hints that appellate courts are willing to exercise discretion and defer a final determination on commonality to trial — particularly where a circumscribed motions application lacks the necessary tools to arrive at a conclusion that is both fair and accurate in the circumstances.

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1 *Andriuk v. Merrill Lynch Canada Inc.*, [2013] A.J. No. 856, 2013 ABQB 422 [*Andriuk QB*] at para. 31, aff'd [2014] A.J. No. 555, 2014 ABCA 177 [*Andriuk CA*].

2 Alberta: *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1) [*Alberta CPA*]; British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1) [*BC CPA*]; Saskatchewan: *Class Actions Act*, S.S. 2001, c. 12-01, s. 6(1) [*Saskatchewan CAA*].

3 Warren K Winkler et al., *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014) at 107, citing *Pro-Sys Consultants Ltd v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57 at para. 106 [*Pro-Sys*].

4 See, for example, the propositions that Strathy J set out in *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113, 2010 ONSC 42 at para. 140.

5 *Watson v. Bank of America Corp.*, [2014] B.C.J. No. 534, 2014 BCSC 532 at para. 222 [*Watson SC*], var'd in part [2015] B.C.J. No. 1775, 2015 BCCA 362 [*Watson CA*].

6 *Ibid*.

7 *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676, 38 CPC (6th) 373 (S.C.J.) at paras. 45 and 78 [*Risorto*]; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299, 236 DLR (4th) 348 at para. 44 (S.C.J.) [*Caputo*].

8 *Caputo*, *ibid.* [emphasis added].

9 *Alberta CPA*, *supra* note 3, s. 1 *sub verbo* "common issues"; *BC CPA*, *supra* note 3, s. 1 *sub verbo* "common issues"; *Saskatchewan CAA*, *supra* note 3, s. 2 *sub verbo* "common issues" [emphasis added].

10 Winkler et al., *supra* note 4 at 109, citing *McCracken v. Canadian National Railway Co.*, [2012] O.J. No. 2884, 2012 ONCA 445 at para. 132 [*McCracken CA*].

11 *Pro-Sys supra* note 4 at para. 102, citing *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924, 247 DLR (4th) 667 at para. 50 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 50.

12 *Ibid.*, at para. 99, citing *Hollick v. Metropolitan Toronto (City)*, [2001] S.C.J. No. 67, 2001 SCC 68 at para. 16 [*Hollick*].

13 *Ibid*., *Pro-Sys Consultants v. Infineon Technologies AG*, [2009] B.C.J. No. 2239, 2009 BCCA 503 at para. 65 [*Infineon*].

14 *LeFrancois v Guidant Corp*, [2009] OJ No 2481 at para 14.

15 *Infineon, ibid* at para 65, citing *Hollick* at paras 21, 24-25. The idea that a certification judge should approach commonality "purposively" was explicitly affirmed in *Pro-Sys*, *supra* note 4 at para 108.

16 Winkler et al, *ibid* at 116 – 118.

17 *Pro-Sys*, *supra* note 4 at para 104. See also: *Dumoulin v Ontario* (2005), 19 CPC (6th) 234 (Ont SCJ) at para 27.

18 *Hollick*, *supra* note 13; *Pro-Sys*, *supra* note 4.

19 *Glover v Toronto* (2009), 70 CPC (6th) 303 at para 15.

20 *McCracken v Canadian National Railway*, 2010 ONSC 4520 at para 288, rev'd *McCracken CA*, *supra* note 11.

21 *Andriuk CA*, *supra* note 1.

22 2015 BCCA 26 [*Charlton*].

23 *Ibid* at para 130, citing *Chadha v Bayer Inc.* (2003), 63 OR (3d) 22 at para 52 (Ont CA).

24 *Ibid* at para 134. See also: *Clark v Energy Brands Inc.*, 2014 BCSC 1891 at para 113.

25 *Ibid* at paras 146 – 147.

26 *Andriuk CA*, *supra* note 1 at paras 11 and 13.

27 *Charlton*, *supra* note 23 at para 84.

28 *Ibid* at para 86, citing *Pro-Sys*, *supra* note 4 at para 114.

29 *Ibid* at para 86, citing *Pro-Sys*, *ibid* at para 115.

30 *Ibid* at para 87, citing *AIC Limited v. Fischer*, 2013 SCC 69 at para 45 [emphasis added].

31 *LC v. Alberta*, 2017 ABCA 284 [*LC*]; *Watson CA*, *supra* note 6.

32 *Watson CA*, *ibid*.

33 *Ibid* at Appendix A.

34 *Ibid* at paras 204 – 205.

35 *Ibid* at paras 157 – 159; *Watson SC*, *supra* note 6 at paras 264, 274 – 275.

36 *Watson SC*, *ibid* at paras 274 – 275.

37 *Watson CA*, *supra* note 6 at paras 158 – 159.

38 *Ibid* at paras 202 and 207.

39 *Ibid* at paras 198.
40 *Ibid* at para 200, citing *Watson SC*, *supra* note 6 at para 278.
41 *Ibid* at para 201.
42 *LC*, *supra* note 32.
43 *Ibid* at para 25.
44 *Ibid* at paras 20 – 21.
45 *Ibid* at para 20 [emphasis added].
46 *Ibid* at para 27.
47 *Ibid* at para 45.

• FOURTH TIME'S A CHARM? CANADA'S HIGHEST COURT TO REVISIT INDIRECT PURCHASER TRILOGY •

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On June 7, 2018, the Supreme Court of Canada ("**SCC**") granted leave to appeal in *Godfrey v. Sony Corporation*, [2017] B.C.J. No. 1618, 2017 BCCA 302, which case concerned the application for the certification of a national price-fixing class action.[1] *Godfrey* brings into national focus issues that have split Canadian appellate courts since the SCC first considered indirect purchasers' ability to participate in class actions in late 2013. These issues include the standard for finding "commonality of harm" in indirect purchaser class actions; what, if any, expert methodologies are sufficiently credible to establish such commonality of harm; and whether so-called "umbrella" purchasers have a tenable cause of action.[2]

The SCC appeal is scheduled to be heard on December 11, 2018, and it is a case worth following for the defense bar. Although the *Godfrey* decision arose in the context of a competition price-fixing class action brought under the *Competition Act*, R.S.C. 1985, c. C-34, the issues that are now before the SCC have potentially far-reaching implications for the defence of class actions across Canada.

BACKGROUND AND PROCEDURAL HISTORY

Mr. Godfrey, the representative plaintiff, alleged a global price-fixing conspiracy involving optical disk drives ("**ODDs**"), and products using ODDs ("**ODD Products**" such as video game consoles), between January 1, 2004 to January 1, 2010. Proposed class members in *Godfrey* fall into one of two main categories: (i) **direct purchasers**, who bought ODDs and ODD Products directly from an entity that manufactured or supplied them; and (ii) **indirect purchasers**, who bought ODDs and ODD Products manufactured or supplied by a defendant from a party down the distribution chain from the direct purchasers. Within the category of indirect purchasers, there are also so-called **umbrella purchasers**, who purchased

an ODD or ODD Product that was not manufactured or supplied by a defendant.

Mr. Godfrey alleged the same five causes of action on behalf of the direct, indirect and umbrella purchasers: breach of section 45 of the *Competition Act*, anchoring a claim for damages under section 36 of the same; the tort of civil conspiracy; the unlawful means tort; unjust enrichment; and waiver of tort. The British Columbia Supreme Court ("**BCSC**") conditionally certified the class action proceeding pursuant to the *Class Proceedings* Act, R.S.B.C. 1996, c. 50 [***CPA***].[3] The British Columbia Court of Appeal ("**BCCA**") affirmed the result, addressing the type of claims that may be advanced on behalf of umbrella and indirect purchasers.

The *Godfrey* case is one of two alleged price-fixing class actions that have attracted national attention. The other case, which has recently been before the Ontario Court of Appeal ("**ONCA**"), is *Shah v. LG Chem Ltd*.[4] In that case, Khurram Shah (and Alpina Holdings Inc.) sued manufacturers and suppliers of lithium-ion batteries ("**LIBs**"), alleging they conspired to raise, maintain, fix and/or stabilize the price of LIBs, between January 2000 to December 2011. Their collusion is said to have impacted the entire LIB market by triggering an increase in the price for all LIBs and lithium-ion products ("**LIB products**") during the conspiracy period, beyond what the free-market would naturally produce. Accordingly, the conspiracy is alleged to have impacted all purchasers, including direct purchasers, indirect purchasers, and so-called umbrella purchasers.

In *Shah*, much as in *Godfrey*, the plaintiffs sought to certify multiple causes of action including unlawful means conspiracy and a statutory cause of action under s. 36 of the *Competition Act*. The case made its way to the ONCA on issues relating to the umbrella purchaser claims (some of which had been considered in *Godfrey*).

Although the SCC will only hear appeals from the *Godfrey* case on December 11, the Court will have the benefit of the reasons of the ONCA and the BCCA. The timing of that hearing will coincide with the publication of this article. It is well worth asking: what's really at stake in *Godfrey*, from the perspective of the class actions defense bar generally?

WHAT ISSUES WILL BE BEFORE THE SUPREME COURT OF CANADA?

The SCC does not give reasons for granting leave to appeal, and the decision to grant leave to appeal is "at large", *i.e.*, the appellants are not obligated to make the same arguments in the appeal that they raised on the leave application. In this case, however, the breadth of issues that may be determined by the SCC can be gleamed from the written legal submissions filed by the parties to the action, as the defendants raised largely the same issues in legal submissions as they did before the BCCA. These issues include:

i. to what extent does a class action, as a procedural vehicle, exempt indirect and umbrella purchasers from demonstrating that they have *individually* provable claims against defendants by permitting them to advance claims suffered by the *group as a whole* (i.e., the standard for finding "commonality of harm");
ii. more generally, the proper interpretation of the requirement for the plaintiff to put forward an expert methodology that is sufficiently credible or plausible to establish some basis in fact for the commonality requirement; and
iii. whether the principles of indeterminate liability apply to statutory causes of action — such as section 36 of the *Competition Act* — that create liability for pure economic loss and, if so, whether this restricts the claims that may be advanced by indirect and umbrella purchasers.

The first and second issues, more generally, might be referred to as the "class-wide" harm issue; the third issue, meanwhile, might be referred to as the "umbrella purchaser" issue. While the latter has received more attention in commentary (particularly in the competition area), it is the former issue that may have broad implications for class actions defence generally. Both issues are worth exploring, and unpacking.

WHAT'S THE DEAL WITH INDIRECT AND UMBRELLA PURCHASERS?

In a nutshell, the qualifiers "direct", "indirect" and "umbrella" reflect the degree of separation between plaintiff and the alleged co-conspirators in a price fixing class action. An "umbrella" purchaser has no direct or indirect link to an alleged wrongdoer. The only connection between such purchasers and the defendants is that they both participate in the same industry: umbrella purchasers purchased the impugned product and are alleged to have overpaid for it as a result of the effect of the conspiracy. This gives rise to a remoteness issue: on what basis can the umbrella and the indirect purchasers attribute the loss that they allegedly suffered to the defendants against whom they claim?

According to class counsel, who advocate for umbrella purchasers' right of action, the basis upon which umbrella purchasers may validly bring a claim against alleged co-conspirators is the economic theory that a price-fixing conspiracy operates to "move the market" and creates supra-competitive prices throughout an industry. On this theory, even purchasers who get their products from non-defendants who are not alleged to be participants in the conspiracy are said to suffer harm for which they are entitled to recover damages. The result is that even those who bought a product that was not manufactured or supplied by a defendant could bring an action against that defendant.

The possibility that claims may be advanced by umbrella purchasers creates a risk of indeterminable liability for defendants. The issue is that defendants, because they have no control over non-defendants' business decisions (*e.g.*, how much product they sell, to whom they sell the product, and at what prices they sell it), may have no control over their (potential) liability exposure to umbrella purchasers.

The legal viability of umbrella purchaser claims is a hotly contested issue in Canada. This is best demonstrated by the back-and-forth between and within the courts of Ontario (in the *Shah v. LG Chem, Ltd*. case and its appeals) and British Columbia (in the *Godfrey* case and its appeals).[5]

While the BCCA in *Godfrey* acknowledged the concern that permitting indirect purchaser claims may result in indeterminable liability for defendants, the Court affirmed the class action judge's ruling certifying claims on behalf of the indirect purchasers. In doing so, however, the BCCA ruled that it was not necessary for indirect class members to individually prove their claims. To the contrary, the Court ruled that it was sufficient for indirect (and umbrella) purchasers to demonstrate that the group of purchasers as a whole suffered harm (*i.e.*, on a "class-wide" basis).

In *Shah*, the Ontario Divisional Court rejected the reasons of the BCSC in *Godfrey*, which it had the benefit of, and specifically rejected the court's reasons as to indeterminate liability. In turn, the BCCA considered and rejected the reasoning of the Divisional Court relating to indeterminate liability. After the SCC had granted leave to appeal in *Godfrey*, but before the appeal was heard by the SCC, the ONCA released its reasons in the *Shah* case. While the ONCA did not outright adopt the BCCA's reasons in *Godfrey*, it agreed with the direction of the analysis and it was not prepared to "conclude the umbrella purchasers' claims [in that case] fail on the basis of indeterminate liability". In contrast to the BCCA, which focused more on analogies to common law claims in which indeterminate liability was a bar, the ONCA focused on the statutory context of the claims and concluded that normative concerns relating to indeterminate liability "have already been taken care of by Parliament".[6] The SCC will have the benefit of both appellate reasons when considering submissions in the *Godfrey* case.

In written submissions, the appellants in *Godfrey* stress that permitting umbrella purchaser claims (at least under s. 36 of the *Competition Act*) would result in indeterminate liability for defendants by making them liable for any downstream market effects regardless of fault (in the legal sense). Among other things, the appellants stress that practical difficulty of proof for remote claimants will not suffice to address indeterminate liability concerns. Neither the BCCA nor ONCA were prepared to foreclose claims by umbrella purchasers despite indeterminate liability concerns. The respondents in *Godfrey* rely, explicitly, on the ONCA

reasoning in *Godfrey* in their response to the appellants' indeterminate liability argument. Despite the fact that a direct appeal has not yet been taken from it, the SCC may be asked in the context of *Godfrey* to opine on the *Shah* decision much as it would address *Godfrey*.

Although each of the ONCA and the BCCA endorsed certification of an umbrella purchaser class in a price-fixing class action, the legal course charted by the appellate courts was not the same. It remains to be seen whether a majority of the SCC is persuaded by either approach, whether the contrary view by the Ontario Divisional Court, that indeterminate liability concerns so overwhelm in the case of umbrella purchaser cases that their claims are not viable as a matter of law, or whether an entirely new approach to such claims is articulated.

WHAT IS DISTINCTIVE ABOUT THE "CLASS-WIDE" HARM THEORY?

Although the indeterminate liability point is alive in *Shah* and *Godfrey*, the former case goes further in its impact on class action defense by modifying the "commonality of harm" standard in price-fixing class actions generally.[7] By adopting a theory of harm provable "class-wide", the appeal in *Godfrey* raises an issue that has been at the conceptual core of class action litigation in Canada since the SCC first decided the indirect purchaser trilogy in the fall of 2013: to what extent do individual class members have the ability to advance a cause of action on the basis that the class *as a whole* has suffered harm as a result of an alleged price-fixing conspiracy?

The proposal that indirect purchasers may establish liability based on harm suffered by the *group as a whole*, not harm to all or to any identifiable individual class members, is a change in class actions law. In *Pro-Sys*, the SCC ruled that in the context of an indirect purchaser claim, a class action offers indirect purchasers a procedural mechanism to more efficiently provide their individual claims as a group.[8] The SCC repeated that caution in *Sun-Rype*, which was a companion decision to *Pro-Sys*, rejecting that a class member could successfully advance a claim in a class action without individually establishing that he or she had suffered a loss.[9]

In *Godfrey*, the BCCA ruled that *Pro-Sys* must be "[r]ead contextually", such that the requirement that a class member must have "individually provable claims" can be established by way of "loss experienced at the indirect purchaser level, not necessarily [by way of] loss experienced by each and every member of that class".[10] In reaching this conclusion, the BCCA followed the judgment of Justice Perell in his certification decision in *Shah*. This rationale similarly applies to indirect and umbrella purchasers, though the former two cases dealt primarily with umbrella purchasers on this issue.

In their written submissions, the appellants describe consequences of this interpretation as being to change the fundamental nature of class proceedings by treating the class of indirect purchasers as a juridical entity that can assert claims the members individually need not have. In the course of their submissions, the appellants discuss potential methodologies that may credibly meet the commonality of harm standard. Nevertheless, the appellants firmly state that an approach that effectively sidesteps the question of individual harm, by treating all the individuals as a group, cannot adequately make out the requisite commonality. The respondents, in contrast, maintain that individualized harm in the manner put forward by the appellants is not required to succeed at certification. Both parties try and ground their interpretation in the indirect purchaser trilogy, invite the SCC to clarify the scope of the indirect purchaser trilogy as to commonality and, taking it further, to opine on what kind of expert methodology that is sufficiently plausible to establish this commonality of harm requirement.

If the SCC were to endorse the "class-wide" theory of harm in indirect purchaser class actions, the defense of class actions generally may be implicated. While much of this framework derives from the unique context of price-fixing class actions, inventive class counsel may try to expand the scope of such a decision to other industries and claims. The precise way in which the SCC decides this issue, whether it affirms or overrules the BCCA, may have an impact

that outstrips the technical issues of competition law that will be argued in December of this year.

CONCLUSION

Although the *Godfrey* case arises in the context of an alleged price-fixing class action brought under the federal *Competition Act*, the issues to be determined by the SCC bear on the defence of class actions generally. In particular, the ruling in the BCCA that claims could be advanced on a class-wide basis could expand the nature of class that may be advanced in a class action to include claims that class members could not *individually* prove. This would be a departure from the precedent set down by the SCC in the indirect purchaser trilogy that it decided in the fall of 2013.

In the end, the SCC is being asked a series of tough questions that, procedurally, come through the vehicle of the *Godfrey* appeal but whose underlying character has attracted judicial commentary in British Columbia, Ontario and Quebec (among other provinces). The parties are far apart on the key issues, many of which refer back to the principles set down in the indirect purchaser trilogy. As a result of the leave decision, the SCC is being given the responsibility of revisiting its ruling(s) in the indirect purchaser trilogy and chart the way forward for the class actions defense and plaintiff bar.

Will the SCC follow the BCCA, the ONCA, or chart its own course? While provincial appellate courts have been divided, the indirect purchaser trilogy itself might signpost how the Court will approach such issues in the future: taking a measured approach, making "incremental" changes and then only when appropriate, and subordinating settled principles of common law only when there are strong public policy reasons for doing so.

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1 *Sony Corporation, Sony Optiarc, Inc., Sony Optiarc America Inc., Sony of Canada Ltd., Sony Electronics, Inc., et al. v. Neil Godfrey*, 2018 CanLII 51179 [***Godfrey* BCCA**]. The appeal was brought on a joint basis by several corporate defendants, and will be heard together with a parallel appeal led by, among others, Pioneer Corporation.

2 Released on October 31, 2013, this is the colloquially referred to "indirect purchaser trilogy" of cases: *Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57* [***Pro-Sys***], *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] S.C.J. No. 58, 2013 SCC 58 [***Sun-Rype***] and *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, 2013 SCC 59 [***Infineon***].

3 *Godfrey v. Sony Corporation*, [2016] B.C.J. No. 979, 2016 BCSC 844 [***Godfrey* BCSC**], aff'd [2017] B.C.J. No. 1618, 2017 BCCA 302.

4 [2015] O.J. No. 5168, 2015 ONSC 6148, rev'd 2017 ONSC 2586 [***Shah* Div. Ct.**], rev'd [2018] O.J. No. 5355, 2018 ONCA 819 [***Shah* ONCA**].

5 See also *Panasonic Corporation c. Option consommateurs*, [2017] J.Q. no 12964, 2017 QCCA 1442, where the Quebec Court of Appeal ("**QCCA**") denied leave to appeal on the lower court's certification of a class that included umbrella purchasers.

6 *Shah* ONCA at para. 47.

7 Although it is worth noticing that Perell J. in the certification decision in *Shah* did opine on this issue, and did articulate a view that was accepted by the courts below in *Godfrey*. However, this was not a point that was taken up on appeal before the Divisional Court or the Ontario Court of Appeal (instead the issue being indeterminate liability of indirect purchasers).

8 Specifically, the SCC ruled that a class action "was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the CPA is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims": *Pro-Sys* at para. 133.

9 *Sun-Rype* at para. 75: "[This] approach would suggest a class action claim could proceed under s. 36 of the Competition Act without any person establishing that they had suffered loss or damage. However, the CPA neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants with causes of action to unite and pursue their claims as a class."

10 *Godfrey* at paras. 149-150.