

**COMPETITION LAW CASES
under the OPT-OUT REGIMES of
AUSTRALIA, CANADA AND PORTUGAL**

**A Research Paper
for submission to the
Department for Business, Enterprise and Regulatory Reform (BERR)**

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10 October 2008

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ACKNOWLEDGMENTS

The author wishes to specifically acknowledge and thank the following for their assistance during the course of preparation of this Research Paper:

- ❑ Mr John Templeton, Assistant Director, Department for Business, Enterprise and Regulatory Reform (CCP), for both his valuable support and for helpful information and assistance provided during the course of the project;
- ❑ Mr Nuno Oliveira, formerly Legal Adviser at the Portuguese Association for Consumers' Protection (DECO), and now Legal Officer of Portugal Vodafone, for kindly updating a previously-supplied document, '*Collective Redress: An Overview of the Portuguese Legislation*' (Aug 2007, copy on file with the author) about the Portuguese Popular Action, and for further clarification about some legal aspects of the *DECO v Portugal Telecom* litigation via memo dated 2 October 2008 (copy on file with the author);
- ❑ Mr Philip Kellow, Registrar of the Federal Court of Australia, and Ms Melanie Faithful, Legal Assistant to the Deputy Registrar, for kindly providing an invaluable spreadsheet of actions commenced under Australia's federal class actions regime up until 31 August 2008 (hereafter, the 'Federal Court Spreadsheet');
- ❑ Professor Henrique Sousa Antunes, of the Law Faculty of the Portuguese Catholic University (School of Lisbon), and author of '*Class Actions, Group Litigation and Other Forms of Collective Litigation: National Report Portugal*', the National Report prepared for the conference, 'Globalisation of Class Actions' (Oxford, 13–14 Dec 2007), for helpfully updating information about collective actions brought under the Portuguese collective action regime and about the costs rules applicable thereunder;
- ❑ Professor Peter Cashman, of the University of Sydney Law School, and author of *Class Action Law and Practice* (Federation Press, Sydney, 2007), for providing helpful information pertaining to the Australian competition law class actions landscape;

- Professor Vince Morabito, of the Department of Business, Law and Taxation, Monash University, Melbourne, Australia, and author of ‘*Class Actions, Group Litigation and Other Forms of Collective Litigation: National Report Australia*’, the National Report for the conference, ‘Globalisation of Class Actions’ (Oxford, 13–14 Dec 2007), for providing useful and interesting information regarding his important and ground-breaking empirical study of Victoria’s opt-out Pt 4A regime; and
- Mr Ward Branch, partner of Branch MacMaster, Barristers & Solicitors, Vancouver, for very helpful updates regarding ongoing developments in class actions jurisprudence across Canada.

Of course, any errors contained in the Research Paper remain the sole responsibility of the author.

Further, any opinions expressed in this Research Paper are those of the author, and should not be taken to necessarily represent the views of BERR. This Research Paper has been prepared in response to the Specification of Research prepared by BERR, as part of the Department’s consideration of possible reform of collective redress in England and Wales in the future.

EXECUTIVE SUMMARY

1. Each of Australia (federal and State: Victoria), Canada (federal, and all provinces bar one), and Portugal, have enacted an opt-out regime, whereby a representative claimant can bring an action on behalf of a class of described, rather than named, persons, and where any judgment on the common issues affecting the class members is binding upon them all, unless class members elect to opt out. This type of action will be denoted as a ‘class action’ throughout this Research Paper. These regimes (hereafter, ‘the focus jurisdictions’) commenced operation from 1992 onwards, and hence, the longest-serving of them have now been operative for over 15 years.
2. Across the focus jurisdictions, there has been a total of **41** competition law class actions brought during the period of those regimes’ operation. These cases have covered diverse anti-competitive behaviour, but have, in the main, concerned price-fixing and market share allocation infringements. (Where the *same* product has been the subject of litigation in more than one Canadian province, in relation to precisely the *same* alleged price-fixing period, it has been counted as *one* action for the purposes of this tally, although the separate filed actions are referenced later in the Paper.)
3. The costs rules vary from jurisdiction to jurisdiction, as described in the Paper. However, in the main, costs-shifting applies in most of the jurisdictions considered (whereby, in the usual course, the losing party bears the burden of paying the reasonable legal costs of the successful party), and security for costs applications have also been evident in certain competition-law based class actions commenced in both Australia and Canada. Whilst some judicial unease has been expressed from time to time about security for costs orders in the class actions context (and some of the orders have been for fairly modest sums), the effect of such costs rules undoubtedly has had some filtering effect upon the number and type of actions commenced.
4. Of the focus jurisdictions, only the Canadian regimes have statutorily implemented an express certification requirement, consisting of a hearing of the relevant certification criteria, viz:— a valid cause of action, a sufficient number of class members, an adequate class definition, sufficient commonality among them, a class action must be preferable to other forms of resolving the competition law class action, the representative claimant/s must be adequate, and any preliminary

merits criteria, either express or implied, must favour the action being brought. By contrast, both the Australian and Portuguese regimes provide the court with the authority to discontinue the action in class action form, should certain statutory criteria be met. In effect, the Australian and Portuguese regimes operate a *'de facto'* certification requirement, by a combination of their commencement criteria and discontinuance circumstances.

5. The 41 competition law cases are not uniformly spread across the focus jurisdictions, indeed, quite the reverse. Canada has witnessed 35 of them, Australia only 5, and Portugal only the one. Thus, the number and scope of competition law class actions heard by Canadian courts far outstrips the Australian and Portuguese case law arising from anti-competitive breaches. Several Australian commentators have flagged, however, that this situation will change under Australia's opt-out regime, given some high-profile competition law cases currently on the landscape.
6. Parallel class actions have been evident across both Australia and Canada on occasion — regarding rubber chemicals, airflight cargo charges, and linerboard and corrugated cardboard. There is only one Canadian case to date in which an anti-competitive action has won on a *contested* certification. No competition law class action in any of the jurisdictions of Canada, Australia or Portugal has proceeded to a full trial of the merits. On the other hand, there have been numerous settlements of price-fixing actions achieved in Canada, where class actions have been *certified for the purposes of settlement*. There has been explicit judicial acknowledgement by Canadian judges that a 'more relaxed' view of the threshold certification requirements may be adopted where certification is occurring for the purposes of settlement, but *not* where the certification motion is being contested by the defendants.
7. Of those 41 competition cases commenced in Australia, Canada and Portugal, the following data is of interest:
 - 63% of those have been certified (or not discontinued); 15% of them have failed certification (or been discontinued because improper class actions); and 22% of them are currently pending. Hence, when excluding the pending cases, the success rate of certification/continuance in competition law cases to date is 81%;

- 51% of the actions have settled for monetary compensation; 15% of them will never achieve any monetary result whatsoever for the class members; and 34% of the actions have yet to see an outcome. Hence, of the cases in which the outcome is now known, the strike rate for achieving some monetary compensation for the class members in competition law cases is 78%;
 - none of the actions has proceeded to full trial in any of the jurisdictions to date; and
 - 40% of all the cases commenced to date (but a much higher percentage of the Canadian cases) have given rise to a *cy-près* settlement of some description, which component has varied from less than 10% minimum, to almost 100%, of the total settlement sum.
8. Public enforcement or public investigation of some type has been a precursor in around three-quarters of the competition law cases commenced across the focus jurisdictions to date. Around a quarter of the cases gave no indication in any of the judgments or settlement agreements that *either* any public enforcement (in either the home jurisdiction or elsewhere) *or* litigation based upon the same subject matter elsewhere occurred. In the remainder, some previous public enforcement activity/investigation/indictment/fine/private enforcement by means of litigation elsewhere, or combination thereof, were evident. This tends to indicate that competition law class actions do not often come ‘out of the blue’, whereby representative claimants act as ‘private policeman’ — and this is reinforced by the fact that only three actions appear to have been certified where there was no previous public investigation or enforcement at all.
9. Given the lack of punitive damages awarded in any of the focus jurisdictions in respect of competition law class actions litigation, the amount of monies recovered on class actions settlements typically have not been out of all proportion to the amount of the fine (where a fine was indeed levied), and in some cases, the settlement recoveries were less than the amount of the fines levied upon the defendants in the same jurisdiction. For each \$1 of fine levied on the defendants collectively, settlements have netted between 30 cents and \$1.53.
10. Overall, the number of competition law class actions across the focus jurisdictions have by no means indicated any ‘floodgates’ concerns. The filtering screens which certification, costs rules, security

for costs, and the claimant lawyers' own evaluation of the action, provide, clearly have applied considerable 'brakes' upon the number of actions commenced. However, once commenced, some significant settlements have been achieved. Where *cy-près* is permitted under the statutory regime (Portugal and Canada, but not Australia), the difficulty of allocating monetary compensation to those further down the chain (i.e., the indirect purchasers and end-consumers) has been solved, in several cases, by *cy-près* distributions, either by approving a distribution to like-minded organisations or (far more rarely) by approving a price-rollback.

PART I

INTRODUCTION

1. RESEARCH SPECIFICATION

The *Specification of Research into the Need for Private Representative Actions in Competition Law in the UK* for this project provides as follows:

‘BERR is considering consulting on proposals to introduce in the UK the possibility for a representative body to bring an action in competition law on behalf of consumers and businesses at large (currently, such representative actions can be brought on behalf of named consumers only). The consultation would be accompanied by an impact assessment which would take a view on the need for these proposals and the likely number of actions that would come forward under them.

In order to inform this view, BERR would like to commission some work examining the number of private actions under competition law that were filed on behalf of consumers or businesses at large in countries that already have similar arrangements in place. These are: Australia, Canada, and Portugal.

For federal jurisdictions, the research should identify actions filed at both federal and state/province levels as well as presenting the aggregate picture where parallel actions (based on the same facts and involving the same defendant(s)) are filed in different jurisdictions. Class/representative actions under competition law brought by competition authorities should also be included.

Where court approval is required to commence or continue an action, the research should separately identify actions filed and approved, as well as the reasons for such approval if available.

The research should identify whether actions were follow-on actions or stand-alone actions (that is, in the presence or absence (respectively) of adverse findings pursuant to an investigation by a competition authority). The research should also identify any judgments handed down by the courts and the amount of any award, if applicable. Similarly, to the extent that information is reasonably available, the terms and amount of any settlement should be identified.’

2. METHODOLOGY

1. Jurisdictional coverage for this Research Paper

Each of the following jurisdictions has been evaluated for the purposes of this project:

- each of the common law jurisdictions in *Canada* in which opt-out class proceedings legislation permitting described opt-out classes has been provided for, viz:

- Ontario's Class Proceedings Act, SO 1992, c 6;
- British Columbia's Class Proceedings Act, RSBC 1996, c 50;
- Newfoundland and Labrador's Class Actions Act, SNL 2001, c C-18.1;
- Saskatchewan's Class Actions Act, SS 2001, c C-12.01;
- Alberta's Class Proceedings Act, SA 2003, c C-16.5;
- Manitoba's Class Proceedings Act, CCSM 2002, c C130;
- New Brunswick's Class Proceedings Act, SNB 2006, c C-5.15;
- Nova Scotia's Class Proceedings Act, SNS 2007, c 28 (proclaimed into force recently, on 3 June 2008); and
- for class actions brought under Canadian federal jurisdiction, Pt 5.1 (rr 334.1–334.40, 'Class Proceedings') of the Federal Court Rules (inserted by SOR/2007-301, s 7, and replacing the former rr 299.1–299.42).

(Prince Edward Island and Yukon and Northwest Territories are now the only Canadian common law provinces and territories not to have introduced comprehensive class actions legislation.)

- the federal jurisdiction of *Australia* (under Pt IVA of the Federal Court of Australia Act 1976, which commenced operation in 1992) and the state regime of Victoria (under Pt 4A of the Supreme Court Act 1986 (Vic), which commenced operation in 2000); and
- the 'popular action' in *Portugal*, enacted pursuant to the Right of Proceeding, Participation and Popular Action Law No 83/95.

In accordance with the Research Specification, competition law jurisprudence emanating under the opt-out class action regimes in the United States (either state, or the federal regime under FRCP 23) and from Quebec in Canada (under Code of Civil Procedure, RSQ c C-25, Book IX), has intentionally not been canvassed (other than via oblique references) for the purposes of this Research Paper.

2. The sources of case law used for this Research Paper

This Research Paper is case-specific, and to that end, the sources listed below have been used in order to elicit the cases, and their details, for the purposes of compiling Part II and the various Appendices:

Canada — the following sources were referred to:

- the subscription-only case law databases of LexisNexis Butterworths ‘All Canadian Court Cases’, and Westlaw’s ‘Canada – All Cases’ libraries;
- the free-access website of www.canlii.org ;
- the class actions blog of cases maintained by Mr Ward Branch, of Branch McMaster, available at: <http://classactionsincanada.blogspot.com/> ;
- various law firm websites, such as that maintained by Siskinds, at: <http://www.classaction.ca/> ;
- the articles contained in the Special Issue on competition law of (2006) 3 *Canadian Class Action Review*, in particular, the articles in this issue by: S Pitel, ‘Litigating Conspiracy: An Introduction’ (pp 3–14); M Sanderson and M Trebilcock, ‘Competition Class Actions: An Evaluation of Deterrence and Corrective Justice Rationales’ (pp 15–46), and especially the helpful Table at Appendix 2; and J Laskin, L Plumpton and A Kemshaw, ‘The Certification of Competition-Related Class Actions in Canada’ (pp 219–244);
- the materials regarding the ‘cross-country check-up’ provided as part of the 5th Annual Symposium on Class Actions (10–11 Apr 2008);
- the National Report for Canada, authored by W Bogart, Ms J Kalajdic and I Matthews, ‘*Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?*’, for the conference, ‘Globalisation of Class Actions’ (Oxford, 13–14 Dec 2007), and available for perusal at: http://www.law.stanford.edu/display/images/dynamic/events_media/Canada_National_Report.pdf; and

- the Canadian Class Actions national database, maintained at: <http://www.cba.org/classactions/main/gate/index/default.aspx>.

Australia — the following sources were referred to:

- the subscription-only case law databases of LexisNexis Butterworths, via 11 separate case law libraries of reported and unreported decisions provided by means of that subscription;
- the free-access website of www.austlii.edu.au;
- various law firm websites, such as that maintained by Maurice Blackburn Lawyers, at: http://www.mauriceblackburn.com.au/areas/class_actions/index.aspx;
- the National Report for Australia, authored by V Morabito, ‘*Class Actions, Group Litigation and Other Forms of Collective Litigation: National Report Australia*’, for the conference, ‘Globalisation of Class Actions’ (Oxford, 13–14 Dec 2007), and available for perusal at: http://www.law.stanford.edu/display/images/dynamic/events_media/Australia_National_Report.pdf; and
- the Federal Court Spreadsheet, referred to earlier under ‘Acknowledgments’.

Portugal — the following sources were referred to:

- two memoranda kindly prepared by Mr Nuno Oliveira (formerly legal officer at DECO), and entitled: ‘*Collective Redress: Overview of the Portuguese Legislation*’ and ‘*Portugal Telecom v DECO: Overview of the Court Decision Issued on 7 October 2003*’, together with relevant legislation (copies on file with the author);
- information on, and links available via, the DECO website, and noted in Appendix C (‘Portuguese Cases’);
- the National Report for Portugal, authored by H Antunes, ‘*Class Actions, Group Litigation and Other Forms of Collective Litigation*’, for the conference, ‘Globalisation of Class Actions’ (Oxford, 13–14 Dec 2007), and available for perusal at: http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf; and
- the publications, DECO, ‘*Group Action: Experience from Portugal*’ (paper presented to the Conference on Collective Redress, Lisbon, 9 Nov 2007); by J Pegado Liz, ‘*Notion and*

Regime of the “Popular Action” in Portugal (paper presented to the conference, *Group Action: Taking Europe Forward*, 11 Oct 2007, copy on file with the author).

The cases identified as a result of the above searches represent, the author believes, a reasonably complete list of competition law class actions instituted in each of the three focus jurisdictions, but if any others are identified hereafter, the Appendices will be updated accordingly.

3. MEANING OF 'COMPETITION LAW' FOR THE PURPOSES OF THIS RESEARCH PAPER

1. What the term encompasses

The cases referred to in Appendices A, B and C, and the discussion of those cases in Part II, relate to breaches of competition law of the following types:

- price-fixing;
- giving effect to some contract, arrangement or understanding that has the purpose or effect of substantially lessening competition;
- resale price maintenance;
- a refusal to deal/exclusive dealing;
- abuse of market power/position;
- collusive tendering; and
- allocating market share.

Many of these are statutory offences which are variously described as 'restrictive trade practices' under Pt IV of the Trade Practices Act 1974 (Aus), and which are also variously contained within Pt VI, as 'offences in relation to competition', under the Competition Act, RSC 1985, c C-34 (Can).

2. What the term does *not* encompass

This Research Paper does not cover other breaches, the provisions of which may be encompassed within Competition Law legislation, but which pertain to *consumer protection*, and not to anti-competitive practices, strictly-speaking. BERR's Research Specification particularly relates to anti-competitive practices of the type described in 1 above. Hence, cases which (from the details of the cases/judgments/pleadings available to the author) revolve around the following allegations aimed at consumer protection, viz:

- misleading and deceptive conduct;
- unconscionable conduct;
- knowingly or recklessly making a representation to the public that is false or misleading in

- a material respect;
- putting up for sale products which are defective or unfit for the purpose for which they were intended;
- failing to warn of adverse effects;
- engaging in pyramid selling schemes; and
- product misrepresentation,

are excluded from consideration in this Paper. It follows that some of the ‘offences in relation to competition’ described in Pt VI of Canada’s Competition Act, such as cases arising out of alleged false or misleading representations (under s 52) or arising out of alleged pyramid selling schemes (under s 55.1), are excluded from Appendix A (‘Canadian Cases’).

Similarly, a contract entered into between competitors which amounts to a restraint of trade may be illegal on the grounds of being contrary to public policy, but those types of cases, although of an inherently anti-competitive nature, arise from the common law, and have not been included in the Appendices of relevant competition law cases.

3. Some examples of excluded cases

A number of cases examined during the course of research were either described in judgments as ‘competition law cases’ or otherwise referred to (whether in judgments, pleadings, or both) relevant competition law statutes. However, given the meaning of that term which has been adopted for the purposes of this Research Paper, several of those cases have been taken to fall within the ambit of *consumer protection* cases (revolving around misleading and deceptive conduct, and the like), and hence, have been intentionally excluded from consideration herein. Typical examples of *excluded* cases consist of the following:

– *Frey v Bell Mobility and BCE Inc* [2006] SKQB 328, where the allegation was that, in breach of their statutory duty and obligation to consumers, providers of cellular phone services engaged in deceptive acts or practices towards consumers by collecting unauthorised and mis-described ‘license administration fees’, ‘system administration fees’, ‘system license administration fees’, and ‘system access fees’;

- *Desjean v Intermix Media Inc* (2007), 66 CPR (4th) 458 (Federal Court of Canada), where the allegation was that the defendant Californian software company misled and deceived customers by bundling ‘spyware’ or ‘adware’ with free software it offered for download on various websites, without disclosing such bundling to consumers;

- *Waddell v Apple Computer Inc* (Ont SCJ, 6 Aug 2008), a class action which concerned the battery life of Apple iPod music players, and which alleged misleading advertisements that indicated that the iPod would run 8–20 hours before needing to be recharged, and which also alleged a design and manufacturing defect in the lithium ion rechargeable battery in certain models of the iPod;

- *Williams v FAI Home Security Pty Ltd (No 2)* [2000] FCA 726, where the allegation was that class members entered into loan contracts with a finance provider, to finance the purchase of certain home alarm systems, and that it was wrongly represented to the class members that the alarm systems were the ‘latest technology available’, and the ‘best on the market’, and that they acted on the faith of those representations by entering into the sales and loans contracts; and

- *Australian Competition and Consumer Commission (ACCC) v Golden Sphere Intl Inc* [1998] FCA 598 and *ACCC v Giraffe World Australia Pty Ltd* [1999] FCA 1161, where the allegations were that a so-called ‘marketing business operation’, and a ‘grow rich system’ promoted at ‘happiness circle’ meetings, respectively, were, in fact, pyramid selling schemes.

All of these cases, and others like them, usually invoke some alleged contravention of trade practices legislation, but they are not *competition law* cases involving anti-competitive behaviour, as that term has been defined for the purposes of the Research Specification.

4. CROSS-REFERENCES TO DRAFT OPT-OUT LEGISLATION FOR ENGLAND AND WALES

As a matter of further interest, prior to commencing work on this BERR project, the author submitted a draft of a possible opt-out legislative framework for consideration and review by the Civil Justice Council (CJC). For the sake of completeness, and where appropriate, cross-references are made to the draft (hereafter, the '*Draft Legislation*') in order to highlight certain certification criteria which have been at issue in competition law cases elsewhere, and which could, similarly, come into play, should any opt-out regime for competition law cases be introduced into England and Wales.

The provisions within the draft could provide a possible 'best practice' regime, by which the most utilitarian and workable features of opt-out regimes from elsewhere could, with appropriate modifications, feasibly be transposed and adopted as a legislative schema for England and Wales. Such legislation is not inconsistent with Lord Woolf's sentiments in his *Access to Justice* report, and the discussion of the multi-party debate therein.

PART II

PRIVATE ENFORCEMENT

5. A BRIEF SYNOPSIS OF THE RELEVANT OPT-OUT REGIMES, COSTS RULES AND SECURITY FOR COSTS

The following synopsis nutshells the principal features of each focus jurisdiction's opt-out regimes, and the rules governing both costs awards and security for costs orders:

Canada

Competition law class actions: The various Canadian opt-out provincial regimes, and the much-less utilised federal regime, under which competition law class actions can be brought on behalf of unnamed, described classes, have been noted previously (at p 3).

Canadian statutory law specifically confers a right of private enforcement in respect of any persons who have engaged in prohibited anti-competitive conduct. In particular, s 36(1) of the Competition Act, RSC 1985, s C-34, provides that any person who has suffered loss or damage as a result of conduct contrary to the provisions of Pt VI of the Act (which creates a number of offences for anti-competitive conduct) has a private right of action to seek compensation from those persons who engaged in that infringing conduct. Hence, any defendant who participates in anti-competitive behaviour faces the prospect of both prosecution from the competition regulator (the Canadian Competition Bureau, which is the agency responsible for the enforcement of the Competition Act), and also the possibility of private claims for damages (either follow-on if the competition regulator has successfully prosecuted, or stand-alone actions if no successful prosecution has occurred). As Pitel notes ('Litigating Conspiracy: An Introduction' (2006) 3 *Canadian Class Action Review* 3, 3-4), the private right of action under s 36 —

has existed for around thirty years, but for most of its history it has been used only infrequently to combat conspiracies. ... This situation has changed, however, with the adoption by several provinces of class action legislation. Class actions allow for the aggregation of the claims of many persons harmed by a conspiracy, whether or not specifically identified, and thus significantly improve the economic viability of claims under s 36(1).

Each of the Canadian class action regimes contains a formal certification requirement. The certification hearing has become the 'chief battleground' of class actions disputes, and competition law cases

are no different in that respect. That much has been explicitly acknowledged — for example, in *Consumers' Assn of Canada v Coca-Cola Bottling Co* [2006] BCSC 863 (a non-competition law case), Russell J observed (at para 35) that:

One probably unintended consequence of class proceedings statutes has been the transformation of certification proceedings from preliminary step to battleground; in some senses, the certification proceeding is the trial (citing *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 393, para 5).

A loss at the certification hearing is crucial, for as Cullity J remarked in *Stewart v General Motors of Canada Ltd* (Ont SCJ, 8 June 2007), at para 3: 'As a practical matter, the effect of a denial of certification will often terminate the proceeding.'

It is necessary for the representative claimant to prove each of the following certification criteria stipulated by the relevant Canadian class actions legislation. Section 5(1) of Ontario's Class Proceedings Act, SO 1992, provides a typical example of the Canadian regimes' requirements in this regard:

The court shall certify a class proceeding ... if,

- (a) the pleadings or the notice of application disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Costs rules: The costs rules which apply to class actions in Canada differ, depending upon the relevant statutory regime. In British Columbia, the legislature preferred a modified 'no-way' costs rules for class

actions. Under a no-way costs regime, costs do not shift, depending upon the outcome; each side bears its own costs, win or lose. In modified form, however, the court may award costs in any circumstances of vexatious, improper or abusive conduct, meaning that the representative claimant is not entirely immune from the risks of an adverse costs award. This is provided for in s 37(1) and (2) of the BC statute. Of this rule, the British Columbia Court of Appeal has said, in *Samos Investments Inc v Pattinson* [2002] BCCA 442, at para 27, that:

Saskatchewan and Newfoundland have also adopted modified 'no-way' costs rules in their class action legislation ... In each instance, such rules were seen as best ensuring that the purposes of the legislation, with an emphasis on access to the courts by plaintiffs, were met.

The regimes implemented by Manitoba and the Federal Court also followed the BC lead and introduced the modified no-way costs rule. In fact, the no-way costs rule in BC is further amended, in that: if an action is dismissed prior to certification, then costs-shifting applies: *Edmonds v Acton Super-Save Gas Stations Ltd* (1996), 5 CPC (4th) 101 (BCSC), para 4; and costs-shifting applies to any interlocutory applications heard prior to the certification hearing: *The Consumers' Association of Canada v Coca-Cola Bottling Company* [2006] BCSC 1233, para 18.

In addition, court-supervised contingency fees are permitted in BC, by virtue of s 38(2) of the class actions statute. For that reason, the Federal Court of Canada Rules Committee described the BC situation in these terms: 'a representative plaintiff has no exposure to costs, subject to exceptions, and the class lawyer is the risk taker through contingency fees' (*Class Proceedings in the Federal Court of Canada, Discussion Paper*, 2000, p 99).

On the other hand, in Ontario, for example, the legislature preserved the usual costs-shifting rule for class actions, so that, in the usual course, the losing party bears the burden of paying the reasonable legal costs of the winning party (although costs orders are always at the discretion of the court: s 131(1) of the Courts of Justice Act, RSO 1990, and these rules of court apply to class proceedings: s 35 of the Class Proceedings Act, SO 1992). The costs-shifting principle also applies in the common law jurisdictions of Nova Scotia, New Brunswick and Alberta. Furthermore, in exercising its discretion in Ontario and Nova Scotia, a court can consider whether a class action was a test case, raised a novel point of law, or involved a matter of public interest, in which case no costs-shifting may be ordered: eg, s 31(1) of the Class Proceedings Act, SO 1992. On the other hand, the statutes of New Brunswick and Alberta have no explicit

costs protection in place for representative claimants. Hence, a clear division of opinion on the appropriate costs rules is evident across Canadian provincial legislatures.

From a funding point of view, court-supervised contingency fees are also permitted in Ontario, under ss 32 and 33 of that provincial statute. Furthermore, in Ontario, the representative claimant can apply to the Class Proceedings Fund for funding of disbursements, but not for legal fees. The notable feature of this Fund is that if the claimant has received any financial support from the Fund, and then loses his class action claim, the winning defendant can only collect his legal costs from the Fund, and not from the representative claimant. Thus, even though Ontario preserves the costs-shifting rule, the creation of the Fund does, in some cases, shield the representative claimant from having to pay the costs of the winning defendant. It has been noted that, between its establishment in 1992 and the end of 2007, Ontario's Class Proceedings Committee received 67 applications for funding, and of those, 29 were approved, 23 rejected or deferred, 12 withdrawn, and 3 to be heard: *Class Proceedings Fund: Fifteen Years in Review* (paper delivered to the 5th Annual Symposium on Class Actions, Toronto, 10–11 Apr 2008).

Across all the Canadian class actions jurisdictions mentioned above, class members are immune from bearing any adverse costs award if the class loses on the common issues. Class members remain liable, however, for the defendants' costs, if the class members lose on their individual issues.

Security for costs: In the no-way costs regime of British Columbia, it has been held that, unless special circumstances apply, the court has no jurisdiction to order security for costs: *Samos Investments Inc v Pattison* (2002), 216 DLR (4th) 646, para 35. Pre-certification, however, it appears that the action is governed by the ordinary tests for security for costs: *Secure Networx Corp v KPMG LLP* [2002] BCSC 1001, para 14, aff'd: (2003), 12 BCLR (4th) 317 (CA).

In the costs-shifting regimes of Ontario, etc, however, where the capacity of the representative claimant/s to satisfy any adverse costs award, should the class's claim fail, is crucial to the defendant, security for costs awards against the representative claimant are clearly permissible. Indeed, in the recent competition law class action of *2038724 Ontario Ltd v Quizno's Canada Restaurant Corporation* (Ont SCJ, 28 Mar 2007), security for costs in the amount of Can\$10,000 was ordered, in favour of two defendants to the class proceedings, Gordon Food Service Inc and GFS Canada Co Inc (who had estimated their costs, up to and including certification, to be just over Can\$200,000). However, Hoy J reiterated that the amount

ordered by way of security should be modest (at para 51), and cited a couple of earlier class actions cases, quite apart from the competition law context, where amounts as low as \$5,000 had been ordered by way of security:

The Court of Appeal in *Pearson v Inco Ltd* [2006] OJ No 991, para 11 recently reiterated that the objective of the CPA of enhanced access to justice is a factor in fixing the costs of a certification motion. I am of the view that it is also a factor in determining what order for security for costs is just in the circumstances. Having regard to this, and the modest amount of costs an unsuccessful plaintiff in a certification motion is typically ordered to pay, the GFS Defendants are awarded \$10,000 as security for costs.

The GFS Defendants satisfied the court in this case that there was good reason to believe that the representative claimants had insufficient assets in Ontario to satisfy any costs award in favour of the defendants which might be ordered, should the class fail to succeed at the certification motion.

Australia

Competition law class actions: As in Canada, there is a private right of enforcement specifically conferred by the relevant Australian federal competition statute. Both ss 82 and 87 of the Trade Practices Act 1974 (Aus) allow for a person who suffers loss and damage by conduct done in contravention of a provision of Pt IV of the Act (which contains the anti-competitive provisions of that statute) to recover the amount of that loss and damage. Again, a defendant who participates in anti-competitive behaviour within the Australian market faces the prospect of both prosecution from the Australian competition regulator (the Australian Competition and Consumer Commission (ACCC)), and also the possibility of private claims for damages (either follow-on if the ACCC has successfully prosecuted, or stand-alone if the ACCC has not).

Australia's federal class action regime, contained in Pt IVA of the Federal Court of Australia Act (and which commenced operation in March 1992), differs from the Canadian position in a crucial respect — there is no formal certification stage to be satisfied before the action can go forth as a class action (denoted as a 'representative proceeding') under Pt IVA. Instead, there are certain 'threshold requirements' which must be met under s 33C of the Federal Court of Australia Act, failing which the defendant may *challenge* the proceedings as being improperly constituted as representative proceedings. There are further

powers vested in the court to discontinue representative proceedings under any of ss 33L, 33M or 33N, at least in that form, where the scenarios stipulated in those sections are met. At the outset, section 33C(1) of the Federal Court of Australia Act 1976 requires that:

Commencement of proceeding

Subject to this Part, where:

- (a) 7 or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

The most crucial provision by which a class action can be ordered to cease being conducted in that form is s 33N (and this section has indeed been invoked in the competition law context under Pt IVA, as noted later in Appendix B). Section 33N(1) provides:

Order that proceeding not continue as representative proceeding where costs excessive etc.

- (1) The court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:
 - (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
 - (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
 - (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
 - (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

As an alternative to the class actions regime contained in Pt IVA, there is also the opportunity for a collective action to be brought by the ACCC, on behalf of class members, under s 87(1B) of the Trade Practices Act 1974:

The Commission may make an application under paragraph (1A)(b) on behalf of one or more persons identified in the application who:

- (a) have suffered, or are likely to suffer, loss or damage by conduct of another person that was engaged in a contravention of Part IV (other than section 45D or 45E) ...; and
- (b) have, before the application is made, consented in writing to the making of the application.

This provision was amended in 2001 (by the Trade Practices Amendment Act (No 1) 2001, Act No 63 of 2001, effective 26 July 2001) to permit an application to court, on behalf of persons who have suffered damage as a result of conduct in contravention of Pt IV, for orders that require the infringers to provide compensation for all or part of that damage (prior to this amendment, collective actions were permitted for other types of offences under the Trade Practices Act, but not for Pt IVA anti-competitive offences).

However, this is not an opt-out action, but rather, an opt-in regime, given that the legislation expressly provides that the ACCC may make its application ‘on behalf of one or more persons identified in the application’, and that the ACCC requires the ‘consent’ of the parties represented in the action. Thus, the collective redress regime falls outside the scope of the regimes covered by BERR’s Research Specification. In any event, so far as can be ascertained, the ACCC has not used this power, in relation to Pt IV anti-competitive infringements to date (although it has certainly been used in respect of contraventions of *other* sections of the Trade Practices Act, eg: *ACCC v Keshow (No 2)* [2005] FCA 989 (re unconscionable conduct, and misleading and deceptive conduct); compensation sought and denied in: *ACCC v 4WD Systems Pty Ltd* [2003] FCA 850 (re misleading and deceptive conduct); and claimed in: *ACCC v Black on White Pty Ltd* [2004] FCA 363 (re misleading and deceptive and unconscionable conduct)). Conversely, the ACCC has, in the past, also elected to pursue class actions under Pt IVA’s opt-out basis in relation to other types of trade practices/consumer protection contraventions, in preference to pursuing the opt-in representative action provided for under s 87(1B), eg: *ACCC v Golden Sphere International Inc* [1998] FCA 598; *ACCC v Chats House Investment Pty Ltd* (1996) 71 FCR 250.

Costs rules: The usual costs-shifting rule applies to class actions under Australia's Pt IVA regime. The Australian Federal Court has a discretion as to costs, but 'in the ordinary case, costs will follow the event and the court will order the unsuccessful party to pay the costs of the successful party, on a party and party basis, a basis which will fall short of complete indemnity': *Re Wilcox: Venture Industries Pty Ltd (No 2)* (1996) 141 ALR 727 (Full FCA) 729. Again, as under the Canadian regimes, the class members are immunised from an adverse order for costs, should the class lose on the common issues. Contingency fees (in the form of uplift fees) are permitted in some Australian states. Third party funding is also an increasingly important feature of Australian class actions jurisprudence, as discussed in: R Mulheron and P Cashman, 'Third-Party Funding of Litigation: A Changing Landscape' (2008) 27 *Civil Justice Quarterly* 312–341.

Security for costs: The Australian class action regime expressly provides that nothing in Pt IVA affects the court's ordinary powers to order security for costs in representative proceedings: s 33ZG(c)(v).

However, clearly the potential for a security for costs order to stifle a class action entirely has been of some judicial concern. This was evident, for example, in the vitamins price-fixing case of *Bray v F Hoffman-La Roche Ltd* [2003] FCAFC 153, where the Full Federal Court held that security for costs could indeed be ordered (at the request of one of the defendants, Aventis Animal Nutrition Pty Ltd). It was common ground in this case that Ms Bray 'has net assets of A\$73,000. Her only current source of income is a Canadian invalid pension which amounts to A\$931.40 per month. The applicant would not be able to meet an order for security for costs in the amount suggested by Aventis Australia (\$300,00–\$400,000). Ms Bray's solicitors stated that "they do not hold instructions from any group member(s) that they or any of them would be able to provide security"' (see para 134). The dilemma is clearly evident from the variant reasoning between the trial judge and the appellate court in this case. The trial judge (Merkel J, reported as: *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405) had originally held that it would be *inappropriate* to order that Ms Bray should be liable for security for costs, for four reasons:

- (1) Ms Bray had made out a *prima facie* case for relief under the TPA;
- (2) the claims of the class members arose out of an unlawful price fixing cartel which had been admitted to;
- (3) public policy considerations weighed strongly against an order for security of costs that might impede or hinder the class members' claims for injunctive relief and for damages resulting from the

cartel arrangement; and

(4) the kind of circumstances that might warrant an order for security for costs against an impecunious individual bringing a class action were absent in this case.

The three appellate judges, however, saw the matter quite differently, and held that security *could* be awarded in this type of case (the matter was remitted back to the first instance judge for further consideration). Carr J held that the discretion not to award security for costs was miscarried because Ms Bray clearly could not fund this very expensive litigation, ‘someone else must be funding it’ (para 138), and that it was for her to adduce evidence as to what the likely effect of any such order might be, which she had not done. Finkelstein J agreed (at para 250), and considered that whether an order for security should be made depended upon the ‘character of the proceeding’, and that, in turn, would depend upon several factors: whether the members of the class were rich or poor; whether the class action was being funded by someone who would benefit from the action being brought (eg, the representative claimant’s solicitors who were charging a contingency fee); whether it was the claimant who was ‘bogging down’ the class action in ‘interminable and expensive interlocutory applications’; whether the preliminary evaluation of the merits of the claim were good or poor; and whether the class action appeared to be brought as an ‘unmeritorious claim in the hope of compelling the defendant to agree to a settlement to avoid the enormous expense of fighting the case. Those types of actions can be discouraged by an appropriate order for security’ (at para 252). Branson J agreed with both judgments on this point.

Portugal

Competition law class actions: An opt-out system, known as the Popular Action, has been implemented in Portugal since 1995. The relevant laws facilitating the regime are: Law No 83/95 of 31st August, Right of Proceeding, Participation and Popular Action; and Law No 24/96 of 31st July, Establishing the Legal System Applicable to Consumer Protection. Copies of this legislation are available at: <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_Legislation.pdf>.

The regime has no certification requirement, but the court has the ability to discontinue (similarly to the Australian regime). Re standing, any consumer, and any association or foundation, has the right to

initiate a collective action, provided that the association has legal existence and that its purposes are compatible with the interests at stake. Hence, an association such as the Portuguese Association for Consumers' Protection (DECO) can bring an action with respect to consumer protection, even though it is 'not directly affected' by the culpable behaviour. Consumer protection actions and anti-competitive infringements are a suitable subject-matter for the Popular Action. The usual requirements to strike out frivolous litigation (when the 'source of the request is manifestly improbable') are maintained. The representative claimant does not require an express mandate to represent consumers.

Costs rules: A consumer organisation bringing the claim (such as DECO) is exempt from an adverse costs order, should it lose. Otherwise, a costs-shifting regime applies in Portugal, whereby a winning party is entitled to collect costs from the losing party, except for lawyers' fees. See: 'Executive Summary and Overview of the National Report for Portugal', available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/executive_summaries/portugal_en.pdf>.

The author is indebted to Professor Henrique Sousa Antunes, of the Law Faculty of the Portuguese Catholic University, for the following further information regarding costs under the Popular Action:

Article 20(2) and (3) of Law 83/95 [the Popular Action] states that 'the claimant shall be exempt from payment of costs in cases where the claim partially proceeds' and that 'in the case of total collapse of the claim, the intervening claimant shall be required to pay a sum to be fixed by the judge between 10–50% of the costs that would ordinarily be due, taking into account his economic situation and the substantive or formal reason for the failure of the case to proceed'. In Portuguese civil procedure law, the successful party is also entitled to receive from the unsuccessful party a sum regarding legal expenses ('procuradoria'). However this does not correspond to what that successful party actually paid for the services of lawyers, legal opinions, or similar: the court settles an amount, taking into account the complexity of the case, the financial situation of the parties, the volume of activity carried out. 'Goalposts' are established as certain proportions of that which is due as the judicial fee. The same applies to the Popular Action: following Article 21 of Law 83/95, the judge in the case shall rule on the awarding of compensation for the successful party's legal expenses, in accordance with the complexity of the case and the amount in question.

Security for costs: Security for costs are not a feature of Portugal's collective redress regime. In particular, article 20(1) of Law 83/95 provides that 'prepayments are not required for the exercise of popular action'.

6. THE RELEVANT COMPETITION LAW CASES

1. Relevant competition law cases

The competition law cases (concerning the types of infringements outlined earlier at p 7) are identified in the following:

Appendix A – Canada – 35 cases

Appendix B – Australia – 5 cases

Appendix C – Portugal – 1 case

The tables contain all cases which were commenced as competition law class actions. If certification failed, or if the cases were discontinued, that outcome is noted in the tables, as and where appropriate. The following Section 7 highlights the relevant issues which caused some of these cases to ‘run aground’ at certification (or, in Australia’s case, which caused the action to be discontinued in representative form).

2. Some notable points

The number and scope of competition law class actions heard by Canadian courts far outstrips the Australian case law arising from anti-competitive breaches. Why this is so is no doubt due to a variety of imponderable factors (funding availability? the activeness of the claimant bar? the number of investigations undertaken by the respective competition regulators? a different litigious culture?). A few further observations on this aspect are noted in Section 9.

The Australian actions identified in Appendix B are drawn exclusively from the federal jurisdiction. The author has not been able to identify any competition law class actions instituted under the Victorian state Pt 4A regime (insofar as the term ‘competition law’ is defined for the purposes of this Research Paper, as explained previously at pp 7–8), and hence, that state regime will not be considered further.

Parallel class actions have been evident across both Australia and Canada in a few instances — regarding rubber chemicals, airflight cargo charges, and linerboard and corrugated cardboard.

There is only one Canadian competition law class action to date in which the representative claimant has won a *contested* certification (*Axiom Plastics Inc v El Dupont Canada Co* (2007), 87 OR (3d) 352 (SCJ), leave to appeal refused: Div Ct, 16 May 2008).

Otherwise, numerous settlements of price-fixing actions have been achieved in Canada, where class actions have been certified for the purposes of settlement. In the competition law context, there has been explicit judicial acknowledgement by Canadian judges that a ‘more relaxed’ view of the threshold certification requirements may be adopted where certification is occurring for the purposes of settlement, but *not* where the certification motion is being contested by the defendants, viz, in:

- *2038724 Ontario Ltd v Quizno’s Canada Restaurant Corp* (2008), 89 OR (3d) 252 (Ont SCJ), para 139;
- *Bona Foods Ltd v Ajinomoto USA Inc* (2004), 2 CPC (6th) 15 (Ont SCJ), para 20 (where the certification judge said: it would not be reasonable ‘to give weight to such considerations when certification is requested only for the purpose of — and conditional upon — the approval of a settlement that would resolve, and terminate, the litigation. For this purpose, ... the proposed common issues are acceptable’); and
- *Toronto Transit Commission v Morganite Canada Co* [2007] OJ No 448 (where Hoy J noted that ‘[t]he requirements are the same in a settlement context as in a litigation context, although it is generally accepted that they need not be as rigorously applied in a settlement context as a litigation context’).

The great majority of actions arising in Canada and Australia (approximately 75%) were preceded by public enforcement or public investigations of some kind, although not necessarily in the same jurisdiction in which the class action was brought.

Some of the settlements have been very substantial indeed, indicating that behaviour modification via private enforcement is a goal which some courts consider to be worthwhile (given that courts are statutorily required to approve of any class actions settlement as being fair, just and reasonable).

3. Crunching the numbers

Of the 41 competition law actions commenced in Australia, Canada and Portugal:

- their *current status* is as follows:

Certified (or continued) to date	26	63%
Not certified (or discontinued in class action form)	6	15%
Pending (awaiting certification)	9	22%
<i>Hence</i> , of the 32 cases to date in which the outcome of certification/continuance is known, the success rate of certification/continuance is:	81%	

- this is the current outcome of the class action, in terms of the achievement of *monetary compensation* for the class members:

Actions which settled for monetary compensation	21	51%
Actions which will never achieve any monetary result	6	15%
Actions which are pending	14	34%
Hence, of the 27 cases to date in which the monetary outcome can be ascertained, the success rate for achieving monetary compensation is:	78%	

- at least 16 of the cases brought to date (almost 40%) have given rise to a *cy-près settlements*. This figure particularly reflects the fact that, in almost all of the Canadian competition law cases in which monetary compensation has been obtained, a *cy-près* component has been present in the settlement agreement (to take account of the difficulties in allocating compensation to the indirect purchasers and end-consumers bound up within the certified class). *Appendix E* indicates that, where awarded, the *cy-près* component has varied between quite low percentages of less than 10% to up to almost 100% of the total settlement sum.

- 10 of the cases (24%) give no indication, in any of the pleadings, judgments or settlement agreements, that any public enforcement (in either the home jurisdiction, or elsewhere) or litigation based upon the same subject matter elsewhere, occurred. In the remainder of 31 cases (76%), some previous public enforcement activity/investigation/indictment/fine/private enforcement by means of litigation elsewhere, or a combination thereof, were evident.

Of the cases which were preceded by some form of public enforcement / investigation / prosecution, and where a decision on certification has been made (i.e., 27 cases all up)	23 cases (85%) were certified/allowed to continue as class actions	4 cases (15%) were not certified/were discontinued as class actions
Of the cases which were <i>not</i> preceded by some form of public enforcement / investigation / prosecution, and where a decision on certification has been made (i.e., 5 cases all up)	3 cases (60%) were certified/allowed to continue as class actions	2 cases (40%) were not certified/were discontinued as class actions

4. Fines versus monetary compensation

Given the lack of punitive damages in either Australian or Canadian competition law litigation, the amount of monies recovered on class actions settlements typically have not been out of all proportion to the amount of the fine, and in some cases, the settlement recoveries were less than the amount of the fines levied upon the defendants in the same jurisdiction. For a sample of cases, *Appendix F* shows the comparison of what settlement amount was recovered for each \$1 of fine levied.

In reviewing some of these same figures, Sanderson and Trebilcock note (‘Competition Class Actions: An Evaluation of Deterrence and Corrective Justice Rationales’ (2006) 3 *Canadian Class Action Review* 15, 34) that ‘[s]ettlements have tended to be of comparable orders of magnitude to the public fines where Canadian public enforcement action has been taken’.

7. CERTIFICATION OF COMPETITION LAW CASES UNDER OPT-OUT REGIMES: RELEVANT ISSUES

To reiterate, in both Australia and Canada, a number of pre-requisites must be shown for the valid commencement of any collective action (or, more accurately in Australia's case, given the absence of a formal certification stage, the absence of any of the factors described hereunder can lead to a successful application to have the action discontinued in class action form).

The case law canvassed in this Section demonstrates that the screening mechanism provided by certification has been effective to curtail the number and scope of competition law cases going forth as class actions. In fact, out of the total number of competition cases canvassed in Appendices A, B and C (i.e., a total of 41 cases), the rate of failed certification/discontinuance in class action form constitutes some 15%. Many of the cases are still pending, whereby the outcome of the certification battle is not yet known. The experiences of these other jurisdictions refutes the likelihood that, should an opt-out regime be introduced into England and Wales, there would be a floodgates of class actions going forth. The reality would seem to be just the opposite, if a similar certification regime were implemented for England and Wales. (In that regard, reference is made in this Section to the relevant certification thresholds that could be implemented, per the Draft Legislation referred to in Section 4 previously.)

The discussion which follows is not intended to be an exhaustive analytical study of the relevant certification requirements, and how and why competition law cases have, at times, struggled to meet them. Instead, it is intended to flag to BERR the sorts of certification issues which have arisen elsewhere, and which would be of potential relevance, should similar cases be litigated under an opt-out regime for competition law cases in England and Wales. Dealing with each certification requirement in turn:

- (A) **There must be a valid cause of action on the face of the pleading** [already specified by virtue of r 3.4(2)(a) of the Civil Procedure Rules; and in *Draft Legislation*, cl 19.20(1)(a)]

- ***Infringements of competition statutes satisfactorily base most claims.*** Pleading a valid cause of action has not generally been problematical for competition law cases.

- ***Conspiracy requires care.*** However, if a price-fixing conspiracy among co-defendants is alleged, some Canadian courts have been keen to itemise just what must be pleaded and proved for the *tort of conspiracy* to be properly made out. For example, in *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp* (2008), 89 OR (3d) 252 (Ont SCJ), it was noted that an action for conspiracy must include, with clarity and precision, particulars of: (1) the parties and their relationship; (2) an agreement to conspire; (3) the precise purpose or objects of the alleged conspiracy; (4) the overt acts that are alleged to have been done by each of the conspirators; and (5) the injury and particulars of the special damages suffered by reason of the conspiracy. The representative claimant had not, in this case, alleged particulars of special damages resulting from the conspiracy. See too: *Steele v Toyota Canada Inc* [2008] BCSC 1063.

- (B) **The numerosity of the class must exceed the minimum threshold** (two persons for the Canadian regimes, seven for the Australian regimes) [*Draft Legislation*, cl 19.20(1)(b), refers]

- ***Rarely has a minimum number been an issue at certification.*** A minimum threshold has not been a problem in any competition law case brought under an opt-out regime in Australia or in Canada to date — with the notable exception of the very early case of *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997), where the Australian Federal Court doubted whether there were the requisite 7 class members:

it might be thought that in an area as large as the City of the Gold Coast, there would be, at the very least, seven persons who would fall within the class defined by the applicant. But the Gold Coast City Council, despite the attack made on the representative proceedings in this respect, has not produced any evidence confirming the existence of any person or organisation within the definition of group membership interested in recovering losses suffered as a result of the respondent's conduct by means of the representative action. It is, of course, well placed, as the building authority for the city of the Gold Coast, to be able to identify persons and organisations who might be qualified to be group members. Yet in spite of the respondents' quite precise challenge that there are not, in fact, seven persons within the group membership definition who are interested in recovering losses they may have suffered as a result of the respondents' activities by participating in the representative proceeding, the applicant has not provided evidence confirming the existence of a single such person.

The case was actually discontinued on other grounds, as discussed later.

- ❑ ***Indeed, large classes are the norm.*** In competition law cases, the position is generally quite the reverse — the classes tend to be large, even huge: 40,000 purchasers of Toyota vehicles mentioned in *Steele v Toyota Canada Inc* [2008] BCSC 1063; 1.1 million indirect purchasers of paving stones and bricks in *Chadha v Bayer Inc* (2003), 223 DLR (4th) 154 (Ont CA); and 200 million end purchasers of audio-visual products over a class period of almost two decades, in *Price v Panasonic Canada Inc* (2002), 22 CPC (5th) 379 (Ont SCJ). None of these cases was ultimately certified, but their lack of success was for other reasons.

- ❑ ***Overall manageability can be problem.*** Of course, whilst numerosity is concerned with *minimum*, not maximum, class sizes, a multitude of individual issues, plus large class size, has sounded the death-knell for some competition law cases, with the ‘monster of complexity and cost’ line commonly asserted by the court at that point. See recently, eg: *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2008] BCSC 575, para 186 (defendant’s similar assertion agreed with by the court).

In the Australian vitamins cartel suit of *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, the trial judge Merkel J approved of a change of class description, for precisely the reason that the class, as first pleaded, was too big and variant:

Every man, woman and child who has been in this country between 1992 and 1999; every person who is engaged in the food chain, the supply of every food and animal product; is a plaintiff, a group member. I can’t conceive of how that could ever be tried ... there are some areas where there will be losses that are seriously claimed. By all means, they should be singled out, but not everyone in the food chain in this country.

The class definition in this price-fixing cases was re-pleaded and circumscribed, as noted at p 32 below.

(C) **An adequate class definition** [*Draft Legislation*, cl 19.23(1)(a), refers]

□ **Purposes of the class definition.** According to *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp* (2008), 89 OR (3d) 252 (SCJ), the definition of an identifiable class serves three purposes:

- (1) it identifies the persons who have a potential claim against the defendant;
- (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action (whether judgment or settlement); and
- (3) it describes who is entitled to notice of certification.

(citing: *Bywater v Toronto Transit Commission* [1998] OJ No 4913 (Ont Gen Div)).

□ **Example of an adequate definition.** The Ontario case of *McLay & Co v Cascades Fine Papers Group Inc* (Ont SCJ, 2 Jul 2008) (re price-fixing of carbonless paper sheets) provides a typical example of an adequate, non-problematical, class definition:

‘All persons in Canada who purchased Carbonless Paper Sheets Products in Ontario or Quebec during the Class Period, except the Excluded Persons and persons who are included in the Quebec Class’

where the ‘Class Period’ in this case was defined as 1 Oct 1999–30 Sep 2000. The ‘Excluded Persons’ were persons and entities connected with the defendants.

□ **Wide classes common for settlement purposes.** In competition law cases arising from alleged price-fixing, where the action is being certified for the purposes of settlement (i.e., where certification is not being contested), the parties have been generally keen to draft the class as *widely* as possible, and to differentiate between different categories of purchasers for the purposes of distribution of settlement monies. Note, for example, the classification utilised in *Bona Foods Ltd v Ajinomoto USA Inc* (2004), 2 CPC (6th) 15 (Ont SCJ):

1. *Distributors* — Class members who purchased Sodium Erythorbate between July 1, 1992 and December 31, 1994, and who resold the Sodium Erythorbate to a further purchaser.
2. *Manufacturers* — Class Members who purchased Sodium Erythorbate between July 1, 1992 and December 31, 1994, and manufactured a product of which Sodium Erythorbate was a component part.
3. *Intermediaries* — Class Members who purchased products containing or derived from Sodium Erythorbate sold by the Defendants between July 1, 1992 and December 31, 1994, and resold the same or virtually the same product to a further purchaser.
4. *Consumers* — Class Members who purchased and consumed products containing or derived from Sodium Erythorbate sold by the Defendants between July 1, 1992 and December 31, 1994 (including Class members who are not members of other categories).

In other Canadian competition law cases which have been certified for the purposes of settlement, the class has been defined similarly broadly (eg, *Newly Weds Foods Co, Alfresh Beverages v Archer Daniels Midland, Alfresh v Hoechst, Minnema v Archer Daniels* (and see, too, the Notice of Certification and Settlement Approval in the Matter of Polyester Staple Class Action Litigation, available at: <[http://www.classaction.ca/pdf/Polyester%20English %20Notice.pdf](http://www.classaction.ca/pdf/Polyester%20English%20Notice.pdf)>).

- ***Can a class of direct purchasers be certified?*** This rather depends upon the status of the ‘passing-on’ defence. This defence states that, for direct purchasers of price-fixed widgets, these persons actually suffered no damage if they passed on the amount of any overcharge to their customers. For indirect purchasers in the supply chain of widgets, the defence alternatively provides (where applicable) that they did not suffer higher purchase prices because the first-line (direct) purchasers absorbed the overcharge themselves, who then sold on at normal prices to the indirect purchasers — so, by corollary, no overcharge was passed on to the indirect purchasers at all. Hence, the defence, where successfully pleaded, holds that the claimant direct purchaser or the claimant indirect

purchaser suffered *no compensable loss and damage* from the price-fixing arrangement (instead, someone else bore the brunt of the defendant supplier's price-fixed overcharge).

Wherever the defence can be pleaded against class members, so as to dissipate any loss or damage suffered by those class members, then the formation of such a class is problematical. It must be reiterated that both private enforcement provisions at issue in Canada and Australia — s 36 of the Competition Act, and ss 82 and 87 of the Trade Practices Act, respectively — require proof that an actual loss was suffered. Thus, for direct purchasers, they must be able to prove that they did not pass on the overcharge, but bore the burden themselves.

Notably, in the US, the possibility of a defendant pleading the passing-on defence has been rejected in *Hanover Shoe Inc v United Shoe Machine Corp*, 392 US 481, 88 S Ct 2224 (1968). In other words, a class of direct purchasers can be certified, and the defendant cannot allege as against those purchasers that they passed on the overcharge. Two reasons were given by the US Supreme Court for this creative piece of judicial decision-making. First, it was too economically difficult to establish, in most cases, just what amount of overcharge was passed on by the direct purchaser, and what was borne by the direct purchaser alone. Allocating the overcharge down the supply chain would increase the complexity of this type of lawsuit many times over. Hence, it was forensically 'cleaner' to disallow the defence and, in effect, to allow the direct purchaser to recover the *full* amount of the overcharge (a windfall in some cases, if the overcharge had, indeed, been passed on). Secondly, the Supreme Court considered that if the defence were successful for a defendant against the direct purchasers, then that would leave the indirect purchasers (to whom the overcharge was passed) to bring the action — and given the 'tiny stake in a lawsuit' which each of these would have, they would presumably have 'little interest in attempting a class action', and that would reduce the effectiveness of treble damages claims against cartellists, if the claims were, in fact, never brought at all (at 491–494). Hence (at 494):

Our conclusion is that Hanover proved injury and the amount of its damage for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense.

A class of direct purchasers (comprising no end-users at all) was confronted with the passing-on defence, for example, in the Australian federal class action, *Darwalla Milling Co Pty Ltd*

v F Hoffman-La Roche Ltd (sub nom Bray) [2006] FCA 915. In that case, re vitamins price-fixing, the class (as re-pleaded) comprised (at para 2):

1. Manufacturers, distributors and suppliers of pre-mixes containing vitamins A, E, B1, B2, B5, Betacarotene or Canthaxanthin for animal nutrition or health purposes (together and severally the 'Class Vitamins');
2. Manufacturers, distributors and suppliers of stock feeds containing class vitamins;
3. Producers of livestock including poultry, pigs, sheep and cattle, and dairy farmers, egg producers and aquaculturalists, who purchased stock feeds containing class vitamins;
4. Manufacturers, distributors and suppliers of veterinary and performance enhancing preparations and supplements containing class vitamins;
5. Manufacturers and distributors of pet food containing class vitamins who:
 - (i) were at all relevant times ordinarily resident in or carrying on business in Australia;
 - (ii) paid at least A\$2,000.00 in the [class period] for class vitamins or pre-mix or other animal health or nutrition products containing class vitamins; and
 - (iii) are not Justices or Registrars of the High Court of Australia or the Federal Court of Australia.

The passing-on defence was pleaded by the defendant vitamins manufacturers in this case, and in the judicial approval of settlement (reported at [2006] FCA 1388), the court noted (at para 48) that the defence had two legal consequences:

The [class members] were then obliged to confront the proposition, which the [vitamin manufacturers] took in their defences, that they did not in fact suffer any loss or damage at all, because the impact of higher vitamin prices (to the extent that there were any) was passed on down the line to their own customers, and ultimately to consumers. This point had two dimensions: first, the basic proposition itself, which had the potential, if accepted by the court, to make serious inroads into the case which the applicants might otherwise have been able to make in [proving] loss and damage; and secondly, the significance of the proposition, to the extent that it

was valid, for the apportionment of group-wide loss and damage as between group members in different categories (i.e., in the sense that, to the extent that one group member passed on the price increase to a customer who was a group member in a different category, the former's gain would be the latter's loss).

Ultimately, the case settled for A\$30.5M, and the actual impact of the defence did not have to be ultimately determined.

In the Ontario case of *Axiom Plastics Inc v EI Dupont Canada Co* (2007), 87 OR (3d) 352 (SCJ), the passing-on defence was again pleaded as against a class of direct purchasers — and the claim survived certification. The defence clearly may be raised by an alleged cartelist defendant in Canadian law, but it does not necessarily remove the prospect of a class of direct purchasers from being able to prove some loss or damage:

Here, the class members are direct purchasers and passing-on may be raised as a defence. ... The possibility that the defence of passing-on might prevail at trial does not mean that there cannot be some basis in fact for finding that class members suffered loss.

- ***Can a class of end-users/consumers be certified?*** There are also problems of claiming loss and damage resulting from a price-fixing cartel, insofar as end-consumers are concerned. For contested certification motions, especially, a class or sub-class of *indirect purchasers* of a price-fixed product has caused significant difficulties too.

On the one hand is the type of problem evident in *Illinois Brick Co v Illinois*, 431 US 720 (1977). This was an anti-trust treble damages action brought by end-purchasers of structures built using concrete blocks. They alleged that the manufacturers of the concrete blocks had engaged in a conspiracy to fix prices in violation of the Sherman Act, and the question was whether indirect purchasers, as opposed to the direct purchasers who had purchased concrete blocks directly from the manufacturers, could recover the alleged overcharge. It was held that indirect purchasers could *not* sue for treble damages for price-fixing, because allowing claims by both direct and indirect purchasers would create the *risk of double recovery* against the price-fixer, and make the process of determining who had suffered what proportion of the price overcharge too complex, thereby undermining the effectiveness of the remedy. Previously, the US Supreme Court had held, per

Hanover, that the cartellists could not argue a passing-on defence (and as a result, the first-line purchasers in the supply chain actually recovered the whole loss and damage caused by the cartel, whether the overcharge was passed on or not). It must follow (held *Illinois Brick*) that end-consumers/indirect purchasers should not be able to claim damages — otherwise, cartellists would be exposed to the serious risk of double recovery from two different sets of claimants.

A further problem with the end-user class is that if these indirect purchasers are permitted to claim for their losses incurred because they did allegedly incur some of the overcharge, then that can give rise to significant problems of *causation* and *quantification* of the loss actually suffered, that far down the chain and that far removed from the initial overcharge. This calculation is made all the more difficult if the supply chain is long; if the widgets are incorporated into other products as they pass down the supply chain and are then sold as a different product X; and if the price of product X is determined by external market circumstances which are entirely divorced from the overcharge.

In *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2008] BCSC 575 (alleged price-fixing of dynamic random access memory, or DRAM), the class definition sought to include both direct and indirect purchasers in British Columbia. The contested certification failed. Justice Masuhara noted, at para 207, that:

This application reflects the continuing difficulty that has been encountered by the courts over many years, namely the failure to propose a viable class-wide method of establishing harm and thus liability when the proposed class includes *indirect purchasers*. This, combined with the vast array of products and channels [into which RAM is incorporated], serve to dilute the semblance of a manageable and workable process (emphasis added).

A class of indirect purchasers also fared badly in each of the leading cases of *Chadha v Bayer Inc* (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (Ont CA) (iron oxide pigment) and *Price v Panasonic Canada* (2002), 22 CPC (5th) 379 (Ont SCJ) (audio-visual equipment). In *Chadha*, the representative claimant himself was a home-owner who claimed that, as a result of the price-fixing of iron pigment, the price of his home had been inflated, because of the price-fixing of the concrete bricks and paving stones (coloured by the iron oxide pigment) incorporated in his home. Certification of these classes in both *Chadha* and *Price* failed.

- ❑ ***How can some class members tell if they are indeed class members?*** A further problem with class definition is that, in some price-fixing actions, the class members will not be able to objectively self-identify themselves as being in the class. For example, in *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2008] BCSC 575, it was noted that consumers would not be able to tell if their product contained DRAM and, even if they could, the consumers would most likely not know whether the DRAM was manufactured by the defendants — the only method for the individual consumer to determine the manufacturer would be by opening or disassembling the product to inspect its circuitry and memory chips (even assuming that the consumer was able to do this!) which, in turn, could expose the consumer to product damage and voidance of product warranties. This objection, though, was not fatal to the class definition in this case, although the action was ultimately not certified on other grounds.

- ❑ ***The class must be closed.*** Finally, in price-fixing (as in all) class actions, the class must be closed to be valid and effective. Hence, in *Quizno's* case, the class was defined as:

‘all persons, including firms and corporations, carrying on business in Canada under a “Quiznos” Franchise Agreement on or after May 12, 2006.’

The definition required a date for closure of class membership (which was held to be the date that notice of certification was given).

- (D) **There must be a common issue of law or of fact** [*Draft Legislation*, cl 19.20(1)(c), refers]

- ❑ ***Can loss suffered by the class members be a common issue?*** The most significant problem for competition law class actions has been whether the loss suffered by class members as a result of the alleged anti-competitive conduct can comprise a *common issue*, i.e., common on a class-wide basis to all class members, or whether the action will require individualised proof of damage by each class member. Where proof of damage is required, not only to prove the quantum of loss but also to make out the *substantive cause of action*, then courts have been reluctant to certify unless the damage (caused by a price-fixing cartel, for example) *can* be proved on a class-wide basis.

Inevitably, the arguments on a contested certification in Canada have divided along ‘party lines’, and revolve around the reasoning of the previously-mentioned influential decision of the US Supreme Court in *Illinois Brick Co.* It will be recalled that the court held that *indirect purchasers* could not sue for treble damages for price-fixing because allowing claims by both direct and indirect purchasers would create the risk of double recovery against the price-fixer, and make the process of determining who had suffered what proportion of the price overcharge too complex, thereby undermining the effectiveness of the remedy. On the other hand, the decision of the US Federal Court of Appeals for the Third Circuit, in *In Re Linerboard Antitrust Litigation*, 305 F (3d) 145 (3rd Cir 2002), accepted that loss could be provable on a class-wide basis in *some* circumstances — by use of expert evidence, industry data, and economic models, showing that a price-fixing conspiracy could be presumed to have had a common impact upon all purchasers.

□ ***Generally not a common issue in Canada thus far.*** On *contested* certifications in Canadian cases, thus far, defendants have been reasonably successful at opposing certification, by arguing that loss could not be a class-wide issue. The arguments accepted by the courts have included:

- that the economic models relied upon by the class to prove damage as a class-wide issue have been unworkable, infeasible, or based upon erroneous or unfounded assumptions. For example, in *Quizno’s* price maintenance litigation, the class of franchisees sought to put forward expert economic evidence that the franchisees’ damages could be assessed in the aggregate, by taking the difference between actual prices (determined from historical data that quantified the expense to the Quiznos franchisees of purchasing products) and the prices that would have existed but for the price maintenance conspiracy (extrapolated from industry data of comparables). The court rejected the economic model as being based upon three incorrect assumptions, and declined to certify.

In *Chadha* too, the Ontario Court of Appeal refused to accept the expert economic evidence seeking to assess the class-wide effect of iron oxide price-fixing upon homeowners, given that the expert’s models were based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers, whereas that could *not* be safely assumed. *Chadha* was not a case where *all* end-purchasers paid a higher price for

their homes. Furthermore, it was a long distribution chain from manufacturer of the pigment to the home-owner, and there was plenty of opportunity for the overcharge not to have been passed on, but absorbed. Also, the price of a house was influenced by the value of the land, by market forces, by the type of building, all of which may negate the effect of the price-fixing altogether for the homeowner. The economic model assumed that the overcharged price would have been passed on, whereas it may not have been passed on at all.

In a similar vein, in *Steele v Toyota Canada Inc* [2008] BCSC 1063, the econometric model put forward by the claimant class of purchasers of Toyota Corollas did not meet the requirements of statistical safety. The court noted (at para 126) that:

Dr Woodcock's opinion is that the Access Program increased transaction prices for eight of twelve sub-models of Toyota Corolla. Using a one-sided test he found a confidence level of 94.91%. Both Dr. Brander and Dr. Woodcock agree that the ordinarily used standard for statistical significance is 95%. Even without trying to resolve the differences of opinion between the experts, therefore, there is agreement that Dr. Woodcock's analysis does not reach the standard of statistical significance that is commonly employed in the profession.

- the Court of Appeal in *Chadha* also rejected the argument that the aggregate assessment provisions could be used to establish loss on a class-wide basis. That possibility of aggregate assessment (contained, eg, in s 24 of Ontario's Class Proceedings Act 1992 [refer to *Draft Legislation*, cl 19.45(1), for equivalent provision]) contains three pre-conditions, the second of which requires that 'no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability'. If proof of damage is an element of each class member's cause of action, clearly this pre-condition is not satisfied, and s 24 cannot be invoked (so held *Chadha*).

This reasoning has again been recently supported in the competition law field: *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp* (2008), 89 OR (3d) 252 (Ont SCJ); *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2008] BCSC 575; *Steele v Toyota Canada Inc* [2008] BCSC 1063.

□ ***Common issue arguments for the claimant class.*** On the other hand, claimant classes may point to the following to substantiate their argument that their loss/damage can be a common issue:

- in the recent decision in *Axiom Plastics Inc v EI Dupont Canada Co* (2007), 87 OR (3d) 352 (SCJ), on a contested certification motion, the claims against the defendant with respect to one alleged price maintenance offence were found to be suitable for certification, with the loss capable of being assessed on a class-wide basis:

I am satisfied that [the economist's] opinion provides some basis in fact that how damages, or restitutionary payments, are to be computed could, in respect of a narrowed class comprised of persons required to buy DuPont resins, constitute a common issue. With a narrowed class, it should not be difficult to establish a control group. Should the common issues judge not be satisfied that this is the case, and be of the view that the individual issues were not manageable, the proceeding could be decertified.

In that regard, the willingness to de-certify later on in the action shows a more robust attitude towards certification of price-fixing actions;

- while the rationale of *Illinois Brick* has been followed in *Chadha* and *Price v Panasonic Canada*, about 20 US states have enacted legislation to permit indirect purchasers to bring class actions, which have subsequently been successful in being certified, indicating a clear legislative intent in these states to facilitate an improvement in the end-users' prospects of recovery in respect of a price-fixing cartel;
- in *Quizno's* case (the franchisee case, in which certification in respect of an alleged price maintenance arrangement of certain franchise menu items was denied), the court emphasised that it was not setting any sort of precedent by which to say, 'price-fixing can never give rise to common issues':

I wish to be clear that I am not concluding that price maintenance conspiracies or competition offences cannot yield a common issue or that actions asserting such claims are inherently unsuitable for a class proceeding. I simply conclude that a common issue has not been made out in this case.

- furthermore, a more relaxed stance on certification criteria was evident in *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA), where the ‘common issues’ threshold requirement was called a ‘low bar’. This generous attitude towards the certification criterion may herald a change in attitude toward contested price-fixing certifications.

(E) The collective action must be superior or preferable to other forms of dispute resolution [*Draft Legislation*, cl 19.20(1)(d), refers]

- ❑ ***Easier for settlement classes.*** Again, where the certification is occurring preparatory to an agreed settlement, the need to ensure that a class action is preferable to all other forms of dispute resolution is relaxed somewhat: *VitaPharm*. For contested certification motions, however, the preferability criterion has proven a considerable hurdle for some classes to overcome. The following factors have been relevant to that superiority enquiry elsewhere:
- ❑ ***One common issue is not going to render a class action preferable.*** Obviously, where the court is not prepared to certify proof of class-wide damage as a common issue, and this leaves the question of whether the defendant infringed the statute as the *only* common question, then the court is likely to consider that the case will be overwhelmed by the number of individual issues to be determined, and to deny certification. The following reference in *Quizno’s* case is apt, where aggregate assessment of the franchisee class’s loss was not permitted: the result was ‘an avalanche that buries the proposed common issues with an absence of commonality and a proliferation of individual issues’ (at para 115).
- ❑ ***No likely modification of behaviour can sometimes render the class action ‘not preferable’.*** On occasion, certification judges have considered that it is not necessarily the province of class actions proceedings to seek to modify the behaviour of infringing defendants, given that the governing statute (eg, in Canada, the Competition Act) provides for criminal sanctions to achieve the goal of behaviour modification: eg, *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2008] BCSC 575 (certification denied).

- ❑ ***Lack of likely judicial economy can sometimes render the class action ‘not preferable’.*** Where the price overcharge has been ‘minuscule’ (assuming that the fact of damage could be proven at all), that has sometimes disproved the need for the class action to achieve judicial economy, as in *Chadha*, where the Ontario Court of Appeal held that judicial economy would be undermined rather than enhanced by certification, where the losses per individuals were insignificant: (2003), 63 OR (3d) 22 (Ont CA), para 62.

On the other hand, however, access to justice in such a scenario would be greatly enhanced by the certification of a class action, a viewpoint which has received greater emphasis since *Chadha* in 2003 — especially in light of *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA), paras 73–74. To argue that very small claims would actually lead to no litigation, and that no litigation was preferable to a class action that aggregated low-value claims, was an argument that was firmly rejected in *Markson v MBNA Canada Bank* [2007] Ont CA 334, para 9.

- ❑ ***Class members willing to sue individually.*** As a obverse problem to the one mentioned above, if there is an evidence of a willingness for individual class members to sue individually to recover heavy losses occasioned by price-fixing on a widespread scale, this may also preclude preferability, because a class action may not be perceived to have been required for the achievement of access to justice.

This was at the source of the Australian Federal Court’s decision to order that the class action in *Gold Coast City Council v Pioneer Concrete* (FCA, 9 Jul 1977) not continue in class action form under Australia’s Pt IVA regime:

well prior to the applicant bringing these proceedings, the State of Queensland and Queensland Rail separately commenced actions in the Supreme Court against the four respondents and others seeking damages of the kind which are also sought by the applicant in the representative action to be recovered on their behalf. It is highly probable that the State of Queensland and Queensland Rail will opt out of the representative action, if it proceeds and an opt out notice is published.

Again, this early decision under the Pt IVA regime is not necessarily determinative of the issue, given that the factor did not operate on its own in drawing the Federal Court to the conclusion that the action should be discontinued as a representative proceeding under Pt IVA. Whether this factor

should ever operate in the modern era where class actions have, as one of their most important functions, judicial economy and the allocation of court resources as efficiently as possible, is highly doubtful in any event (as noted, eg, in Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, 227).

(F) **There must be an adequate representative claimant** [*Draft Legislation*, cll 19.18 and 19.20(1)(e), refers]

□ ***Separate sub-class representatives.*** Where a class consists of producers, distributors, intermediaries and consumers of product X, then a separate representative claimant, who is a member of one, or more, of these groups, has been approved by the Canadian courts. There must be nothing in the material filed as part of the record to suggest that any conflicts of interest exist, or may arise, between their interests and those of other members of the class, or to raise any other doubts with respect to their ability to represent the class members fairly and adequately. In the context of competition law cases, adequacy of representation was satisfied, for example, in *Bona Foods Ltd v Ajinomoto USA Inc* (2004), 2 CPC (6th) 15 (Ont SCJ). On the other hand, in *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2008] BCSC 575, there was conflict of interest between the representative claimant and the class members, and this was one reason (among several) as to why certification was denied. The court held (at para 202):

the broad definition of the proposed Class which seeks to include both direct and indirect purchasers of all DRAM and products containing DRAM in British Columbia; the complex nature of the market in terms of diversity of products and distribution channels; the time period over which the conspiracy is said to have operated; and the numerous individual inquiries that will have to be addressed, lead me to find that the representative plaintiff has irreconcilable conflicts with other members of the proposed class.

□ ***What a representative claimant should look like.*** In *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp* (2008), 89 OR (3d) 252 (Ont SCJ), the following passage encapsulates what a court will look for in a representative claimant:

Although Representative Plaintiffs need not be typical of the class, it appears to me that these Representative Plaintiffs are typical of the franchisees and that through their principals, Mr May and Mr Johnson, they understand and have experienced the grievances for which the franchisees seek redress. They are suitable spokespersons for their comrade franchisees and they have demonstrated a willingness to make common cause to voice their grievances with the Quiznos Defendants. Mr May's restaurant allegedly went out of business because of the alleged wrongdoing and thus he represents the hardest hit of the class members. The Plaintiffs have retained competent and experienced class counsel, and the Plaintiffs adequately participated in the course of the litigation leading up to the certification motion.

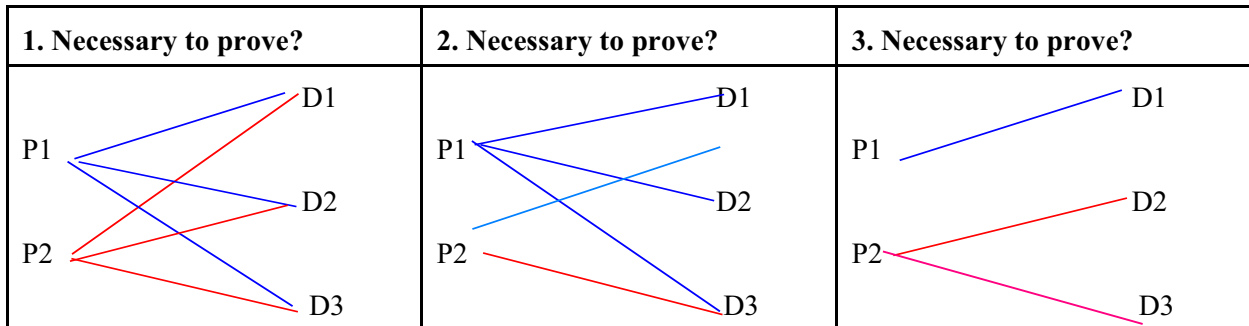
In this case, however, the court was concerned about the representative claimants' ability to satisfy any adverse costs order. Ultimately, the court was prepared to accept that the capacity of the representative claimant to fund the litigation was only one factor in the matrix of adequacy, and to insist upon an ability to meet an adverse costs order would 'limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place — a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of [the adequate representative criterion]': at para 95.

- ***Standing against multiple defendants.*** Price-fixing litigation is one scenario which, of its very nature, raises the so-called 'standing against multiple defendants' point, because a number of alleged cartellists will necessarily be involved. As outlined previously in Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004), pp 144–157, the question arises as to whether every representative claimant and every class member has to have a pleadable cause of action against every defendant sued in the action. Ontario has answered this question, 'no'; whereas Australia has previously answered this, 'yes'. That latter interpretation of the requisite standing has caused real difficulties in the conduct of litigation in which multiple defendants have been sued (notably, in the tobacco litigation of *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 (FCAFC)).

The problem arose again in the Australian vitamins cartel litigation in *Bray v Hoffmann-La Roche* [2003] FCAFC 153. The representative claimant in that case commenced the class action on behalf of all persons who purchased the relevant vitamins in Australia during a period of just over

7 years. The 11 defendants were all companies involved in the manufacture and sale of vitamin products. However, not every class member consumed vitamins manufactured by every single defendant. Some representative claimants and class members would not have consumed some defendants' vitamins at all. Did those representative claimants have standing/capacity to sue, and could those sorts of class members be represented, in that one class action?

The three options of standing are described diagrammatically overpage:



The third-mentioned view is favoured in Ontario, whereby as against each defendant, there must be a representative claimant who can assert a claim against that defendant (a principle established by one of the earliest decisions delivered under the Ontario regime, the breast implant litigation of *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339 (Gen Div)).

By contrast, the Australian Full Federal Court, by majority (Carr and Finkelstein JJ, Branson J dissenting), favoured the first-mentioned of these views, i.e., that each representative claimant had to have a cause of action asserted against each defendant. Their view was softened somewhat, however, by three points of reasoning.

First, not all *class members* had to have a claim against every defendant, said the majority. Secondly, each of the class members had a claim for injunctive relief against the cartellists, and the word 'claim' in s 33C(1)(a) of the Federal Court of Australia Act was not to be construed as limited to a 'cause of action' in the strict sense (say, for contravention of s 45 of the TPA), but as also including a demand for what is due (remedy-wise) by virtue of a strict cause of action, whether it be damages, an injunction or any other relief (Branson J disagreed with the majority on this point, and

held that claims for injunctive relief were not sufficient to satisfy the requirement that each class member have a claim against each defendant to the proceedings). The third factor that softened the ‘multiple defendants’ point somewhat was that the defendants in this instance had acted collectively; that was the precise basis upon which the defendant companies were alleged to have given effect to the cartel agreement, and hence, where either collective conduct or conspiracy was alleged, it is easier to establish a class action against multiple defendants, at least as the requirements of standing have been interpreted under Pt IVA.

However, the contentiousness of the point is highlighted by the fact that special leave to the High Court of Australia was sought in *Bray* (see: *BASF Australia Ltd v Bray* [2004] HCA Trans206), on the basis that (in counsel’s words), ‘what remains is a monolithic class, still containing the essential vice that not all of the group members of the class are capable of having claims against all respondents, primarily for the reason that some of the respondents were not in existence for the totality of the period to which the claims of the group are directed. Therefore, of necessity, some of the group members are incapable of having claims against some of the respondents, or their activities would be confined to a period during which those respondents did not exist, could not have supplied vitamins during that period, could not have been parties to a cartel, and could not have implemented a cartel.’ Argument was also addressed towards what sort of ‘claim’ class members may have against each and every defendant (i.e., is injunctive relief sufficient?).

Special leave was refused, given that the pleadings had been amended since the Full Federal Court’s decision, and the High Court concluded that ‘having regard to the procedural history of the matter to date and its present status, this is not a suitable vehicle to agitate the issues sought to be raised by the applicants.’

The point remains, however, one of much interest and relevance to English law-makers, given its variant treatment in other jurisdictions.

(G) **Any relevant preliminary merits criteria must be satisfied.** [*Draft Legislation*, cl 19.21, refers]

- ***The Australian express provision.*** Under s 33N(1)(a), the Federal Court of Australia is entitled to discontinue a representative action if the ‘costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding’. The court used this provision in *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997) to discontinue the proceeding (pointing to factors such as: the high costs of discovery and third party discovery, and that some group members may have purchased the pre-mix concrete at inflated prices even if they had known of the cartel, rendering causation a very individual issue).

- ***The Ontario implied requirement.*** A cost–benefit analysis of sorts has been oft-recognised by certification judges in Canada, and the following observation in the (non-competition) case of *Larcade v Ontario (Minister of Community and Social Services)* (2003), 65 OR (3d) 289 (SCJ) is typical of these concerns (at para 61):

The expense involved in resolving the issues relating only to the interpretation of the statute in a class proceeding — including the cost to the defendant in producing records and documents with respect to members of a potentially very large class, and that involved in giving notice and identifying such members — is, in my judgment, likely to be entirely disproportionate to the benefits that would be obtained by the members of the class as a consequence of certification.

The features of this passage — large classes, documents in the possession of the defendant, difficulty in locating class members — plus sometimes small individual recoveries, but with often very large class-wide damages, will render an implicit cost–benefit analysis important in price-fixing cases.

In that regard, precisely what type of preliminary merits criterion should be implemented will be a vitally-important design point for any class actions regime that may be implemented in England and Wales.

8. SOME PERTINENT SETTLEMENT ISSUES

Settlements of class actions have to be judicially approved under both the Australian regime (s 33V(1)) and under the Canadian regimes (eg, s 29(2) of Ontario's Class Proceedings Act, SO 1992). A similar requirement is provided for in the *Draft Legislation* (cl 19.50).

Some particular issues have arisen in competition law settlements/proposed settlements, which may be of potential interest to BERR. Briefly put:

- ***No settlement checklist will cover everything.*** The complexity of price-fixing and cartel and market-sharing arrangements prompted the Federal Court of Australia to note, in *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (sub nom Bray)* [2006] FCA 1388, that the nine factors that may assist to determine whether a settlement was '*fair, just and reasonable*', derived from *Re General Motors Corp Pick-Up Truck Fuel Tank Prods Liab Litig*, 55 F 3d 768, 785 (3rd Cir 1995) were helpful, *but* they should not be treated as a check-list for every case.

The nine *GM Corp* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In *Darwalla*, the settlement was split between the overcharge and the market-sharing contraventions, and Jessup J held that 'the present case involves specific problems and issues which no predetermined list could ever hope to anticipate' (para 38). He analysed this price-fixing settlement from two perspectives: first, 'whether the overall settlement sum is reasonable, having regard to the manner of its calculation and its relationship to a best possible case outcome for the group as a whole'; and secondly, 'whether the settlement, including the distribution scheme, involves any actual or potential unfairness to group members, or categories of group members, having regard to all relevant matters, including whether the overall settlement sum, even if reasonable as such,

involves unfair compromises by some members, or categories of members, for the benefit of others' (para 41). His Honour said that advice from lawyers and experts given to the class representatives was 'critical' to his assessment and eventual approval of the settlement (at para 34).

- **Bar orders.** Given the numerous defendants who usually are sued in actions for alleged price-fixing, some defendants may wish to settle, while others may wish to continue to defend the class action. Those defendants who settle will seek to make sure that, should the non-settling defendants ultimately lose the action, the non-settling defendants do not 'come looking' to the settling defendants for contribution and indemnity. This is achieved, in Canadian class actions, by the use of 'bar orders', but the terms of these have provoked a degree of controversy from time to time.

An example of a bar order, taken from the Carbonless Paper Sheets Class Actions Settlement Agreement, cl 7.1, available for perusal at: http://www.classaction.ca/pdf/Carbonless_-_Executed_Settlement_Agreement.pdf, is illustrative:

The parties consent to a bar order which shall be granted by each of the Courts providing that all claims for contribution, indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought by any person or party, against a Releasee, are barred, prohibited and enjoined (unless such claim is made in respect of a claim by a person who has validly opted out of the Settlement Class).

- **Cross-border class membership and enforcement issues.** The class members allegedly injured by a price-fixing scheme may go well beyond the borders of the court's jurisdiction — and the issue of whether a court in one jurisdiction X may certify worldwide classes for the purposes of the settlement, and whether that order (and settlement) has preclusive effect as against an absent class member who resides in another jurisdiction Y, is a live issue, still to be conclusively determined by either an Australian or a Canadian court (although the matter is due to be heard in the Ontario Superior Court of Justice in January 2009 in the *Canadian Air Cargo* action).
- **Cy-près orders.** Where a competition class action is certified for the purposes of settlement, a *cy-près* order may be particularly apposite for the classes of intermediaries and end-users/consumers for whose members loss and damage are difficult to quantify. (*Draft Legislation*, cl 19.48, refers.)

For example, *cy-près* orders were approved, as part of the settlement terms, in *McLay & Co v Cascades Fine Papers Group Inc* (Ont SCJ, 2 Jul 2008). Furthermore, the Special Issue of the *Canadian Class Actions Review*, noted previously, arose out of a conference organised as a result of funds received by the Faculty of Law of the University of Western Ontario, as part of a *cy-près* distribution of the settlement of *Bona Foods Ltd v Pfizer Inc* (2002), which related to alleged price-fixing of sodium erythorbate (as noted in Pitel's article, 'Litigating Conspiracy: An Introduction', 3, 4). **Appendix E** provides further details of these, and other, *cy-près* settlements.

9. SOME OBSERVATIONS RE AUSTRALIA'S RELATIVE LACK OF PRIVATE ENFORCEMENT TO DATE

1. A stark comparison

Both Canadian and Australian law confer a right of private enforcement in respect of any persons who have engaged in prohibited anti-competitive conduct, but Canada has had at least six times the number of competition law actions over the period 1992–present, covering a much broader range of allegedly price-fixed goods and other anti-competitive practices.

The relative paucity of private enforcement of anti-competitive breaches under Australia's class action regime, in comparison with that evident in Canada, is especially surprising, given that the Australian competition regulator, the ACCC, and its predecessor, the Trade Practices Commission, have been both vigilant and successful in penalising defendants for price-fixing and other anti-competitive conduct, regarding products as diverse as petrol, beer, ice, barbeques, ready-mix concrete, breach, automative parts, electricity transformers, clay bricks, and bed linen (to name but a few), and in both wholesale and retail markets.

In that regard, authors DK Round and LM Hanna make several very salient points, in respect of price-fixing public enforcement, in 'Curbing Corporate Collusion in Australia: The Role of Section 45A of the Trade Practices Act' [2005] *Melbourne U L Rev* 7:

- ❑ a large number of cases alleging price-fixing under s 45A of the Trade Practices Act have been brought at the institution of the ACCC (and prior to that, the TPC) since 1977 — the authors provide the following data: between 1977 and 2004, a total of 48 price-fixing cases were brought to a conclusion; only 13 of these were brought up until 1992, but then prosecutions accelerated in 1994 when increased maximum monetary penalties (\$10M for a corporation, \$0.5M for an individual) came into force;
- ❑ of the 48 cases that proceeded to a final hearing in the Federal Court, the regulator lost outright on only 3 of them — a success rate of almost 94%;

- ❑ some of the corporate penalties imposed were quite large: \$26M against Roche Vitamins et al; \$34M against ABB Transformer et al; \$20.3M against Pioneer Concrete et al; \$11M against TNT et al; \$13.4M against Tyco et al; \$3.5M against FFE and another; and \$2.85M against Tubemakers et al, to name but a few (but of these, only Roche and Pioneer faced any follow-on private enforcement — refer to Table 2);
- ❑ the authors conclude, of the public enforcement process, that it has its limitations, and map out how that process could be ‘beefed up’:

Arguably, the culture of price collusion persists ... The penalties imposed to date in Australia appear to have failed to slow down the incidence of price-fixing, at least on the measure of court cases. Companies appear to be able to limit their exposure to full judicial enquiry into the causes and consequences of price collusion by way of the negotiation process endorsed by the Commission. Although this process may be an efficient use of Commission and judicial resources, it is also effective surety for firms that are consequently able to calculate and cap the risk of incurring a high penalty. In part, it appears that firms now greatly influence the process. ...

In addition, to keep firms on their toes and to get an independent judicial assessment of guilt and penalties, we believe that the Commission should on occasion not engage in plea-bargaining but should allow price-fixing case to proceed directly to the Federal Court as a keeper of social standards through the creation of precedent. ... We also believe that judges should be bolder in setting pecuniary penalty amounts, and in setting penalties per offence. Unfortunately, the judiciary has tended to move slowly on issues such as penalties, and a similar conservatism is likely to be observed for some time.

- ❑ the alternative to the somewhat gloomy assessment of the limitations of public enforcement (and to dissuade any assessment that price-fixing may still be economically rational, if offenders can negotiate mutually-agreeable penalties, such that the expected benefits of collusion outweigh the expected cost of detection and punishment), is the *privately*-instituted actions for damages, whether in individual or class action form.

However, as *Appendix B* clearly shows, only a handful of class actions suits have been brought in respect of anti-competitive conduct under Pt IVA of the Federal Court of Australia Act to date.

2. No ACCC-instituted opt-in actions to take the place

Furthermore, this relative lack of private enforcement by means of follow-on class actions under Pt IVA has occurred against a backdrop of inactivity by the ACCC itself in seeking damages on behalf of persons affected by anti-competitive conduct. As mentioned previously (at p 18), under s 87(1B) of the Trade Practices Act, the ACCC has the power to make an application to court, on behalf of persons who have suffered damage as a result of conduct in contravention of Pt IV, for orders that require the infringers to provide compensation for all or part of that damage. However, so far as can be ascertained, the ACCC has not used this power in relation to Pt IV contraventions to date (although such applications by the ACCC have been made in respect of other types of contraventions).

3. Change in the wind?

Several Australian commentators, however, whilst noting the relative paucity of competition law class actions in Australia to date, foreshadow a greater amount of such litigation in the future. For example, to take a sample of predictions:

P Cashman, *Class Action Law and Practice* (Federation Press, Sydney, 2007), p 524 (footnotes omitted):

Notwithstanding the fact that there appears to be considerable cartel activity in Australia, or internationally with a direct impact on Australia, to date there have been very few class actions for damages in Australia. There are a variety of legal, factual and economic reasons for this. There are, however, signs of change.

B Sweeney, 'The Role of Damages in Regulating Horizontal Price-fixing: Comparing the Situation in the United States, Europe and Australia' [2006] *Melbourne U L Rev* 26 (footnote omitted):

The availability of class actions seems to be driving an increased interest in damages in Australia. Hard-core cartels are an obvious target because of the size of the harm they can inflict and the relative simplicity of establishing a breach of the per se provisions of the TPA. Although establishing causation will always be a complex task, the nature of the class action, together with the availability of litigation funding, provides sufficient incentives to make an action for damages attractive. Indeed, the complexity and often substantial costs of litigating the causation issue works in favour of plaintiffs by pushing defendants to settle rather than run the risk of an uncertain award, coupled with the certainty of large costs.

S Stuart Clark and C Harris, 'Class Actions in Australia: (Still) A Work in Progress' (2008) 31 *Australian Bar Rev* 63 (footnotes omitted):

To date, one vector of private enforcement in Australia which has not traditionally been pursued are damages actions against cartel participants. However, given recent developments in the public approach to cartel enforcement, and the enquiring minds and willing hands of Australian plaintiffs' lawyers, this has begun to change. ... In line with the US and Canada, the ACCC expects that private avenues of redress will become more prominent in Australia and act as a further deterrent to persons considering engaging in a cartel.

C Beaton-Wells, 'Forks in the Road: Challenges Facing the ACCC's Immunity Policy for Cartel Conduct: Part 1' (2008) 16 *Competition and Consumer LJ* 71 (footnotes omitted):

It is ... not surprising that questions relating to the conduct of [class and other follow-on] actions specifically (relating to issues of proof and procedure, for example) and the relationship between public and private enforcement more generally have not attracted much attention in Australia. However, with the public attention given to several recent cases — not least the private suits brought in respect of the Visy/Amcor cartel — this appears to be changing.

APPENDICES

APPENDIX A

COMPETITION CASES UNDER CANADIAN PROVINCIAL OPT-OUT REGIMES SINCE 1992

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
	2008							
35.	Kjelshus v Cadbury Adams Canada Inc	13 Feb 2008 Saskatchewan (same dispute against various Cadbury defs, as instituted by the various representative claimants, viz: Golfman v Cadbury in Manitoba, Cowan in Alberta, Thompson in Nova Scotia, Main in British Columbia, Kelly in Newfoundland and Labrador, Thompson in New Brunswick)	chocolate products (Mars, Snickers, Aero bar, etc)	price-fixing, and restricting supply of products to retailers who did not maintain recommended retail prices of product (i.e., those who had low pricing policies), between 1 Jan 2001–date of filing	not evident from pleadings / judgments or from Canadian Competition Bureau website	not yet (note: separate actions in Manitoba 19 Feb 2008; Alberta 19 Feb 2008; Nova Scotia 15 Feb 2008; British Columbia 24 Feb 2007; Newfoundland and Labrador 13 Feb 2008; New Brunswick 15 Feb 2008, also awaiting certification)	no judgments as yet	matters ongoing
34.	Urlin Rent a Car Ltd v Champion Laboratories Inc	3 May 2008 Ontario	oil, air, fuel and transmission filters	price-fixing and market allocation between 1 Jan 1999–1 Apr 2008	not evident that any occurred	not yet	no judgments as yet	matter ongoing

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
	2007							
33.	Harris v LG Philips LCD Co	2 May 2007 Ontario	liquid crystal display (LCD) and LCD products	price-fixing, allocating market share, preventing or lessening competition between 1 Jan 1998–date of filing	>1 def under investigation from Korean, Japanese and US regulatory bodies	not yet	no judgments as yet	matter ongoing
32.	Ilg v Samsung Electronics Co Ltd	9 Jul 2007 British Columbia	flash memory (rewritable memory chip holding content without power)	price-fixing, allocating market share, preventing or lessening competition, between 1 Jan 1999–date of filing	not evident that any occurred	not yet	no judgments as yet	matter ongoing
31.	Nutech Brands Inc v Air Canada	22 Jun 2007 Ontario	airflight cargo shipping services (and including a security surcharge)	price-fixing between 1 Jan 2000–11 Sep 2006	yes, extensive criminal investigations by the EC, OFT, the US DOJ, FBI, and regulatory authorities in Switzerland, South Korea and Canada	yes, partly — certified for the purposes of settlement against three defendants (collectively, Lufthansa); remaining non-settling defendants awaiting certification hearing	terms of Canadian settlement available for perusal at: http://www.aircargosettlement.com/en/sa_ca.pdf , with individual jurisdictions listed at www.aircargosettlement.com	matter ongoing; settlement agreement entered into with Lufthansa only, re airfreight cargo shipping services within, to or from Canada (US\$5.338M paid into settlement fund); no <i>cy-près</i> component evident from settlement agreement

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
30.	Bratton v Samsung Electronics Co Ltd	2 May 2007 Ontario	static random access memory	price-fixing, allocating market share, preventing or lessening competition, between 1 Jan 1998–31 Dec 2005	not evident that any occurred	not yet	no judgments as yet	matter ongoing
29.	Axiom Plastics Inc v EI Dupont Canada Co	2007 Ontario	engineering resins	price-fixing and resale price maintenance between Jan 2000–date of filing	not evident that any occurred	yes — certified	(2007), 87 OR (3d) 352 (SCJ) (Hoy J), leave to appeal refused by Divisional Court: 16 May 2008	matter ongoing
28.	Pro-Sys Consultants Ltd v Infineon Technologies AG	2007 British Columbia	dynamic random access memory	price-fixing between 1 Apr 1999–30 Jun 2002	all but one def pleaded guilty to price-fixing, and collectively paid US\$ 731M in fines; some directors imprisoned in US; no regulatory enforcement in Canada, so far as can be ascertained	certification denied	[2006] BCSC 1047, aff'd: [2008] BCSC 575 (6 May 2008)	none to be forthcoming

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
27.	Steele v Toyota Canada Inc	2007 British Columbia	'Access prices' for purchase of Toyota vehicles	price-fixing between Jun 2002–Jun 2004	yes, investigations by Canadian Competition Bureau; Toyota made voluntary donations of \$2.3M to charitable organisations in Canada	certification denied	[2008] BCSC 1063 (6 Aug 2008)	none to be forthcoming
	2006							
26.	Pro-Sys Consultants Ltd v Microsoft Corporation	19 Apr 2006 British Columbia	pre-installed Microsoft operating systems and software applications	price-fixing and monopolistic practices between 1 Jan 1994–date of filing	significant litigation against Microsoft in the EU and the US (23 actions in US alone) in relation to the same subject- matter, referred to in the judgments	not yet — significant pleadings skirmishes, amendments to statement of claim required, and materials for certification hearing disputed	[2006] BCSC 1738; [2007] BCSC 1663; [2006] BCSC 1047; [2008] BCSC 1263; [2007] BCCA 138	matter ongoing
25.	McLay & Co Inc v Cascades Fine Paper Group Inc	26 Mar 2006 Ontario	carbonless paper sheet products	preventing new market entrant, price-fixing, allocating market share, preventing or lessening competition, between Oct 1999–Sep 2000	yes, following guilty pleas, fines levied against 3 defs by Canadian Competition Bureau, totalling Can\$37.5M	yes — certified for the purposes of settlement	(Ont SCJ, 2 July 2008) Further details of settlement agreement dated 29 Feb 2008 available at: www.classaction.ca ;	Settlement amount set aside was \$2.950M; <i>cy- près</i> component to the settlement

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
24.	Irving Paper Ltd (Park Avenue Hair Salon) v Atofina Chemicals Inc	6 Jun 2006 Ontario	hydrogen peroxide	price-fixing between 1 Jan 1994–31 Dec 2001	subject to EC investigations in 2005, and defs eventually fined total of Euro 237.772M; 2 defs fined in the US for combined amount of US \$ 72.8M; parallel proceedings in the US (7 defs are common in both Canada and the US)	awaiting certification, scheduled for 12 Nov 2008 — previous preliminary skirmish about application to strike expert's affidavit in support of certification	interlocutory application reported at: (2008), 89 OR (3d) 578 (Ont SCJ) proposed settlement terms outlined at www.classaction.ca , with three settling defendants	if class action certified and settlement agreement approved in Nov 2008, a settlement sum totalling \$16.89M will be paid by the three settling defendants, with litigation to continue against 8 non-settling defendants
23.	2038724 Ontario Ltd v Quizno's Canada Restaurant Corp	2006 Ontario	supplies for menu items sold by submarine sandwich franchisees	price maintenance of products [dates not given]	not evident that any occurred	certification denied	(2008), 89 OR (3d) 252 (SCJ) (Perell J)	None to be forthcoming
22.	RG Gibson & Sons Ltd v Bayer Inc	25 Jan 2006 Ontario	polyester polyols	price-fixing of polyester polyols between 1 Feb 1998–31 Dec 2002	investigations by US, Canadian and EU regulators; one def granted amnesty; one def fined US\$33M in 2004	yes — certified for the purposes of settlement	Further information re national settlement agreement dated 28 Feb 2007, and related documents, available for perusal at: www.classaction.ca ;	settlement amount paid by settling defendants: \$140,389 (paid by Bayer) and \$69,000 (paid by Crompton); <i>cy-près</i> component in the settlement agreement for the intermediaries and consumer classes

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
21.	Gould Signs Corp v Arkema Inc	18 Aug 2006 Ontario	polymethyl methacrylates (forms resins and polymers)	price-fixing, allocating market share, fixing production capacity, between 1 Jan 1995–31 Dec 2003	defs investigated by EC and fined a total amount of Euros 173.79M (less reductions for co-operation)	not yet	no judgments as yet	matter ongoing
20.	Toronto Transit Commission v Morganite Canada Corp	2006 Ontario	electrical carbon products	price-fixing and price maintenance between 1 Jan 1995–31 Dec 1998	yes, judgment (para 31) notes that Canadian Competition Bureau investigated alleged price-fixing in the electrical carbon products market, and accepted a guilty plea from one of the Morgan Defendants, in respect of sales to municipal transit authorities	yes — certified for the purposes of settlement	[2007] OJ No 448	payment by settling defendants of \$825,000

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
19.	Crosslink Technology Inc v BASF Canada	5 May 2006 Ontario	polyether polyol products	price-fixing between 1 Jan 1999–31 Dec 2004	investigations in 2005 of 2 defs by US DOJ with respect to manufacture and sales of polyether polyols	yes — certified for the purposes of settlement	certification judgment not obtainable via caselaw databases, but judgment is referred elsewhere, and settlement agreement dated 6 June 2007, and related documents, available at: http://www.classaction.ca/pdf/Polyether%20Bayer%20Settlement%20Agreement.pdf	settlement sum of \$2.5M agreed to be paid by settling defendants
18.	Glen Ford and Fleming Feed Mill Ltd v Degussa- Huls AG	20 Nov 2006 Ontario	methionine or products containing methionine (used as poultry feed additive)	price-fixing and allocating market share between 1985–98	one def fined by EU in 2002 in amount of Euros 9M; one def settled a parallel class action in the US for US\$35M	yes — this was part of the vitamins class action settlement	yes, with other judgments Further information re vitamins settlement available, together with answers to FAQ, at: www.vitaminclassaction.com/ help	rights of recovery re methionine were very restricted under the vitamins settlement, and no payments in respect of such purchases appear to have been made under that agreement

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
	2005							
17.	Stone Paradise Inc v Bayer Inc	18 Jan 2005 Ontario (same case as RN Parton Ltd v Bayer Inc in BC)	ethylene- propylene diene monomer (EPDM) (synthetic rubber), and including the polychloro- prene litigation (also a synthetic rubber, known as CR)	price-fixing between 1 Jan 1997–31 Dec 2001 (for EPDM), and price-fixing between 1 Jan 1999–31 Dec 2003 (for CR)	investigations by US, Canadian and EU regulators; one def granted amnesty; one def fined Can \$9M	yes — certified for the purposes of settlement	Further details of settlement agreements, including allocations among defendants, referenced in the Notice of Settlement Approval located at www.classaction.ca (two separate links, one each for EPDM and CR, contain the relevant documents)	separate settlements reached in this action commenced by Stone Paradise: settling defendants paid \$176,505 (paid by Polimeri) and \$691,369 (paid by Bayer) under the 'EPDM Proceedings'; <i>cy- près</i> component in the settlement agreement for the consumers and intermediaries classes settling defendants paid \$628,517 (paid by Bayer) and \$65,090 (paid by Polimeri) under the 'CR Proceedings'; <i>cy-près</i> component in the settlement agreement for the consumers and intermediaries classes

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
16.	Del Guercio o/a Westtown Shoe Clinic	Feb 2005 Ontario	rubber chemicals	price-fixing between 1 May 1995–31 Dec 2001	investigations by DOJ and EU regulators, variously, and charges against, and guilty pleas by, and fines payable by, defendants, referred to in Statement of Claim	yes — certified for the purposes of settlement	Further details of settlement agreements, including allocations among defendants, referenced in the Notice of Settlement Approval located at www.classaction.ca	settling defendants paid \$412,447 (paid by Bayer) and \$2,317,494 (paid by Flexsys), under the 'Rubber Chemicals' proceedings; <i>cy-près</i> component in the settlement agreement for the consumers and intermediaries classes
15.	Sun-Rype Products Ltd and Wendy Wyberg v Archer Daniels Midland	14 Jun 2005 British Columbia	high fructose corn syrup (HFCS)	price-fixing between 1988–29 Jun 1995	no — although various manufacturers of lysine and citric acid were indicted in the US on charges of illegally conspiring to fix prices of those products, no evidence that indictments were ever made or charges laid with respect to HFCS in either Canada or the US, according to judgment	not certified at first instance, because competition law claim commenced out of time (2 year limitation period applied) — but on appeal, Wyberg's claim for competition law claim allowed to proceed, limitation period postponed — certification yet to be heard	[2007] BCSC 640; and on appeal: [2008] BCCA 278	matter ongoing, but only in respect of Wyberg's claim as representative claimant for the sub-class of end-consumers

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
	2004							
14.	La Cie McCormick Canada Co v Stone Container Corp	20 Feb 2004 Ontario (similar case brought in BC)	corrugated sheets and linerboard	price-fixing and decrease of inventory levels of product between 1 Oct 1993–30 Nov 1995	US FTC entered consent decree with one def to cease and desist from anti-competitive activity in 1998	yes — certified for the purposes of settlement	(Ont SCJ, Hoy J, 24 May 2006) main settlement agreement dated 1 Dec 2005, and later ancillary settlement agreements, available for perusal at: www.classaction.ca	settlement amounts of \$935,528, \$830,000, and \$20,000, agreed; <i>cy-près</i> component in the settlement agreement for consumers and intermediaries classes
	2003							
13.	Randall Klien Inc v Nan Ya Plastics Corp	11 Mar 2003 Ontario (similar action brought in BC)	polyester staple fibre	price-fixing and allocating market share between 1 Sep 1999–31 Jan 2001	sales manager of one def indicted in US in 2002 for conspiring to fix prices in the polyester staple industry; one def fined US\$28.5M; director of one def fined US\$20,000 and jailed for 8 mths	yes — certified for the purposes of settlement	cannot locate certification decision on any case law database, but various documents pertinent thereto are located at: http://www.classaction.ca/content/actions/polyester_staple.asp	\$974,929 paid as settlement sum; <i>cy-près</i> component in the settlement agreement for classes of consumers and intermediaries

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
12.	A&M Sod Supply Ltd v AKZO Nobel Chemicals BV	10 Nov 2003 Ontario	monochloro- acetic Acid and sodium monochloracet ate (MCAA) or products containing MCAA	price-fixing between 1 Sep 1995–31 Aug 1999	>1 def fined in US proceedings in 2001–2, with fines totalling US\$17M	yes — certified for the purposes of settlement	(Ont SCJ, Nordheimer J, 22 Dec 2003)	payment of \$490,000 by settling defendants; <i>cy- près</i> component in the settlement agreement
11.	Bona Foods Ltd v Ajinomoto USA Inc	2 Sep 2003 Ontario (same case as Lam v Ajinomoto USA Inc in BC)	monosodium glutamate (MSG) and nucleotides	price-fixing between 1 Jan 1984–31 Dec 1999	criminal proceedings and guilty pleas in US Dist Ct in Dallas in 2001 (amount of fines not mentioned)	yes — certified for the purposes of settlement	(2004), 2 CPC (6 th) 15 (Ont SCJ) allocation among defendants shown in main settlement agreement dated 7 Nov 2003, and ancillary settlement agreements, available for perusal at: www.classaction.ca	settlement payments of \$5.422M, \$900,000, \$100,000, agreed to by settling defendants; 85% distribution to producers and distributors, 15% to intermediaries and consumers; <i>cy-près</i> component in the settlement agreement
2002								

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
10.	Cello Products Inc v Sumitomo Corp	7 Jun 2002 Ontario	copper, scrap copper, copper products	unduly lessening competition by large off-market purchases of copper, thereby creating an artificial shortage of copper and artificially raising its price, between 1 Jun 1993–31 May 1996	one def fined US\$150M by US Commodity Futures Trading Commission in 1995, brokerage clearing firm fined US\$1M by London Mercantile Exchange in 2000; financier reprimanded by Fed Res Bank of NY in 1997	yes — certified for the purposes of settlement	settlement agreement dated 8 Dec 2005, showing division between settling defendants, available for perusal at: www.classaction.ca	settling defendants paid amounts totalling Can \$1.402M, in the proportions specified in the settlement agreement; <i>cy-près</i> component included in the settlement agreement
9.	Newly Weds Foods Co v Pfizer Inc	10 Jun 2002 Ontario	Maltol (chemical food- flavouring agent)	price-fixing and allocating market share between 1 Jan 1989–31 Dec 1995	not evident from the judgment or from the settlement agreement	yes — certified for the purposes of settlement	(Ont SCJ, 7 Apr 2003) Further details of settlement agreement dated 7 April 2003 available at: www.classaction.ca	\$567,000 paid in settlement (the particular allocation among defendants is detailed in the settlement agreement); <i>cy-près</i> component included within settlement for the class of consumers and intermediaries
	2001							

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
8.	Bona Foods Ltd v Pfizer Inc	27 Dec 2001 Ontario (same case as Mura v Pfizer Inc in BC, and in Quebec)	Sodium Erythorbate	price-fixing between 1 Jul 1991–31 Dec 1994	Yes. Pfizer fined \$1.5M by Canadian Competition Bureau in 2001	yes — certification referred to in settlement approval judgment	[2002] OJ No 5553 (Ont SCJ)	\$1.385M paid in settlement, covering Ontario, Quebec, and BC class members; funds made available for <i>cy-près</i> distribution to ‘3 deserving organisations’ covered by the Ontario action
7.	Price v Panasonic Canada Inc	2001 Ontario	audio-visual products	resale price maintenance between 1 Jan 1980–30 Mar 1999	no	certification denied	(2002), 22 CPC (5th) 379 (Ont SCJ)	none to be forthcoming
2000								
6.	Alfresh Beverages Canada Corp v Hoechst AG	28 Mar 2000 Ontario (same case brought as Mura v Hoechst in BC)	sorbates (food preservative, primarily a mould inhibitor in high moisture foods)	price-fixing and allocating market share between 1 Jan 1979–31 Dec 1996	yes, all defs bar one pleaded guilty to price-fixing in 1999; fines totalling \$7.49M levied against them by the Canadian Competition Bureau	yes — certified for the purposes of settlement	(2002), 16 CPC (5th) 301 (Ont SCJ, Cumming J) Further details of the settlement are available at: www.classaction.ca ,	payment of \$3.055M, with separate <i>cy-près</i> payments (to separate nominated organisations) to indirectly compensate the intermediaries and the consumers; note that that was amount referenced in the judgment; the settlement agreement itself, at www.classaction.ca , refers to a settlement sum of \$2.655M; separate settlement entered into with Chisso Corp, for \$285,000

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
	1999							
5.	Minnema v Archer Daniels Midland Co	5 Mar 1999 British Columbia (same case as: Mura v Archer Daniels Midland Co in Ontario and another in Quebec)	lysine and lysine products (used in hog feed)	price-fixing between 1 Jun 1992–27 Jun 1995	three defs pleaded guilty in criminal proceedings in the Fed Ct of Canada in 1998; fines totalling Can\$17.57M were levied on the defendants by the Canadian Competition Bureau	yes — certified for the purposes of settlement	[2003] BCSC 727	\$5.25M paid to settle all the class actions in BC, Ontario and Quebec; \$260,500 of that paid to BC class members; <i>cy-près</i> component included within settlement for consumers and intermediaries
4.	Wong v Sony of Canada Ltd	1999 Ontario	Sony-brand products	resale price maintenance between 1976–31 Dec 2000	not clear, but significant amount of litigation in the US conducted on the same subject matter	the recent judgment under the same name, Wong v Sony of Canada Ltd (SCJ, 30 Jul 2008), appears to be a different case? It concerns the period 1 Jan 1998–21 Jul 2008, and appears to concern negligent misrep re DVD players?	pleading skirmish reported at: [2001] OJ No 1707 (SCJ), when claim for punitive damages struck out by Cumming J	If the recent judgment at (SCJ, 30 Jul 2008) is relevant, then the matter has settled – amount not disclosed in judgment or on Siskinds' website

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
3.	Ford and VitaPharm Canada Ltd v F Hoffmann-La Roche Ltd	1999 (5 separate actions instituted in Ontario, plus actions in BC and Quebec)	vitamins for animal and human consumption (including the Ontario action for price-fixing of choline chloride)	price-fixing between 1 Jan 1986–28 Feb 1999	noted in certification judgment that ‘Some of the defendants pled guilty in the United States and Canada to price-fixing charges concerning vitamins’; fines totalling Can\$91.49M levied on defendants by Canadian Competition Bureau	yes — certified for the purposes of settlement	(2005), 74 OR (3d) 758 (Ont SCJ) Further details of settlement to be found at: www.vitaminsc.lassaction.com	settlement of Can \$140M paid by settling defendants; <i>cy-près</i> orders made with respect to component of settlement relevant to intermediaries and consumers (indirect purchasers)
2.	Alfresh Beverages Canada Corp v Archer Daniels Midland Co	1999 Ontario (same case as Sun-Rype Products Ltd v Archer Daniels Midland (BC), brought on 27 Nov 2000)	citric acid	price-fixing and allocating market share between 1991–1995	yes, US grand jury indictments against certain manufacturers of citric acid in the US; considerable class actions instituted in the US in 1995 following indictments; fines totalling Can\$11.75M levied on some defs and directors by Canadian Competition Bureau	yes — certified for the purposes of settlement	[2001] OJ No 6028 (Ont SCJ), and the BC case was certified for settlement: (BCSC, Sigurdson J, 9 Nov 2001)	settlement amount paid to all class members in the Ontario, BC and Quebec actions was \$7.718M; Ontario action included all purchasers in Canada except for Quebec and BC, and that portion of the settlement was \$6.112M; a <i>cy-près</i> order for consumers and intermediaries was part of the settlement agreement

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Certified?	Where reported?	Class action judgment or settlement?
	1998							
1.	Chadha v Bayer Inc	2002 Ontario	iron oxide pigments	price-fixing between 1984–1992	Canadian Competition Bureau investigated, but discontinued its investigation, so no public enforcement in Canada	certification denied	(2003), 223 DLR (4th) 158, 63 OR (3d) 22 (Ont CA)	none to be forthcoming
	1992–1997							
	no actions filed							

Notes accompanying Table:

1. Where the same product (eg, chocolate products) is the subject of litigation in more than one common law province, it has been counted as one action, unless the alleged price-fixing period is different between the pieces of litigation. Where a parallel action has been brought in another common law province, that parallel action is noted, where its title is known, for ease of reference. Parallel actions brought in Quebec are not necessarily noted in the Table, given the Table's emphasis upon common law opt-out regimes.
2. The status of *Wong v Sony of Canada Ltd*, concerning the claim of resale price maintenance brought in 1999, is a little unclear, but in the absence of determinative information, the case has been treated as if it was certified/settled, in accordance with the recent 2008 decision.
3. All websites noted in the Appendix were accessed during September 2008.

APPENDIX B

COMPETITION CASES UNDER THE AUSTRALIAN FEDERAL OPT-OUT REGIME SINCE 1992

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Maintained as a representative proceeding?	Where reported?	Class action judgment or settlement?
2008								
no actions filed as at 31 August 2008								
2007								
5.	Wright Rubber Chemicals Pty Ltd v Bayer AG and Chemtura Corp	27 Sep 2007 Australia (federal)	rubber chemicals	price-fixing, and market allocation by restricting the supply of rubber chemicals, between 1 Jul 1995–31 Dec 2001	no action taken by ACCC in Australia to date; however, extensive prosecutions by competition regulators in US, EU and Canada. EU imposed fines totally Euros 88M. DOJ in US imposed fines totalling US\$116M. Canadian Competition Bureau imposed fines totalling Can\$11.9M.	yes, currently maintained as a representative proceeding	no judgments as yet. Further information at: < http://www.mauriceblackburn.com.au/areas/class_actions/current/Rubbers_FA.pdf >	matter ongoing

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Maintained as a representative proceeding?	Where reported?	Class action judgment or settlement?
4.	The Air Cargo Class Action v Qantas, JAL, Lufthansa, Singapore Airlines, Cathay Pacific, Air New Zealand, and BA	1 Feb 2007 Australia (federal)	air cargo freight and shipping services, security charges and insurance charges	price-fixing between 1 Jan 2000–11 Jan 2007	<p>the ACCC is currently investigating (see, eg, the report in Sydney Morning Herald, ‘Air Cartel “Lasted a Decade”’ (14 Apr 2008));</p> <p>In the US, 8 airlines pleaded guilty in a DOJ prosecution, leading to fines totalling US\$1,275M. 6 Qantas executives were fined US\$69M by DOJ in Nov 2007. One Qantas executive was jailed for 6 mths on 8 May 2008, and fined US\$20K. The EC’s investigations and decision are expected to be completed in late 2008.</p>	yes, currently maintained as a representative proceeding	<p>no judgments as yet.</p> <p>Further information at: http://www.mauriceblackburn.com.au/areas/reas_documents/Air_CArgo_Class_action_FA(0908).pdf</p>	matter ongoing
2006								

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Maintained as a representative proceeding?	Where reported?	Class action judgment or settlement?
3.	Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd (Visy added as co- defendant by order dated 29 Nov 2007)	11 April 2006 Australia (federal)	corrugated fibreboard packaging products	price-fixing between 1 May 2000–1 May 2005 (class members are those who paid >\$100K for corrugated fibreboard packaging products in Australia between those dates)	yes, ACCC instituted penalty proceedings against Visy defendants on 21 Dec 2005; Amcor and senior executives granted amnesty from prosecution; Visy admitted 69 contraventions of the TPA; Visy (and owner Richard Pratt) fined Aus \$36M; two other Visy executives fined total of \$2M	yes, currently maintained as a representative proceeding	interlocutory decisions at: [2008] FCA 575; [2007] FCA 1559 Further amended statement of claim available at: < http://www.mauriceblackburn.com.au/areas/class_actions/Further_Amended_Statement_of_Claim.pdf > The ACCC's penalty proceedings are reported as: ACCC v VisyIndustries Holdings Pty Limited (No 3) [2007] FCA 1617 (2 Nov 2007)	matter ongoing
	2000– 2005							
	no actions filed							
	1999							

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Maintained as a representative proceeding?	Where reported?	Class action judgment or settlement?
2.	Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2), <i>sub nom</i> Bray v F Hoffman-La Roche Ltd	5 Jul 1999 Australia (federal)	vitamins for animal consumption and treatment ('class vitamins' consisted of: A, B1, B2, B5 (Pantothenic Acid), B6, B9 (folic acid), B12, C, E, Beta Carotene, Canthaxanthin, Astaxanthin)	price-fixing and market-sharing between 5 Mar 1992–31 Dec 1999	yes — ACCC fined Roche Vitamins Aust P/L Aus\$15M, Aventis Animal Nutrition P/L A\$7.5M, and BASF Australia Ltd A\$3.5M for contraventions of s 45 of the TPA, totalling A\$26M; of the 11 defs sued in these private proceedings, several also fined very sizable amounts by regulators in the US, Canada and Europe. In the US, fines were levied against F Hoffman-La Roche Ltd of US\$500M and against BASF Aktiengesellschaft of US\$225M. The EU regulator fined these same defendants Euro 462M and Euro296M, respectively. Some defs also prosecuted in Canada and New Zealand.	yes, maintained in representative form until finalisation on or about 6 Nov 2006	for judicial approval of settlement, see: [2006] FCA 1388 for interlocutory proceedings, see: Darwalla [2006] FCA 915; Bray (2003) 200 ALR 607 (Full FCA), [2003] FCA 153; [2003] FCA 1505; [2002] FCA 1405; (2002) 190 ALR 1, [2002] FCA 243; The ACCC's penalty proceedings are reported as: ACCC v Roche Vitamins Australia Pty Ltd [2001] FCA 150 See also, for further information: www.mauriceblackburn.com.au	yes – settled for A\$30.5M, plus legal costs
	1997–1998							
	no actions filed							

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Maintained as a representative proceeding?	Where reported?	Class action judgment or settlement?
	1996							
1.	Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd	4 Nov 1996 Australia (federal)	certain grades of pre-mixed concrete	price-fixing and collusive tendering between Jun 1989–Jul 1994	yes, fines levied by TPC against all four defs sued in this private action for contraventions of s 45 of the TPA: A\$6.6M against Pioneer Concrete (Qld) P/L; A\$6.6M against Boral Resources (Qld) P/L; A\$6.6M against CSR Ltd; and A\$400,000 against Hymix Industries P/L; plus smaller fines against senior executives and one employee; totalling Aus \$20.3M	order made on 9 July 1997 that proceeding no longer continue as a representative proceeding under s 33(N)(1)(a)	(1998) 157 ALR 135 (FCA), [1998] FCA 791; and earlier: FCA, 9 Jul 1997 The ACCC's penalty proceedings are reported as: ACCC v Pioneer Concrete (Qld) P/L (1996) ATPR 41- 457.	none to be forthcoming in the class action (Gold Coast City Council amended its statement of claim and sought to carry on the litigation as a unitary action)

Notes accompanying Table:

1. The date of filing is taken from the Federal Court Spreadsheet, noted previously on page iv of the Research Paper.

2. In the Table:

- ‘ACCC’ means the Australian Competition and Consumer Commission;
- ‘TPA’ means the Trade Practice Act 1974 (Aus);
- ‘TPC’ means the Trade Practice Commission (predecessor of the ACCC);

3. For the avoidance of doubt, it is perhaps useful to note that a number of actions denoted on the FCA Spreadsheet as ‘competition law action’, listed below, have *not* been included in Appendix B, because they do not fall within the restricted ambit of the term, ‘competition law’, which has been adopted for this particular Research Paper. The cases which fall within that category, and which are excluded from Appendix B, consist of the following:

Cook v Pasmenco Ltd (filed 18 Feb 2000 as a Pt IVA action) concerned an allegation that the class members had suffered in their health from noxious emissions from Pasmenco’s plants at Cockle Creek in New South Wales and at Port Pirie in South Australia (there was also a claim for damage to real estate).

Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd (filed 16 Jul 1993 as a Pt IVA action) arose out of the allegation that Federation Furniture Company (FFC), importers and distributors of furniture, engaged in misleading and deceptive conduct or unconscionable conduct under ss 52, 51AB and 51AA of the Trade Practices Act 1974. Tropical Shine, a competitor of the FFC, sought an order that the FFC be restrained from advertising, promoting or conducting the sale of furniture in such a way as to mislead or deceive potential purchasers of FFC’s furniture regarding the price or quality of FFC’s furniture.

Ming v Uvanna Pty Ltd trading as NorthWest Immigration Services (filed 5 Aug 1994 as a Pt IVA action) was brought against a migration consultant engaged to obtain permanent residency status for applicants under an Employer Nomination Scheme. Certain statements were made by officers of the consultant as to guaranteed success of applications or refund of fees paid. The case turned upon whether such representations constituted misleading and deceptive or unconscionable conduct under ss52 or 51AB of the Trade Practices Act 1974, and for alleged contraventions of the Fair Trading Act (NSW) and the Contracts Review Act 1980 (NSW).

McIntyre v Eastern Prosperity Investments Pty Ltd (filed 22 Dec 2000 as a Pt IVA action) concerned a shopping centre’s tenants’ dissatisfaction with the maintenance, upkeep and management of the shopping centre and its key tenants. The case was framed as one based upon a variety of allegedly express and implied misrepresentations, said to have been misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the Trade Practices Act 1974.

McMullin v ICI Australia Operations Pty Ltd (filed 3 May 1995 as a Pt IVA action) arose out of the alleged liability of the manufacturer (ICI) of an agricultural pesticide used for cotton, and which allegedly contaminated cattle which ingested the chemical from over-spray, spray-drift and consumption of cotton gin trash. The class was made up of various sub-classes, including owners of cattle at time of contamination, owners at time of discovery of contamination, persons holding cattle, persons suffering losses of sales, reduced cattle prices, etc. The action against ICI was based upon negligence and misleading and deceptive conduct under s 52 of the Trade Practices Act 1974.

Other cases, denoted as ‘competition law cases’ on the Federal Court spreadsheet, have been excluded from Appendix B, for the following reasons:

Grainger v Pier No 3 Pty Ltd (trading as Cooperage Bar & Grill) (filed 3 May 2002) – no details can be located about this case on either www.austlii.edu.au, or via the LexisNexis case law database, and hence, it has been excluded from the Appendix.

Atkins v Master Builders Association of NSW (filed 15 Jun 2005) concerned a claim by Mr Atkins for damages and injunctive relief for ‘misuse of market power, contrary to s 46 of the Trade Practices Act 1974, by the publication and dissemination of a document, the *Guide to Internal Wet Area Waterproofing*, by the MBA’s Waterproofing Council (NSW) Technical Committee 2003–4, without acknowledgment of Mr Atkins’s contribution to that document, or of his own book entitled *The Bathroom Book*. The judgments issued in this action, available to the author and reported at: [2005] FCA 1402, [2006] FCA 142, and [2007] FCA 554, show this to have been a unitary, and not a representative, action.

4. All websites noted in the Appendix were accessed during September 2008.

APPENDIX C

COMPETITION CASES UNDER PORTUGAL’S POPULAR REGIME SINCE 1995

	Case	filing date/ jurisdiction	product in issue	allegation	preceded by public enforcement?	Maintained as a popular action?	Where reported?	Class action judgment or settlement?
1998–99								
1.	DECO v Portugal Telecom	Jan 1998, Jan 1999, Sep 1999	telephone call charges for fixed line telephone services (an 'activation fee', or call set-up charge)	increase of call charge constituted an abuse of PT's dominant market position (at the time, PT was operating on a monopoly basis) and was proscribed by Portugal's 'Public Services Law'	not so far as can be ascertained (to the contrary, ANACOM, Portugal's telecommunications regulator, had approved the activation fee and, hence, opposed DECO's suit)	yes	(Portuguese Supreme Judicial Court, 7 Oct 2003)	yes – activation fee represented excessive economic gains for PT in a market where it operated as a monopolist – disgorgement required, in the amount of Euros 120M; Portugal Telecom and DECO reach an agreement that allowed consumers to make free phone calls as detailed in note 3 below

Notes accompanying Table:

1. The settlement sum of Euro 120M is referred to by Director of DECO, Mr Luis Silveira Rodrigues, in his paper: 'DECO v Portugal Telecom' (presentation to CLEF meeting, Brussels, 17–18 May 2007), available for perusal at: <http://www.clef-project.eu/media/d_DECOvsPortugalTelecomLuisSilviera_69658.pdf>, slide 9.
2. The total class size in this litigation was approximately two million Portugal Telecom customers. Five persons in the class opted out.
3. The details of the settlement achieved between DECO and Portugal Telecom (PT) (which constituted a form of *cy-près* settlement) is described by Portugal Telecom, under 'Item 18—Financial Information' (2004), in the publication available at:

<<http://www.telecom.pt/NR/rdonlyres/C1074D9D-FF21-4AA8-AF5C-0A6D24F89BF8/1320571/item8p135141.pdf>>, as follows:

‘on March 15, 2004, PT reached a settlement with DECO. According to the terms of this settlement, PT did not charge its customers for their national, regional and local calls on March 15, 2004 [National Consumers’ Day], and on 13 consecutive Sundays between March 21, 2004 and June 13, 2004. PT also agreed to reimburse any customer who makes a claim for his portion of the 1998 call set-up charges. Under the terms of the settlement, DECO agreed with withdraw both claims within 30 days of March 12, 2004. DECO waited to withdraw its claims until it received confirmation that PT had fulfilled its part of the settlement. A request for withdrawal of both claims was finally submitted in June 2004 and was accepted and confirmed by the courts in July 2004 and September 2004, respectively.’

4. No other competition law actions have been filed under the Popular Action to date.

APPENDIX D AT A GLANCE: CERTIFICATION CRITERIA WHICH FAILED

Of the **41** actions noted in Appendices A, B and C, straddling all three focus jurisdictions, **7** of these (when including Sun-Rype’s out-of-time claim in the corn syrup case) failed certification outright. This denotes a failure rate of **17%**. (It will be recalled that, in actual fact, Ms Wyberg survived the limitations point in Sun-Rype on appeal in July 2008, so the number of true failures is 6).

The Table below denotes which certification criterion/criteria failed in each of these cases (listed in alphabetical order of claimant):

Case	Juris-diction	valid cause of action	numerosity	adequate class definition	common issue/s	superiority over other forms of resolution	adequate rep. claimant	preliminary merits
2038724 Ontario Ltd v Quizno’s Canada Restaurant Corp	Ont			X (but court itself closed the class, fixing the defect)	X	X	X or ? (ability to meet adverse costs award questioned)	
Chadha v Bayer Inc	Ont			X	X	X		
Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd	Aus		X (7 members of class doubted, at least)			X		X
Price v Panasonic Canada Inc	Ont				X	X		

Case	Juris-diction	valid cause of action	numerosity	adequate class definition	common issue/s	superiority over other forms of resolution	adequate rep. claimant	preliminary merits
Pro-Sys Consultants Ltd v Infineon Technologies AG	BC	X (part of the pleading struck out; the rest survived)		X (part of the class definition inadequate; the rest survived)	only two of these	X	X	
Steele v Toyota Canada Inc	BC					X	X	

APPENDIX E

CY-PRES DISTRIBUTIONS AS A PERCENTAGE OF TOTAL SETTLEMENT AMOUNTS

For those cases for which figures are reasonably ascertainable, the following Table sets out the approximate percentage which the *cy-près* distribution component represented of the entire settlement amount (the figures, where available, have been sourced from relevant judgments, settlement agreements, and distribution protocols annexed to settlement agreements):

Case	Product in issue	Jurisdiction	<i>cy-près</i> as a % of total settlement:	Nominated <i>cy-près</i> beneficiaries
Alfresh Beverages Canada Corp v Archer Daniels Midland Co (citric acid)	citric acid	Canada	approx. 6% (as a minimum)	the intermediary purchasers' fund to go <i>cy-près</i> to the Canadian Council of Grocery Distributions and the Canadian Federation of Independent Grocers; the consumers' fund to go <i>cy-près</i> to the Canadian Association of Consumers, the Canadian Association of Food Banks, and the Food Institute of the University of Guelph
Alfresh Beverages Canada Corp v Hoechst AG (sorbates)	sorbates	Canada	approx. 28%	as above (same <i>cy-près</i> arrangement for both cases)
A&M Sod Supply Ltd v AKZO Nobel Chemicals BV	MCAA	Canada	unspecified 'residue' of settlement sum after claims by direct purchasers paid	Advanced Foods and Materials Network
La Cie McCormick Canada Co v Stone Container Corp	corrugated sheets and linerboard	Canada	% not clear, but three funds created from settlement amount, and \$75,000 set aside <i>cy-près</i> as Fund 3	Tree Canada Foundation

Case	Product in issue	Jurisdiction	<i>cy-près</i> as a % of total settlement:	Nominated <i>cy-près</i> beneficiaries
Stone Paradise Inc v Bayer Inc	EPDM and CR (synthetic rubbers)	Canada	% of total settlement not clear from settlement notice	for the EPDM proceedings, the main <i>cy-près</i> beneficiaries were: Auto21 (receiving 35% of the <i>cy-près</i> fund) and Canadian Roofing Contractors Association (15%), with other entities sharing the remainder; for the CR proceedings, the main <i>cy-près</i> beneficiaries were Auto21 (50%) and London Community Foundation (32%), with the remainder being shared among other entities
Bona Foods Ltd v Pfizer Inc	sodium erythorbate	Canada	13%	Boys and Girls Clubs of Canada (28% of <i>cy-près</i> amount available); Law School of the University of Western Ontario (28%, and used for a symposium on competition class actions (held April 2005)); and Canadian Partnership for Consumer Food Safety Education (44%)
DECO v Portugal Telecom	phone call charges	Portugal	almost 100%	a price-rollback <i>cy-près</i> to permit free phone calls at specified times in the future
Ford and VitaPharm Canada Ltd v F Hoffmann-La Roche Ltd	vitamins	Canada	a 'trickle-down' effect among the classes, precise amount not known	all of the industry organisations, agricultural producers, wholesalers, pharmacies, nominated at http://www.vitaminsclassaction.com/otherfunds.html , plus a variety of Universities, agricultural colleges, and a food education charity, Ontario Agri-Food Education
Cello Products Inc v Sumitomo Corp	copper	Canada	just over 7%	Canadian Copper and Brass Development Assn (50%) and Canadian Foundry Association (50%), as nominated in Settlement Agreement, Appendix C, cl 2.1
Bona Foods Ltd v Ajinomoto USA Inc	MSG and nucleotides	Canada	at least 15%	the Canadian Counsel of Grocery Distributors (25% of <i>cy-près</i> fund), Canadian Federation of Independent Grocers (25%), and a myriad of other Community Foundation beneficiaries nominated at: http://www.classaction.ca/pdf/Main_Agreement.pdf , Appendix D

Case	Product in issue	Jurisdiction	<i>cy-près</i> as a % of total settlement:	Nominated <i>cy-près</i> beneficiaries
Del Guercio o/a Westown Shoe Clinic	rubber chemicals	Canada	precise % not clear from settlement agreement or distribution protocol	nominated beneficiaries were: Auto21 (50% of the <i>cy-près</i> fund), and 31% to the London Community Foundation, and the remainder to be shared among other entities according to prescribed percentages nominated in the Rubber Chemicals Distribution Protocol
RG Gibson & Sons and Bayer Inc	polyester polyols	Canada	approx. 22.5%	50% of the <i>cy-près</i> fund to be given to the Canadian Home Builders' Association, 38% to the Habitat for Humanity; and other percentages to funding entities, as nominated in the Polyester Polyols Distribution Protocol
Newly Weds Foods Co v Pfizer Inc	maltol	Canada	at least 20%	Breakfast for Learning (45% of the <i>cy-près</i> fund), Cosmetic, Fragrance and Toiletry Association (45%) and ACEF (10%), according to the Settlement Agreement, Appendix C
McLay & Co v Cascades Fine Papers Group Inc	carbonless paper	Canada	35%	47% of the <i>cy-près</i> payment to United Way, 47% to the Retail Council of Canada, and 4% to Fonds d'aide
Randall Klien Inc v Nan Ya Plastics Corp	polyester staple fibre	Canada	20%	63% of the <i>cy-près</i> payment to the Salvation Army; 12% to the Canadian Apparel Federation; and five other entities sharing the remainder of the <i>cy-près</i> fund in amounts less than 10% each
Minnema v Archer Daniels Midland Co	lysine	Canada	10%	designated amounts to the Quebec Fonds d'Aide, and to the Options Consommateurs, 50% of the remaining funds to the Boys and Girls Clubs of Canada, 25% of the remaining funds to Breakfast for Learning, and further lower percentages to other entities

APPENDIX F

COMPARISON BETWEEN FINES AND SETTLEMENT AMOUNTS

The purpose of this Table is to select a sample of those cases in which public enforcement/fines preceded the private action as noted in Appendices A, B and C, and where the precise amount of the fine is ascertainable from either the judgments or the settlement agreement, and to enquire:– for each dollar of fine, how much settlement/judgment money was paid by the defendant/s in the private action which was brought in the same jurisdiction in which the fine was levied?

(NB. The amount of fine imposed upon the defendant/s in jurisdictions, *other than* the jurisdiction in which the private action was brought, has been excluded from this Table. In other words, the Table concentrates upon intra-jurisdictional public/private enforcement against relevant defendants).

Case	Jurisdiction	for each \$1 of fine levied collectively on the defendants, the following amount was collectively paid by the defendants by way of private enforcement:
Alfresh Beverages Canada Corp v Archer Daniels Midland Co (citric acid)	Ont	66 cents
Alfresh Beverages Canada Corp v Hoechst AG (sorbates)	Ont	36 cents
Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2), <i>sub nom</i> Bray v F Hoffman-La Roche Ltd (vitamins)	Aus	\$1.17
Ford and VitaPharm Canada Ltd v F Hoffmann-La Roche Ltd (vitamins)	all the common law Canadian provinces	\$1.53
Minnema v Archer Daniels Midland Co (lysine)	Ont	30 cents