CONSPIRACY CLASS ACTIONS: EVIDENCE ON THE MOTION FOR CERTIFICATION

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A. INTRODUCTION

Canadian class actions are growing up. For a while it seemed that any lawyer with a representative plaintiff, a common issue, and a statement of claim could invoke the mantra "it's only procedural" and get a class action certified.

However, if they ever existed, those days ended — or should have ended — with the Supreme Court of Canada's class action trilogy: *Western Canadian Shopping Centres Inc. v. Dutton*,[1] *Hollick v. Toronto (City)*,[2] and *Rumley v. British Columbia*.[3] In those cases, the court implicitly recognized that a certification motion is a watershed in any proposed class action. In particular, the court tightened up the standards for both the certification criteria and the evidence to which they are applied.

This article discusses certain aspects of the post-*Hollick* requirements for evidence on certification motions. It begins with a review of *Hollick*. After a short detour, it focuses on the evidence appropriate to the issues of commonality and preferable procedure on motions to certify class actions variously described as conspiracy, cartel, or price-fixing cases.

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1 [2001] 2 S.C.R. 534.

2 [2001] 3 S.C.R. 158 [*Hollick*].

3 [2001] 3 S.C.R. 184.

B. THE LESSONS IN *HOLLICK*

The general requirement that there must be satisfactory evidence to support a certification motion was confirmed by the Supreme Court of Canada in *Hollick*. The court began by noting some basic principles. For example, it recited Ontario's rejection of the Ontario Law Reform Commission's proposal that class action legislation include a preliminary merits test as part of the gate-keeping function of certification. Noting that Ontario's *Class Proceedings Act, 1992*[4] requires only that the statement of claim disclose a cause of action, the court described the certification motion as "decidedly not meant to be a test of the merits of the action."[5]

Accordingly, the merits of the action are not relevant to certification. Only the form of the action matters: "the certification stage focuses on the *form* of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as class action."[6]

But even an inquiry into the form of an action requires evidence. The Supreme Court of Canada described as "appropriate" the 1990 report of the Ontario Attorney General's Advisory Committee on Class Action Reform, which suggested that the plaintiff must, and the defendant might, deliver affidavits with the facts on which they intend to rely on the motion.[7] The court also referred favourably to lower court decisions that variously expressed reluctance to rely only on solicitors' affidavits, allowed defendants to cross-examine individual plaintiffs to obtain evidence, and required some satisfactory evidentiary basis for certification.[8] The court concluded as follows:

> I agree that the representative of the asserted class must show some basis in fact to support the certification order ... [T]hat is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However ... the class representative will have to establish an evidentiary basis for certification ... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s.

4 S.O. 1992, c. 6 [CPA].

5 *Hollick*, above note 2 at para. 16. See also CPA, *ibid.* at ss. 5(1)(a) and 5(5).

6 *Hollick*, *ibid.* [emphasis in original].

7 *Ibid.* at para. 22.

8 *Ibid.* at paras. 23–24; see, for example, *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.) and *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.).

> 5 of the [CPA], other than the requirement that the pleadings disclose a cause of action.[9]

This, of course, does no more than state that evidence is required. The question of *what* evidence, and *how much* evidence, will turn on the nature and circumstances of each case.

C. A SHORT DETOUR INTO THE DISCLOSURE OF A CAUSE OF ACTION

As noted above, in *Hollick* the Supreme Court of Canada held that the plaintiff must provide an evidentiary basis for each of the certification requirements in the CPA "other than the requirement that the pleadings disclose a cause of action."[10] Accordingly, the plaintiff need not lead evidence in respect of the requirement in section 5(1)(a) of the CPA that a cause of action be disclosed. Instead, the plaintiff may rely on the allegations in the statement of claim.

However, unlike a typical motion to strike, a certification motion will have an evidentiary record, albeit one compiled with respect to other matters. But what if that record contains evidence contrary to the allegations in the statement of claim? And what if that evidence includes the plaintiff's disavowal of the pleaded claim?

An answer can be found in the certification motion decision of Nordheimer J. in the polybutylene litigation.[11] This case involved claims that the defendants had manufactured and sold polybutylene resin or acetal resins that were fabricated by others into inadequate plumbing pipes and plumbing fittings respectively. The plaintiffs alleged that the premature failure of polybutylene plumbing systems was inevitable, and framed their case in causes of action that included misrepresentation and breach of warranty.

The plaintiffs filed affidavits in support of their certification motion. In the course of cross-examination, however, all plaintiffs expressly disavowed receiving or relying on any representations (true or false) with respect to their plumbing and admitted that they never received any

9 *Hollick*, *ibid.* at para. 25.

10 *Ibid.*

11 *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.), aff'd [2004] O.J. No. 5309 (Div. Ct.) [*Gariepy*]. Companion cases in British Columbia (*Furlan v. Shell Oil Co.* (2002), 8 B.C.L.R. (4th) 302 (S.C.)) and in Quebec (*Couture c. Shell Oil Co.*, [2003] J.Q. no 3255 (C.S.)) have not advanced to a certification motion.

information in the nature of a warranty upon which they relied. The statement of claim alleged otherwise. The defendants asserted that, given these admissions by the plaintiffs, the misrepresentation and breach of warranty causes of action could not be said to be "disclosed" within the meaning of section 5(1)(a) of the CPA and therefore should not be certified.

In the result, the certification motion was dismissed for other reasons. However, Nordheimer J. rejected the defendants' argument with respect to the section 5(1)(a) requirement of disclosure. He recited the quotation from *Hollick* set out earlier in this article, noted that section 5(1)(a) of the CPA only requires a cause of action to be disclosed in "the 'pleadings'" and held that it was "sufficient ... if the statement of claim alleges the necessary facts to found the cause of action."[12] He stated:

> [This approach] avoids turning the certification motion into what otherwise would amount to a form of surrogate motion for summary judgment. It further avoids the court having to engage in any consideration of the degree to which the facts would need to be put forward by the representative plaintiff such as to satisfy any evidentiary requirement in support of the causes of action asserted. The approach cannot be altered by the defendants' assertion that the plaintiffs have expressly disavowed the facts underlying these claims in their cross-examinations. To follow that route would require the court to rely on what is, by definition, inadmissible evidence.[13]

Is that the right result? *Hollick* does not say that it is. In fact, after noting that disclosure of a cause of action is the one certification requirement that need not be supported by evidence, the Supreme Court of Canada went on to state that "[the disclosure] requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists."[14]

Hollick does not say that evidence that is properly in the certification motion record is "inadmissible" when considering section 5(1)(a); instead, *Hollick* simply relieves the plaintiff from any obligation to lead evidence on this point. Why is it not "plain and obvious" that no claim exists on a point where the plaintiff has expressly disavowed the existence of the pleaded allegations that underlie his or her claim?

12 *Gariepy*, *ibid.* at paras. 35 & 36.
13 *Ibid.* at para. 37.
14 *Hollick*, above note 2 at para. 25.

The answer for Nordheimer J. appears to lie in his practical concern that if he accepted the defendants' position he might be inviting defendants in every case to lead evidence or cross-examine plaintiffs with an eye to disputing the merits or *bona fides* of the allegations in the statement of claim. This is clear in his statement about certification motions turning into virtual motions for summary judgment, an outcome that would be at odds with the Supreme Court of Canada's admonition that the certification motion "is decidedly not meant to be a test of the merits of the action."[15] As a result, Nordheimer J. clung to the typical practice on motions to strike in which evidence is prohibited and the impugned allegations are treated as true and provable. But in *Gariepy* this approach led to an awkward outcome: allegations that the plaintiffs themselves conceded were unambiguously false were deemed instead to be true and provable, and a statement of claim from which the plaintiffs had resiled was found to disclose causes of action.

A more nuanced approach is available. Nordheimer J.'s concerns about a descent down a slippery slope into lengthy affidavits and cross-examinations designed to rebut the allegations in the statement of claim may be well-founded. While much more than "merely procedural," certification motions are not the place to resolve the merits of the plaintiffs' claims. However, where evidence is validly before it, the court should not be required to ignore the facts and treat as "true and provable" claims that are clearly neither.

The route through these competing objectives lies in taking a more flexible approach to the analysis under section 5(1)(a). The courts should acknowledge that while the certification *test* for disclosure is the same as for motions to strike,[16] the certification *process* is not. Unlike motions to strike, which expressly prohibit evidence, certification motions expressly require evidence. When analyzing the disclosure of a cause of action, the court should not pretend that that evidence does not exist or treat it as "inadmissible." Instead, the court should consider whether the record makes it — as stated in *Hollick* — "plain and obvious" that no claim exists.

The key to the success of this approach is balance. Evidence should not be adduced, and cross-examination should not be permitted, if the *only* issue to which it is relevant is disclosure of a cause of action. Further, the court should not engage in a complex weighing of compet-

15 *Gariepy*, above note 11 at para. 37; *Hollick*, *ibid.* at para. 16.

16 See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

ing evidence in order to determine the truth of allegations in a statement of claim. However, clear disavowals by the plaintiffs of the allegations in their statements of claim should permit the court to reject those allegations as untrue and unprovable and to analyze disclosure of a cause of action in that light. To do otherwise is artificial and unfair to the defendant against whom the unsustainable cause of action has been alleged.[17]

D. EVIDENCE REGARDING COMMONALITY AND PREFERABLE PROCEDURE

1) Introduction

There is little guidance in the jurisprudence with respect to the evidence required to support the certification of a conspiracy case. Although no statistics are kept, it appears that only about twenty proposed class actions alleging cartel behaviour have been initiated outside Quebec.[18] The plaintiffs have not filed certification materials in all of these cases, and defence materials have been filed in only a handful. Only one case, *Chadha v. Bayer Inc.*, has proceeded to a contested certification motion, and the courts dismissed that motion for want of satisfactory economic evidence.[19]

However, the dearth of contested certification motions does not mean an absence of legal guideposts for assessing the evidence that may be required. Although a certification motion is not a test of the merits of the action, any analysis of the appropriate evidence as to commonality

17 It does not matter that other class members might be able to assert the cause of action disavowed by the plaintiff, because at least one of the named representative plaintiffs must be able to make out an alleged cause of action against each defendant. See *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.). However, see *Furlan v. Shell Oil Co.* (2000), 77 B.C.L.R. (3d) 35 (C.A.) at para. 22 for a contrary approach in British Columbia.

18 As of March 2005. This estimate treats multiple class actions about a conspiracy relating to a single product as a single action, and also treats the many interrelated vitamin actions, involving both vitamins and similar products, as involving a single product. The entirely different "authorization" regime in Quebec, which puts relatively little weight on evidence, makes the Quebec jurisprudence irrelevant to a consideration of evidence on certification motions in the common law provinces.

19 (1999), 45 O.R. (3d) 29 (S.C.J.), rev'd (2001), 54 O.R. (3d) 520 (Div. Ct.), rev'd. (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. refused (2003), 65 O.R. (3d) xvii (S.C.C.) [*Chadha*].

and preferable procedure on a motion to certify a proposed cartel class action must be informed by certain key characteristics of the substantive laws respecting cartel conspiracies. The court's consideration of the "form" of the action on the certification motion requires a consideration of how that action proposes to deal with the merits of its allegations. That analysis cannot be performed without some understanding of the legal structure that would be applied should the case be certified and the merits ultimately addressed.

2) Conspiracy Causes of Action Generally

Two related legal principles concerning cartels provide the main legal framework for considering evidence on commonality and preferable procedure. These are (a) the need to prove harm in order to establish liability, and (b) the absence of an *Illinois Brick* doctrine in Canada and thus the availability of a "pass-through" defence (and claim).

a) The Requirement of Harm

Whether claims are brought as common law conspiracy actions or as civil actions under section 36(1) of the *Competition Act*,[20] harm is a constituent element of the cause of action. Tort claims do not "crystallize" or "complete" without harm, as was noted by the Court of Appeal for Ontario in *Chadha*,[21] and the statutory civil cause of action arising under section 36(1) of the *Competition Act* is only available to a person "who has suffered loss or damage."

Accordingly, harm is an element of liability as well as damages. These separate aspects of harm represent (a) the *fact* of harm or impact, and (b) the *extent* of harm or impact, respectively.

The CPA provides in section 6.1 that a court shall not refuse to certify a proceeding solely because the relief claimed includes a claim for damages that would require individual assessment. But this refers to an assessment of the *extent* of harm once liability is determined. There is no statutory admonition against refusing to certify because of the individual nature of any consideration of the *fact* of each plaintiff's harm and thus the liability of any defendant to that plaintiff.

This distinction was confirmed by the Court of Appeal in *Chadha*. That case was an "ingredients" price-fixing case. The defendants were alleged to have conspired to fix the price of iron oxide pigments used

20 R.S.C. 1985, c. C-34.

21 *Chadha* (C.A.), above note 19 at para. 16.

to colour concrete bricks and paving stones. The proposed class was a consumer class, consisting of homeowners and other end-users of bricks or other products containing the iron oxide pigments for which the price had allegedly been fixed.

The Court of Appeal unanimously upheld the majority decision of the Divisional Court, which had overturned the motion judge's certification of the case and instead dismissed the certification motion. The Court of Appeal noted the distinction between the fact and the extent of loss or damage, and held that the plaintiffs had failed to provide satisfactory evidence as to how the former could be addressed on a common basis. As a result, the court held that the fact of impact, and thus liability, could not be assessed as a common issue and thus held that a class proceeding was not a preferable procedure for resolving the plaintiffs' claims.

In particular, the Court of Appeal held as follows on the need to address the fact of harm:

> [The plaintiffs' expert] evidence does not address the issue of what method could be used at trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the [defendants'] iron oxide pigment overpaid for the buildings as a result. Rather, the [plaintiffs'] expert effectively assumes that higher costs of products containing the [defendants'] iron oxide pigment would have been passed on to end-users ... [The expert] then went on to postulate a conceptual model for calculating the damages ... The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.
>
> The motion judge relied on the opinion of the [plaintiffs'] expert that "there would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment." However, the fact that any price impact may be "measurable" goes only to the issue of how the damages can be calculated and distributed, not whether the inflated price charged to the direct buyers of the product was passed through to all of the ultimate consumers. The issue of whether there would be a price impact on all ultimate consumers of iron oxide coloured products, i.e., a pass-through to the class members of the inflated price charged by the [defendants] to their direct buyers, was

> what the expert assumed, but he did not indicate a method for proving, or even testing that assumption.[22]

b) The *Illinois Brick* Doctrine

As noted above, *Chadha* stands for the rather straightforward proposition that a plaintiff in a proposed cartel class action must lead evidence with respect to an approach to proving common impact if liability is to be certified as a common issue. However, an arguably more important ruling in *Chadha* for the purposes of assessing certification evidence was not the rejection of the plaintiffs' economic evidence but rather the courts' refusal to strictly apply the American *Illinois Brick* doctrine in Canada.

This doctrine was developed by the United States Supreme Court in two steps. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[23] it held that defendants could not assert a pass-through defence in response to a direct purchaser price-fixing claim. Then in *Illinois Brick Co. v. Illinois*,[24] it held, consistent with its earlier ruling, that indirect purchasers had no right to sue. In effect, direct purchasers of price-fixed products were deemed to retain (and were therefore entitled to recover) whatever initial harm they suffered on purchasing the products.[25]

The motions judge in *Chadha*, who certified the consumer class in the first instance, had to decline to apply *Illinois Brick* in order to do so. The Divisional Court and Court of Appeal, which rejected certification, nevertheless left open the possibility that indirect purchaser antitrust claims could be advanced by way of a class proceeding in appropriate cases.[26] But the Court of Appeal, while not adopting the *Illinois Brick* doctrine, did accept the concerns articulated by the United States Supreme Court in that case. In particular, the Court of Appeal was sensitive to that court's worries about the "complexities of proving the extent to which the different players in the chain of purchase bear the higher price caused by the illegal conspiracy to fix the price of the base product."[27]

On its face, *Chadha* teaches us that indirect purchaser price-fixing class actions are at least theoretically viable and that indirect purchasers with pass-through claims have standing to sue. In practical terms, how-

22 *Chadha*, *ibid.* at paras. 30 & 31.

23 392 U.S. 481 (1968) [*Hanover Shoe*].

24 431 U.S. 720 (1977) [*Illinois Brick*].

25 More than twenty states and the District of Columbia have enacted *Illinois Brick* "repealer" statutes that permit indirect purchasers to sue under state antitrust legislation.

26 *Chadha*, above note 19 at paras. 10, 43, & 65.

27 *Ibid.* at para. 43.

ever, the decision also signals that the pass-through *defence* is available in Canada and must be addressed. Yet any analysis of pass-through on the merits is, by its nature, complex and subject to "many problems of proof."[28] This conclusion, together with the requirement of harm as an essential ingredient for liability for conspiracy, whether at common law or by statute, animates much of the analysis of what evidence is required on a cartel certification motion.

c) Relevant Evidence

Chadha provides some clues as to the types of evidence that might be useful in addressing common impact in a regime where a pass-through defence is available. As a practical matter, such evidence usually falls into two related categories: (a) factual evidence, sometimes from experts and sometimes from the defendants themselves, describing the characteristics of the industry or marketplace in which collusion is alleged; and (b) expert economic evidence that relies on either the industry evidence or other available data and applies economic theory to draw conclusions relevant to commonality and preferable procedure.

In the former category, there are many types of evidence as to the organization of the relevant industry that may be useful. Some are described below.

- The nature and characteristics of the products should be described. In particular, it may be important to know whether the product is a fungible commodity, is partly specialized, or is custom designed on a customer-by-customer basis.
- The product's use should be described. Do direct purchasers resell or consume the product as-is, or is the product an ingredient or input into other products? If the latter, how is the subject product incorporated into the end product and of what significance is the subject product in the end product?
- The sellers' and purchasers' sides of the market should be described. Who are the relevant manufacturers? Where are they? What information is available regarding market share and capacity (or capacity restraints)?
- An industry expert may, in relevant cases, comment on the ease or difficulty with which a new entrant could enter the relevant market.

28 *Ibid.* at paras. 44–46.

- Information about other substitutes should be provided. If there are substitutes, at what price? What are the characteristics (and drawbacks) of the substitutes?
- The product's pricing should be explained. For example, what purchasing arrangements are prevalent in the industry? Is the product typically sold from price lists or is pricing more individuated (whether there is a price list or not) by way of discounts or individual negotiations? To what degree do customers enter into long-term controlled price contracts with the impugned manufacturers?
- Actual pricing data should be gathered, although this information is more typically supplied to the economic experts for their analysis rather than provided directly to the court.
- Information about where the product goes should be provided. For example, is some or most of it exported? Are there offsetting imports? If so, from where?
- The industry witness should also describe, at least in a general way, any relevant changes in manufacturing capacity and usage patterns for the impugned product over the period of the alleged conspiracy.

The pass-through issue also requires additional industry evidence.

- The distribution chain by which the product goes from being manufactured to being finally consumed must be described. Particular attention needs to be paid to the modification of the product or its inclusion in other products and any subsequent changes or uses of the product along the chain. The steps in the chain, and the different chains, must be identified. Different pricing models and practices at different steps of the chains should be examined.
- Industry witnesses should consider whether the alleged conspiracy caused, or was offset by, other changes in the relevant industry. In the travel agents conspiracy class action case, for example, the plaintiff travel agents alleged that certain airlines had conspired to reduce, and eventually eliminate, the commissions they paid to travel agents on certain kinds of tickets.[29] The defendants filed evidence from an industry expert that showed that many travel agents had taken advantage of the disappearance of the commission revenue model

29 *Always Travel Inc. v. Air Canada* (2004), 49 C.B.R. (4th) 1 (F.C.). The plaintiffs ultimately discontinued the proceeding during the cross-examination stage of the certification motion. This case was unusual in that it alleged a conspiracy on the buyers' side instead of the sellers' side of the market.

(whether it resulted from a conspiracy or from unilateral behaviour) and switched to a fee-for-service model under which they directly charged their customers for ticketing and other services. This raised the question of whether those travel agents had actually improved their position, or at minimum suffered no harm, as a result of the loss of airline commissions.

- Whether or not the product is an ingredient, the industry witness should comment on the degree to which a direct, indirect, or consumer purchaser will be able to self-identify as having purchased a relevant product. Are there impugned and non-impugned products that are indistinguishable from one another?[30]

The second category of evidence is expert economic analysis, which usually accompanies the industrial evidence. At certification, it usually focuses on the degree to which impact can be assessed as a common or individual issue. As noted by the Court of Appeal in *Chadha*, it is not good enough to assume that a price-fixing conspiracy will result in inflated costs to all direct or indirect purchasers at any particular level of trade: it is not sufficient to simply assert that "a rising tide floats all boats." Instead, while the plaintiff's expert need not establish the actual amount of harm suffered by purchasers on certification, he or she must provide a credible and reliable approach to determining impact on a common basis.

The Court of Appeal in *Chadha* referred often to *In re Linerboard Antitrust Litigation*, a decision of the Court of Appeals for the Third Circuit of the United States.[31] In that case, the court approved a "belt and suspenders" approach for satisfying the plaintiffs' need to demonstrate a common approach to proving impact.

First, the *Linerboard* plaintiffs contended that they would lead generalized evidence designed to show that, notwithstanding other factors affecting prices, the prices for the impugned product were higher than they would have been but for the alleged collusion. The Court of Appeal for Ontario quoted and emphasized the following *Linerboard* language:

30 In *Chadha*, above note 19, the court noted the difficulty that proposed class members would have in establishing that their houses included the relevant pigment: see para. 57. In *Gariepy*, above note 11, certification was denied in part because class members would be unable to determine whether their plumbing fittings were made from the impugned acetal resin or from other substances.

31 305 F.3d 145 (3d Cir. 2002) [*Linerboard*].

"*Therefore, the Court concludes that plaintiffs' allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular plaintiff class members.*"[32]

Second, the *Linerboard* plaintiffs led extensive empirical evidence collected by their expert economists. The economists testified that they could create economic models that would take into account variations in purchasers, products, regions, and other matters and still determine the *fact* of loss on a common basis. Only the *amount* of loss would vary by individual class member.[33]

In *Chadha* the court stated that one could make "a useful comparison" between the evidentiary record in *Linerboard* and the record before it with respect to iron oxide pigment. However, it is important to keep the *Linerboard* evidence in context. The *Illinois Brick* doctrine meant that the *Linerboard* plaintiffs were only direct purchasers, who were deemed to keep (and not pass on) any harm they suffered as a result of fixed prices. Accordingly, the *Linerboard* experts had only to find a common approach to assessing the impact of the initial price-fixing, and were not required to consider the effects of any passing on. Analyzing common impact on the basis of generalized evidence is much simpler when the realities of passing on are arbitrarily eliminated by judicial doctrine.

3) *Competition Act* Actions

There is additional evidence that may be relevant whenever a plaintiff relies on the civil cause of action provided for in section 36(1) of the *Competition Act*. This evidence arises from the fact that the civil cause of action is stated to arise in respect of "conduct that is contrary to any provision of Part VI" of the statute. Part VI includes the section 45 conspiracy provisions, which contain the substantive offence normally relied on by plaintiffs making a section 36 civil claim.

However, unlike the *per se* regime in the United States, the mere fact of a conspiracy to fix prices does not give rise to an offence under section 45. There is an "effects" test as well. In particular, to constitute an offence, the conspiracy must cause an "undue" effect on competition:

> 45(1) Every one who conspires, combines, agrees or arranges with another person

32 *Chadha*, above note 19 at para. 34 [emphasis in original].

33 *Ibid.* at para. 36.

> (a) *to limit unduly* the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
> (b) *to prevent, limit or lessen, unduly*, the manufacture or production of a product or to enhance unreasonably the price thereof,
> (c) *to prevent or lessen, unduly*, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price on insurance of persons or property, or
> (d) *to otherwise restrain or injure competition unduly*,
> is guilty of an indictable offence ... [emphasis added].

Accordingly, for actions brought pursuant to section 36 of the *Competition Act*, not only harm but also "undueness" must be established, in addition to the conspiracy itself, in order to establish liability. This raises the question of whether undueness can be dealt with as a common issue and whether, if it cannot, a class proceeding is the preferable procedure.

Any consideration of undueness requires a consideration of the impact of the alleged conspiracy in the relevant market or markets. This, in turn, requires identification of the relevant product and geographic markets. While it may be that the effect of a conspiracy on competition in a market can be assessed on a basis common to all class members in that market, it is important to consider the nature and number of the markets and the degree to which class members can determine which markets are relevant to them in considering both commonality and preferable procedure.

The travel agent litigation provides an example on the question of markets, and it is one of the relatively few cases in which defence experts have filed affidavits. The plaintiffs alleged that Air Canada and five American airlines, all abetted by IATA, had conspired to reduce and eliminate commissions paid by the airlines to travel agents for certain tickets. The defendants' economist pointed out that the relevant market was not simply the entire market for travel agent ticketing services. The various airlines only competed with each other to purchase travel agent "inputs" insofar as they competed on specific "city-pair" routes. Moreover, because the class alleged a conspiracy that excluded domestic American routes (there was already an American class action with respect to those routes),[34] the only potentially relevant routes were domestic

34 The American case was certified as a class proceeding but then dismissed on the merits on summary judgment.

Canadian, cross-border, and international routes. As a matter of regulation and industry structure, the defendant airlines only competed with one another on cross-border city-pairs. There were many of these routes, each involving a different combination of defendants but almost always involving Air Canada.

The upshot of this analysis was the conclusion that undueness would have to be analyzed and established not once, but scores of times — once for each relevant city-pair. It would be entirely plausible to find undueness in some markets but not others. Depending on any given travel agent's location and ticketing experience, it might be unaffected, possibly affected, or likely affected by a scattering of findings of undueness in the various markets.

Evidence of this kind addresses several issues relevant to certification of a civil cartel claim under the *Competition Act*. One is the question of whether harm can be assessed on a common basis. Another is the question of whether, even if undueness or effect could be considered on a common basis within each properly defined market, the sheer number of markets involved means that a class action is not the preferable proceeding.

Finally, the undueness requirement under section 45 of the *Competition Act* is another reason to approach American direct purchaser certification decisions with caution. American plaintiffs relying on federal antitrust legislation do not need to show undueness, and therefore their proposals as to common impact assessment can be more straightforward than may be the case in Canada.

E. CONCLUSION

The certification of conspiracy class actions requires careful attention by both plaintiffs and defendants to the evidentiary record. Before *Hollick*, the very experienced motions judge in *Chadha* couched his analysis of the parties' expert economics evidence by stating "I am not to be taken as holding that it was necessary to adduce such evidence at this stage of the proceedings."[35] The Supreme Court of Canada's decision in *Hollick* ensured that these misgivings may now be put aside. The plaintiff now has a positive obligation to adduce evidence on certification and, realistically, the defendants have a positive obligation to respond in kind.

35 *Chadha* (S.C.J.), above note 19 at para. 11; *Chadha* (C.A.), above note 19 at para. 27.

Certification motions need not resolve the underlying merits of the dispute, but the structural facts relating to the nature and economics of the industry in which a conspiracy is said to have occurred are necessary ingredients in an analysis of the form of the action. Certification motions may be procedural, but they are about much more than process.