New Frontiers in Price-Fixing Class Actions

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In the U.S., where price-fixing actions have been advanced for decades, chaotic is an appropriate way to describe the current state of the law.

In the U.S. federal sphere direct purchasers may advance price-fixing claims under the *Clayton Act.* If successful, they will be entitled to treble damages whether or not they have suffered any damage. Conversely, indirect purchasers, who will likely have suffered some, if not all, of the damage, are barred from pursuing a claim. This anomalous situation arises out of two U.S. Supreme Court cases decided in 1968 and 1977, *Hanover Shoe v. United Shoe Machinery* [1] and *Illinois Brick Co. v. Illinois* [2]*.* In an effort to remedy the perverse result of these two cases, and to enable indirect purchasers to claim damages for price-fixing , many U.S. states have passed "Illinois Brick repealer laws". The Illinois Brick repealer laws allow indirect purchaser claims to be advanced in various state courts.

As a result of the decisions in *Hanover Shoe* and *Illinois Brick,* and the state reactions to these decisions, the U.S. law achieves chaos but not the purpose of the antitrust litigation: "to compensate victims of anti-trust violations and to deter future violations"[3]. As stated in the dissenting opinion of Justice Brennan in *Illinois Brick*: "[t]oday's decision flouts Congress's purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement..the court's decision frustrates both the compensation and deterrence objectives of the treble-damages action."[4]

In Ontario, price-fixing actions are novel. Plaintiffs' class counsel have a clean slate to work from and the opportunity to ensure that the chaos in the U.S. law is not imported into Canadian law. The law in Canada should be developed with a view to achieving the objectives of the *Competition Act,* namely "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and *in order to provide consumers with competitive prices and product choices*." (emphasis added)[5]. The simplest, most efficient, and most desirable way to achieve this is to include all purchasers in the class, both direct purchasers and end users. A class which includes all purchasers is desirable for plaintiffs and defendants alike: plaintiffs recover the full value of any overcharge while defendants obtain a broad release and therefore, closure.

The U.S. law, while in a state of chaos in respect of the direct/indirect class member dichotomy, may aid Canadian counsel in their efforts to overcome the evidentiary threshold required for the procedural certification step. The U.S. theory that discovery should take place in the public

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1 *Hanover Shoe Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968).

2 *Illinois Brick Co. v. Illinois*, 97 S.Ct. 2061 (1977).

3 *Ibid* at 2076.

4 *Ibid* at 2076.

5 *Competition Act*, R.S.C. 1985, Chap. C-34.

sphere in order that sunlight may act as a disinfectant[6], is being seized upon by Canadian plaintiffs seeking to obtain access to evidence available in the U.S. Of course, these efforts have been resisted by defendants on both sides of the border, recently culminating in a hearing before the Ontario Court of Appeal. Like the direct/indirect dichotomy, the law in this area continues to develop and remains a hotbed of debate.

An "all inclusive" Class of Purchasers is Desirable

One of the best ways to achieve the objectives of the *Competition Act* is to ensure that consumers are provided with competitive prices, and where an unlawful conspiracy impacts on competitive prices, to ensure that consumers have a viable remedy. To date, two proposed "consumer only" price-fixing class actions have been pursued in Canada: both failed at the certification stage[7]. Conversely, five price-fixing conspiracy actions which included all purchasers, both direct and indirect, have been certified on consent in the context of negotiated settlements[8]. These decisions highlight the debate which is ongoing in Canada about whether consumers are proper class members in price-fixing cases. The debate arises largely out of the U.S. law as it has developed in respect of indirect purchaser claims, and whether the law in Canada ought to mirror the U.S. experience.

In the U.S., in the federal sphere, class actions may not be advanced on behalf of a class that includes "indirect purchasers". This is the result of a series of cases decided by the U.S. Supreme Court in the 1960's and 1970's. *Hanover Shoe* serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme Court in 1968, *Hanover Shoe* involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore was not entitled to recover such damages. The court rejected this defence, holding that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue[9].

Hanover Shoe was affirmed in 1977 in *Illinois Brick*. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The State alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, or indirect purchasers causing them to suffer a loss. The court held the plaintiffs could not use the passing on theory offensively in light of the court's prior ruling that it could not be used defensively[10].

The decisions in *Illinois Brick* and *Hanover Shoe* create a windfall for the direct purchaser that is able to pass on an overcharge in whole or in part to an indirect purchaser. The indirect

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6 *Wilk v. American Medical Association,* 635 F. 2d 1295 (7th Cir. 1980).

7 see *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 (Gen. Div). (Certification granted), (2001), 54 O.R. (3d) 520 (Div. Ct.) (Certification denied),appeal dismissed, [2003] O.J. No. 27 (Q.L.) (C.A.) and see *Price v. Panasonic Canada*, [2002] O.J. No. 2362 (QL) (S.C.J.).

8 see *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Company et al.,* Endorsement of Winkler J. (23 October, 2001); and see *Alfresh Beverages Canada Corp. v. Hoechst et al,* Endorsement of Cumming J. (14 January, 2002); and see *Bona Foods v. Pfizer Inc. et al*., Endorsement of Winkler J. (6 August, 2002); and see *Minnema v. Archer Daniels Midland et al.*, Orders of McKinnon J. (28 February, 2003).

9 *Hanover Shoe Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968).

10 *Illinois Brick Co. v. Illinois*, 97 S.Ct. 2061 (1977).

purchaser, who suffers a loss as a result of the conspiracy, will be barred from any recovery. This point was picked up in the strong dissent of Mr. Justice Brennan in *Illinois Brick.* Mr. Justice Brennan noted that the court's decision to prohibit indirect purchaser plaintiffs from pursuing a remedy in price-fixing cases frustrates the compensation and deterrence objectives of treble-damage actions. Consumers are precluded from recovering damages and direct purchasers, acting as middlemen, have little incentive to sue where they pass on the overcharge to the consumer. Based in part on Mr. Justice Brennan's dissent in *Illinois Brick,* several states have enacted statutes which authorize indirect purchaser lawsuits ("Illinois Brick repealer laws"). These statutes serve to ensure that the *Illinois Brick* decision does not bar state residents from potential recoveries against alleged conspirators.

The result of the decisions in *Hanover Shoe, Illinois Brick,* and the creation of "Illinois Brick repealer laws" is a state of chaos in the realm of U.S. antitrust litigation. At any given time, there may be numerous class actions being pursued in the federal sphere in respect of a particular product, some of which may or may not be consolidated, as well any number of indirect purchaser cases in the various state courts. This results in varying decisions by different courts and causes the parties to incur tremendous expense. Many plaintiffs' counsel in Canada believe there is a better, simpler, more efficient way to pursue price-fixing class actions. Simply put, the class must be defined to include all purchasers in the chain of purchase, both direct and indirect.

In Canada, two "consumer only" price-fixing actions have been pursued: both failed the satisfy the certification test. In *Chadha v. Bayer,* the plaintiff homeowners sued the defendant for alleged price-fixing in the market for iron oxide, a component part of bricks and paving stones. The plaintiffs alleged that as a result of increased iron oxide prices they paid more for their home. The defendants contested certification largely on the basis that liability could not be determined as a common issue because the damage suffered by each homeowner would need to be proven to establish liability. The defendants further asserted that complexities in the housing market, coupled with a lengthy chain of purchase would preclude the plaintiffs from establishing damages. The Court of Appeal, independently relying on the U.S. decision, *In re Linerboard Antitrust Litigation,* ultimately denied certification on the basis that the expert evidence filed by the plaintiffs simply assumed damages would be passed through the chain of purchase to homeowners and did not suggest a methodology for establishing damages were passed through or for establishing damages on a class-wide basis[11]. The decision in *Chadha* boils down to an inadequate expert report - it does not stand for the proposition that price-fixing cases are inappropriate for certification.

In *Price v. Panasonic,* the plaintiffs alleged that the defendant unlawfully sought to maintain the resale prices of various audio-visual products. The market for audio-visual products was extremely complex with products being sold by many people in many markets, under different market variables. The defendants argued that numerous variables affected prices and that each class members' loss would vary. The defendants also argued there was no cause of action because the damages of the class must be individually determined. Although the court rejected the defendants' argument, it concluded that each class member would have to prove actual loss or damage to

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11 *Chadha v. Bayer Inc.,* [2003] O.J. No. 27 (QL) (C.A.).

establish liability and that liability could not be decided as a common issue. The court found that the sale of electronic products are subject to a series of variables that influence price and that it would be necessary to analyze each of the variables in respect of each sale to determine the price. At the end of the day the court concluded a class proceeding was not the preferable procedure. The individual issues would outweigh the any common issues and the litigation plan submitted by the plaintiff was inadequate[12]. *Price* does not stand for the proposition that price-fixing cases are inappropriate for certification. It simply stands for the proposition that on the facts of the case, certification would not have achieved the objectives of the *Class Proceedings Act.*

Unlike the *Chadha* and *Price* cases*,* several price-fixing actions advanced on behalf of all purchasers, both direct and indirect, have successfully been certified in the context of negotiated settlements. In *Alfresh Beverages v. Archer Daniels Midland Company,* in the context of a negotiated settlement, the class was defined to include "all persons other than the defendants who purchased Citric Acid or products containing or derived from Citric Acid"[13]. This all inclusive approach achieves the objectives of the *Competition Act* and has been endorsed by numerous courts in Ontario and British Columbia. By including all purchasers in the class definition, the case can be pursued in two distinct stages. In the first stage, liability is established and aggregate damages are determined. In the second stage, the distribution of damages between the various purchaser

classes is established. By pursuing the case in two stages, all class members will have a common interest in the first stage, in establishing liability and maximizing the aggregate damages. In the second stage, class members can be divided into the various purchasers classes with separate representation to address the distribution of damages and the resulting conflict which may arise. This approach has received approval by the courts in Ontario and British Columbia. In *Vitapharm v. F. Hoffmann-LaRoche Ltd.,* Cumming J. stated:

> It is not difficult to understand why a global assessment is necessary in the case at hand. The starting point to any quantification of damages must be to determine the difference between the economic rents generated due to the alleged conspiracy, and what the normative economic rents would have been had a competitive market prevailed. This will be a complex task.
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> In the theory of the Counsel Group, after the global damages have been assessed, a protocol is to be put in place utilizing the various processes outlined in sections 25 and 26 of the CPA to ensure that those plaintiffs who suffered harm as a result of the conspiracy are compensated.
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> This will involve further economic analysis. It seems probable that due to varying economic factors persons at different levels in the overall distribution process

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12 *Price v. Panasonic Canada*, [2002] O.J. No. 2362 (QL) (S.C.J.).

13 *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Company et al.*, Endorsement and Order of Winkler J. (23 October, 2001).

> suffered different losses. There may well be differing interests and perspectives as between different users. Claimants at any given level of user in the distribution chain, such as retail purchasers, may well require separate counsel at that point in time to properly represent their interests. Separate subclasses can be formed if appropriate: see ss. 8(2), (3), 11(1)(b), 12, 25 and 26 of the CPA.[14]

The theory advanced by counsel and endorsed by the court in *Vitapharm* was picked up by the Divisional Court in *Chadha v. Bayer.* Although the Divisional Court denied certification, it was careful to leave the door open for cases such as *Vitapharm*:

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14 *Vitapharm* v. *F. Hoffmann-LaRoche Ltd.,* [2000] O.J. No. 4594 (QL).

> In light of my conclusions with respect to the application of s. 5(1)(d) of the Act to the case at bar, it is neither necessary nor advisable to determine whether a class of indirect purchasers could ever assert claims involving alleged antitrust violations. See the comments of Cumming J. in Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd., [2000] O.J. No. 4594 at para. 44. There may well be claims by indirect purchasers involving alleged antitrust violations which can be advanced by means of a class proceeding. However, it is not appropriate to certify this particular action as a class proceeding.[15]

The Court of Appeal endorsed the Divisional Court's comments in *Chadha* noting the Divisional Court left open the possibility of indirect purchaser price-fixing actions[16].

A plaintiff class that includes all purchasers is desirable for both plaintiffs and defendants. From a defendants' perspective, a broad release is obtained that encompasses all possible claimants and provides finality to what is usually, a matter defendant corporations want resolved. Additionally, there is a level of efficiency, and cost savings that can be achieved by resolving the claims of all class members in one action. Where indirect claimants are excluded from the class, closure may not be obtained until the expiration of all limitation periods, and even then, the defendant may not be insulted from a claim to extend the time for commencing a claim.

From a plaintiff's perspective, a broad class is advantageous because it allows liability and damages to be established on a class-wide basis. Arguably, aggregate damages, and therefore, liability, would be easier to establish as a common issue for a class that included all purchasers, both direct and indirect. A class formulation that includes all purchasers will negative the need to establish pass through at the certification stage and will simplify the evidence that must be led in respect of aggregate damages as a common issue.

Inclusion of Canadian Claimants in the Chaos of U.S. Anti-trust Litigation is Undesirable

Recently, in the U.S., classes have been defined to include international class members, including Canadian plaintiffs. Although some courts, such as the Second Circuit Court of Appeal, have permitted the inclusion of international class members, the U.S. circuits are split in their views of whether the U.S. anti-trust legislation permits suit by foreign claimants.

The inclusion of Canadian plaintiffs in U.S. class proceedings will have a profound impact on class proceedings in Canada. This impact will be lessened if we understand that the desirability of proceeding in the U.S. is only a surface desirability and that the inclusion of Canadian plaintiffs in U.S. antitrust litigation may not secure a benefit for plaintiffs or defendants. Canadian litigants should be hesitant to abandon Canada's viable litigation process.

In the Second Circuit, the U.S. Court of Appeal permitted an international class of plaintiffs in the context of a federal antitrust case. In *Kruman et al. v. Christie's International PLC et al* [17], the plaintiffs filed a class action against two auction houses, Christie's International PLC and Sotheby's Holdings, Inc. The plaintiffs alleged that the defendants entered into an agreement to fix buyer's and seller's premiums. The plaintiffs all made purchases or sold goods in auctions held outside the U.S. and claim they were injured because they paid inflated commissions. The

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15 *Chadha v. Bayer* (2001), 54 O.R. (3d) 520.

16 *Chadha v. Bayer Inc.,* [2003] O.J. No. 27 (QL) (C.A.).

17 *Kruman et al v. Christie's International PLC et al.* (13 March 2002) Docket No. 01-7309 (2nd Cir. 2002).

defendants moved to dismiss the case for lack of subject matter jurisdiction, lack of standing, and improper venue. They were successful in the first instance but on appeal the decision was reversed. The Second Circuit examined the application of U.S. antitrust law to conduct directed at foreign markets and held that an antitrust action under U.S. law may be pursued where a plaintiff is able to demonstrate that the agreement to fix prices in a foreign market had an effect on domestic commerce. The requisite effect on domestic commerce will be found where the agreement caused injury to domestic commerce by (1) reducing the competitiveness of a domestic market; or (2) made possible anti-competitive conduct directed at domestic commerce. The Second Circuit held that based on the plaintiffs' allegations, the defendants could not be shielded from scrutiny under U.S. antitrust law. In rendering its decision, the court did not consider whether a judgment of the U.S. court would be enforceable in a foreign jurisdiction as against a foreign class member choosing to commence an action in his/her home jurisdiction.

In *Den Norske Stats Oljeselskap As v. Heeremac Vof,*[18] the plaintiff, a Norwegian oil company conducting business in the North Sea, brought an antitrust conspiracy claim against providers of barge services alleging that the service providers conduct inflated the plaintiff's operating costs and inflated oil prices in the U.S. market. The Fifth Circuit Court of Appeal took a more restrictive view of the U.S. antitrust legislation and held that the federal antitrust laws do not apply to claims in which the plaintiff's injury does not arise from the conspiracy's anti-competitive domestic effect. On this view, the antitrust legislation allows a claim to be pursued in the U.S. only where the plaintiff is injured by the U.S. effects of the anti-competitive conduct.

In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*[19], the District of Columbia Court of Appeal considered whether allegations that a global price fixing conspiracy which affects commerce in both the U.S. and other countries gives persons injured abroad a remedy under U.S. antitrust law. The Court of Appeal adopted neither the reasoning of the Fifth Circuit in *Den Norske* or the reasoning of the Second Circuit in *Kruman*. Instead, the Court of Appeal came down somewhere in between the two circuits, albeit closer to the court in *Kruman*. In *Empagran*, a claim was advanced in the U.S. on behalf of foreign purchasers who alleged that they paid more for vitamins as the result of a world-wide conspiracy undertaken by the defendant corporations. The plaintiffs alleged that the conspiracy had adverse effects in the U.S. and in other nations and that the unlawful conduct caused injury to the plaintiffs in connection with their foreign purchases. The Court of Appeal held that "where the anticompetitive conduct has the requisite harm on the U.S. commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on U.S. commerce must give rise to "a claim" by someone, even if not the foreign plaintiff who is before the court." Leave to appeal the decision of the Court of Appeal to the U.S. Supreme Court has been sought.

Although some U.S. courts have expressed a willingness to certify a class of plaintiffs which includes foreign nationals, the inclusion of Canadian plaintiffs in U.S. class actions should have limited appeal for plaintiffs and defendants. The inclusion of Canadian plaintiffs, and indeed any

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18 *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001).

19 *Empagran S.A. v. F. Hoffman-LaRoche, Ltd*. (7 June 2001) Docket No. 00-1686 (Dist. Columbia).

foreign plaintiff, in a U.S. class proceeding could result in complications in the class proceeding, having a negative impact on the claims of international class members and on the ability of a defendant to obtain closure.

Canada has a viable litigation process and a proven class actions regime. In light of this important fact, the deep discounting of Canadian plaintiff class claims by U.S. counsel in U.S. proceedings should be of particular concern to plaintiffs. For example, in 1994, Ontario and Québec Canadian class counsel opposed a worldwide settlement entered into within the context of U.S. multi-district litigation proceedings. The worldwide settlement ultimately became an opt-in settlement for women in Ontario, Quebec and Australia. Subsequently, Canadian class counsel opposed a Plan of Reorganization within the context of Dow Corning Corporation's Chapter 11 Reorganization. In both instances, U.S. counsel, largely unfamiliar with the Canadian tort system, negotiated sharp discounts for Canadian claimants. The risk of such treatment should cause Canadian courts to be reluctant to allow foreign courts to assume jurisdiction over Canadian residents whose claims may be and have been commenced in Canada. U.S courts must consider whether the representative plaintiff and class counsel are in a position to adequately and without conflict represent the interests of Canadian residents.

Additionally, Canadian plaintiffs should be concerned about the difficulty of pursuing a claim in U.S. proceedings. Individual hearings which might be required to establish damages, could be onerous and costly for Canadian plaintiffs to pursue in the context of a U.S. proceeding.

For defendants, the extent to which they can and should rely on the determinations reached by the U.S. courts in respect of Canadian plaintiffs is limited. Whether a defendant is successful on the common issues or upon resolution of an action, the defendant will require certainty that the matter cannot be resurrected and re-litigated at a later date. This certainty may be lacking in an action where international class members, including Canadian plaintiffs, are included as class members. To date, most of the courts which have dealt with the international class issue have not addressed the issue of foreign enforcement. As a result, it is uncertain at this stage whether a Canadian plaintiff who does not opt out of an U.S. proceeding will be bound by the result of the proceeding in Canada.

Of concern to both Canadian plaintiffs and defendants, is the cost of an international notice campaign, and the cost of seeking approvals in more than one jurisdiction. In Canada, settling defendants will frequently seek to either have a settlement approved in each class action jurisdiction where they perceive a substantial exposure (historically Ontario, British Columbia and Quebec), or they will create a form of opt-in procedure to ensure that each plaintiff actively submits to the jurisdiction of the court. These concerns are of even greater importance with an international class and as a result, defendants may wish to seek the approval of courts in more than one jurisdiction (or ensure that class members are individually bound).

Let the Light Shine In

The unique nature of a conspiracy case means that, in the absence of a cooperative witness, it may be difficult for plaintiffs' counsel to obtain evidence which may be of assistance on a motion for certification because much of the evidence will be in the hands of the conspirators. Although only a threshold showing of evidence is required for meet the procedural certification

test, this may prove challenging in some price-fixing class actions. The U.S. law, while not desirable in respect of the direct/indirect class member dichotomy, can be a significant aid in assisting Canadian counsel to overcome the evidentiary threshold required for certification.

The threshold evidentiary base that will be required for certification in price-fixing cases can be gleaned from *Hollick v. Toronto (City)*[20] and the Court of Appeal's decision in *Chadha v. Bayer.* In *Hollick,* the Supreme Court of Canada examined the threshold evidentiary requirements for a certification motion, holding that a representative plaintiff must come forward with sufficient evidence to support certification. Specifically, the plaintiff will be expected to lead evidence with respect to all aspects of the certification test except in respect of whether the claim discloses a cause of action. The plaintiff will be required only to lead evidence that is relevant to the certification test and not with respect to the merits of the case.

In *Chadha,* the Ontario Court of Appeal considered the specific nature of the evidence which must be led on a certification motion in a price-fixing case. The primary issues were whether liability, including proof of loss, could be a common issue and whether a class action was the preferable procedure for the conduct of the action. In respect of the commonality issue, the Court of Appeal held that the evidentiary basis provided by the plaintiff was insufficient to establish that the end purchasers of buildings constructed using bricks containing iron oxide overpaid in their purchase. Instead, the overpayment was assumed by the plaintiff's expert, an assumption, which the Court of Appeal held to be fundamental to whether liability could be established as a common issue[21]. The Court of Appeal discussed at length, and endorsed, the U.S. case, *In Re Linerboard Antitrust Litigation*[22].

In Re Linerboard the U.S. Court of Appeals for the Third Circuit adopted the concept of presumed impact, taking notice of the law of economics that an individual plaintiff can prove damage simply by proving free market prices would be lower than the prices actually paid. In addition, the court relied on empirical evidence provided by the plaintiff's expert, which demonstrated that all purchasers would have paid a higher price because of the conspiracy. These two elements formed the evidentiary basis for the court's conclusion that loss as a component of the cause of action could be proved on a class-wide basis[23].

It is clear from *Hollick* and *Chadha* that in respect of price-fixing conspiracy cases, only a threshold evidentiary showing will be required to achieve certification. As a practical matter, in conspiracy cases, this could potentially be problematic because the nature of a conspiracy case is such that the evidence will largely be in the hands of the defendants and will not be accessible to the plaintiffs. Unlike Canada, in the U.S., discovery generally takes place in the public domain. The reasons for this were succinctly stated in *Wilk v. American Medical Association*:

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20 *Hollick v. Toronto (City)* (2001), 3 S.C.R. 158.

21 *Chadha v. Bayer Inc.,* [2003] O.J. No. 27 (QL) (C.A.).

22 *In re Linerboard Antitrust Litigation,* [2002] CA3-QL 605.

23 *In re Linerboard Antitrust Litigation,* [2002] CA3-QL 605.

> Yet, “(a)s a general proposition, pre-trial discovery must take place in the (sic) public unless compelling reasons exist for denying the public access to the proceedings.” Grady, 594 F.2d at 596. This presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process.[24]

In price-fixing conspiracy cases, where most of the requisite evidence will be in the hands of the conspirators, the principles enunciated in *Wilk* become even more important. Against this backdrop, plaintiffs in the *Vitapharm* case sought to obtain access to documents available in parallel U.S. class proceedings, an effort which was unprecedented in the U.S or Canada.

In *Vitapharm,* the plaintiffs alleged the existence of a world-wide price-fixing conspiracy in the market for certain specified vitamins. Similar litigation was ongoing in the U.S. at the time the *Vitapharm* action was commenced. The U.S. litigation was at a more advanced stage than the Canadian litigation, with millions of documents, and numerous depositions having been produced. The U.S. documents were produced subject to a protective order issued by the U.S. case management judge.

The plaintiffs moved in the U.S., pursuant to U.S. law, to obtain access to some of the discovery evidence which had been produced in the U.S. Specifically, the plaintiffs sought to be declared parties and to modify the protective order in order to access the U.S. documents. In response to the

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24 *Wilk v. American Medical Association,* 635 F. 2d 1295 (7th Cir. 1980).

plaintiffs U.S. motion, some of the Canadian defendants, moved in the U.S., to enjoin the plaintiffs from pursuing their U.S. motion. Despite the defendants' opposition, the plaintiffs were granted the right to intervene for the purpose of modifying the protective order. The U.S. court adjourned the portion of the motion seeking modification of the protective order pending the outcome of a Canadian motion which had been commenced by some of the Canadian defendants.[25]

After the U.S. motion was brought, some of the defendants moved in Canada before Justice Cumming, for an order enjoining the plaintiffs from proceeding with their U.S. motion. Justice Cumming, the Ontario case management judge, declined to enjoin the plaintiffs from proceeding with their U.S. motion, holding the plaintiffs motion to neither violate the Ontario rules and procedure or result in consequential unfairness to the defendants in the Canadian class proceedings[26]. The matter has been appealed through the courts, with a hearing most recently in the Ontario Court of Appeal.

On appeal to the Court of Appeal, the defendants' unsuccessfully argued that the decisions of Cumming J. and the Divisional Court were made in error and that the plaintiffs ought to be enjoined from attempting to obtain discovery materials in the U.S. The defendants' appeal was unanimously

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25 *In re Vitamins Litigation,* Memorandum Opinion of Hogan J. (19 March, 2001).

26 *Vitapharm* v. *F. Hoffmann-LaRoche Ltd.,* [2001] O.J. No. 237 (S.C.J.).

dismissed. The Court of Appeal held that "the facts of and circumstances of this case do not give rise to comity concern, nor are there any overriding policy or fairness issues that would warrant the injunctive or declaratory relief sought by the appellants"[27].

The plaintiffs' efforts in the *Vitapharm* case signify the importance of the evidence gathering process to plaintiffs who advance price-fixing conspiracy claims. Although merits based evidence is not required for certification, a threshold of evidence is required in respect of the certification test. In the absence of a threshold evidentiary base to support certification and the assertion of liability and the assessment of aggregate damages as common issues, certification may be difficult. The Ontario courts have expressed a willingness to allow the plaintiffs to pursue evidence in foreign jurisdictions although it is unclear, at this point in time, whether the U.S. court in *Vitapharm* will modify the U.S. protective order to allow Canadian plaintiffs access to the evidence they seek. Regardless of how the U.S. court decides, jurisdictional issues such as this will continue to arise. As stated by Justice Cumming:

> As a result of the inexorable forces of globalization and expanding international free trade and open markets, there will be an ever-increasing inter-jurisdictional presence of corporate enterprises. This is seen particularly in respect of American and Canadian business activity, given the extent of cross-border trade. If both societies are to maximize the benefits of expanding freer trade and open markets, the legals systems of both countries must recognize and facilitate an expeditious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries.[28]

Conclusion

Although the U.S. law is in a state of chaos, plaintiffs' class counsel have a clean slate from which to work and an opportunity to ensure that the chaos in the U.S. law is not imported into Canadian law. The law in Canada should be developed with a view to achieving the objectives of the *Competition Act,* to protect consumers and prevent future conspiratorial behaviour. These objectives will best be achieved if price-fixing class actions are commenced on behalf of all purchasers, with the necessary threshold evidentiary basis to ensure that certification can be achieved and the actions can be litigated.

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27 *Vitapharm* v. *F. Hoffmann-LaRoche Ltd.* Endorsement of the Ontario Court of Appeal. (13 March, 2003).

28 *Vitapharm* v. *F. Hoffmann-LaRoche Ltd.*, [2001] O.J. No. 237 (S.C.J.).