Significant Developments in Canadian Competition Law and Policy
since March 2009

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Significant developments in Canadian competition and foreign investment law and policy over the past year and a half include:

- The most significant amendments to the *Competition Act* in its history, including the introduction of a *per se* conspiracy offence and dual track criminal/civil regime in the area of competitor agreements, the decriminalization of predatory pricing, price maintenance and price discrimination, and the creation of a reviewable price maintenance provision. Bill C-10 also increased penalties for conspiracy, obstruction and bid-rigging, and introduced significant new administrative monetary penalties (“AMPs”) for abuse of dominance, as well as higher maximum AMPs for civil deceptive marketing practices. Bill C-10 brought Canada’s merger review process more in line with the U.S. and introduced substantial changes to the *Investment Canada Act* such as a new national security review mechanism and revised thresholds for review;

- The appointment of a new Commissioner of Competition, Melanie Aitken, in August 2009;

- Issuance of number of significant policies by the Competition Bureau including the *Competitor Collaboration Guidelines* and the *Merger Review Process Guidelines*;

- A number of consent agreements between the Bureau and merging parties requiring divestitures in transactions, and a number of Supplementary Information Requests under the new merger review provisions;

- The first-ever legal action against an foreign investor for failing to comply with undertakings given as a condition of investment approval;

- A number of charges laid and/or pleas entered in relation to price fixing in retail gas in Québec, air cargo and hydrogen peroxide;

- The Bureau’s initiation of an abuse of dominance application against the Canadian Real Estate Association;

- Significant criminal and civil enforcement activity in the area of false and misleading advertising; and

- An apparent lowering of the threshold for class certification in competition class actions in British Columbia and Ontario.
I. Changes to Legislation and Enforcement Policy

A. Legislative developments

On March 12, 2009 the Canadian Government passed Bill C-10, An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures. Bill C-10 introduced the most significant amendments to Canada’s Competition Act in its 25 year history, and also brought considerable changes to the Investment Canada Act.

Changes to the Competition Act

Significant changes to the Competition Act under Bill C-10 include the following:

(i) **Per se Conspiracy Offence**

As of March 12, 2010, the burden of proving anti-competitive effects was removed for so-called “hard core” competitor agreements (i.e. agreements among competitors to fix prices, allocate markets or restrict supply). Previously, the Crown had to demonstrate beyond a reasonable doubt that agreements among competitors “unduly” lessened competition in order to secure a conviction. This amendment to section 45 is similar to the approach in the U.S. and will make it easier for the prosecution to prove hard core cartels.

The new conspiracy provision provides an ancillary restraints defence: parties to an agreement may defend a charge if they can establish on a balance of probabilities that the agreement is ancillary to a broader or separate arrangement by the parties, that the ancillary agreement is directly related to, and reasonably necessary for giving effect to, the objective of the broader agreement, and that the broader or separate agreement does not, on its own, violate the criminal provision.

The regulated conduct defence, which can exempt conduct prescribed or authorized by a regulatory scheme, has also been preserved.

(ii) **New Civil Competitor Agreement Provision**

As of March 12, 2010, agreements or arrangements between competitors other than hard core cartels that substantially prevent or lessen competition are reviewable by the Competition Tribunal. The Commissioner of Competition is able to bring an application to the Tribunal for an order prohibiting any person from doing anything under the agreement, but the conduct is not subject to criminal sanction or monetary penalties. The new civil regime provides for treatment similar to merger review, including an efficiencies defence that allows the parties to argue that the pro-competitive efficiencies resulting from the agreement outweigh its anti-competitive effects and would not be attained if the Tribunal were to issue a prohibition order.

(iii) **Higher Penalties**

Effective March 12, 2010, the maximum penalty for conspiracy is a $25 million fine and/or fourteen years’ imprisonment. This is a significant increase over the previous maximums of $10 million and five years’ imprisonment.
Penalties for obstructing an investigation and bid-rigging increased as of March 12, 2009. Previously, the Act provided for an obstruction offence punishable on summary conviction or on conviction on indictment by a maximum penalty of $5,000 and/or up to two years’ imprisonment. The maximum summary conviction fine has been increased to $100,000 and the penalty for the indictable obstruction offence increased, punishable by an unlimited fine and/or up to 10 years’ imprisonment. The maximum prison sentence for bid-rigging increased from five to fourteen years, while the maximum unlimited fine was maintained.

(iv) No Criminal Sanction for Price Maintenance, Predatory Pricing or Price Discrimination

As of March 12, 2009, the criminal price discrimination, predatory pricing and price maintenance provisions were repealed, and a new price maintenance provision added to the civil enforcement track. Moving price maintenance to the reviewable matters regime marks a significant change as it removes the prospect of criminal sanction and civil actions for damages. Private parties are, however, now able to seek leave from the Tribunal to bring applications to regain supply on usual trade terms or other remedial orders. The new reviewable provision – unlike the old criminal provision – does not apply to attempts by a supplier to influence downstream prices upward or discourage their reduction.

(v) Effect on Civil Actions

Section 36 of the Act permits parties to sue for loss or damages suffered as a result of conduct that is contrary to the criminal provisions of the Act. The amendments to the conspiracy provisions discussed above may make it easier for private plaintiffs to prove violation of the new conspiracy provision as the “unduly” element has been removed. The decriminalization of price discrimination, predatory pricing and price maintenance extinguish private causes of action for claims under these provisions.

(vi) Changes to Reviewable Conduct Provisions

On March 12, 2009, substantial penalties were introduced for both abuse of dominance and deceptive marketing practices. Formerly, those found by the Tribunal to have abused their dominant position (other than airlines) were not subject to monetary penalties: the Tribunal could order a party to cease an offending practice and/or, where that was inadequate to address the anti-competitive effects, impose other potentially broad remedial orders. Corporations found to have engaged in civil deceptive marketing practices were subject to orders to cease the offending conduct, publish a notice and pay a fine (i.e. an administrative monetary penalty) of up to $100,000 for the first order and up to $200,000 thereafter.

AMPs of up to $10 million are now available for a first finding of abuse of dominance or deceptive marketing practices, and AMPs of up to $15 million are available for each subsequent finding. The constitutional validity of AMPs of this magnitude is questionable in that they are akin to the imposition of criminal sanction without the protection of a higher burden of proof and important procedural rights.
Other changes to the reviewable provisions of the Act include interim injunctions for misleading representations, repeal of the consignment selling provisions, and repeal of airline-specific provisions.

(vii) Changes to Merger Provisions

Changes to the Act’s merger review process came into effect on March 12, 2009. The merger review process is now similar to the process in the U.S., and for complex transactions may be longer and more expensive. Changes include:

- **Increased thresholds for pre-notification**: the existing $400-million “size of the parties” threshold has been retained, but the “size of the transaction” threshold increased from $50 million to $70 million (with further increases annually).

- **Changes to pre-notification filing requirements**: the Notifiable Transaction Regulations that reflect the amendments came into force on February 2, 2010. Previously, merging parties elected to file either a short-form or long-form filing based on the complexity of the transaction. The new regulations have replaced the short and long form requirements with a single form for all transactions; this form includes the previous short form information requirements as well as:
  
  (a) all documents analysing the transaction with respect to market shares, competitors, markets, potential for sales growth or expansion into new products or geographic regions;
  
  (b) a copy of each legal document, or the most recent draft if it is not yet executed, that is used to implement the proposed transaction;
  
  (c) a list of the foreign competition or antitrust authorities that have been notified of the proposed transaction by the parties and the date on which each authority was notified; and
  
  (d) the total annual volume or dollar value of purchases from and sales to all suppliers and customers for each principal category of product.

- **Changes to statutory waiting periods and production powers**: the statutory waiting period for mergers subject to pre-notification was 14 days under the old merger review process, with complex transactions subject to a maximum 42-day waiting period. The waiting period applicable to most uncomplicated transactions has increased to 30 days, and in complicated transactions, the Bureau can extend the waiting period by an additional 30 days beyond the time required for the parties to respond to a request for information and documents (a Supplementary Information Request or “SIR”). Effectively, this may increase the period during which the parties may not close the transaction by several months.

Previously, the Commissioner had to seek court orders for the production of information and documents (in the absence of voluntary production) if she wanted information beyond that which was required in the pre-notification filings. Those orders required
parties to provide extensive information and documents within a short time period, and
the statutory waiting period was not affected by the issuance of the court order. If the
waiting period had expired, the parties could close the transaction (at their own
substantial risk) unless the Commissioner had sought an interim order from the Tribunal
to extend the review period and prevent closing. If the waiting period had not expired, the
issuance of the order did not suspend the waiting period. Throughout, the previous
process was subject to Court and Tribunal oversight.

Now, judicial oversight of the process has essentially been removed. The Bureau is
authorized to issue an SIR within 30 days after submission of pre-notification filings.
This request has the effect of extending the waiting period: once the parties’ response is
complete, and only then, a second 30-day waiting period will begin to run. A similar
process is currently used in the U.S., where the experience has been that responding to
second requests can take months and cost millions of dollars.

- **One year post-closing challenge window:** the Commissioner used to have a three-year
  period post-closing to launch an application challenging a transaction. This period has
decreased to one year. In practice, in certain cases the Bureau has continued merger
inquiries long after closing; this provision ensures that the parties face a shorter period of
uncertainty.

### Changes to the *Investment Canada Act*

Significant changes to the *Investment Canada Act* (“ICA”) under Bill C-10 include:

(i) **New National Security Review**

The ICA permits the government to review acquisitions of control of Canadian businesses by
non-Canadians that are above certain prescribed thresholds in order to ensure they are “likely to
be of net benefit to Canada.” The amendments increased the scope of the review powers to
encompass concerns of national security in respect of acquisitions of control and minority
investments in Canadian businesses by non-Canadians, and the establishment of new businesses
by non-Canadians.

Features of the national security review include:

- **Vague criteria and potentially broad review:** the government can review proposed
  investments where it has “reasonable grounds to believe that an investment by a non-
  Canadian could be injurious to national security.” No financial threshold applies to a
  national security review, no definition of “national security” is provided, and review can
  occur before or after closing. The Minister may deny the investment, ask for
  undertakings, provide terms or conditions for the investment or, where the investment has
  already been made, require divestment.

- **Information produced can be shared with other investigating agencies:** the Minister can
  compel a party to provide information that the Minister “considers necessary,” and may
communicate this information to prescribed investigative bodies which may also disclose the information to others for the purposes of that agency’s investigation.

The new National Security Review of Investments Regulations came into force on September 17, 2009. The regulations prescribe the time periods within which the government must act to trigger a national security review, conduct the review, and, where necessary, order measures to protect national security. The regulations also list the investigative bodies with which the Bureau may share confidential information.

(ii) Changes to Review Thresholds

The prescribed threshold in 2010 for pre-closing review of direct investments by World Trade Organization (“WTO”) member country investors in all sectors except cultural businesses is $299 million (down from $312 million in 2009). Bill C-10 removed the lower $5 million threshold for investments in transportation, financial services and uranium businesses, but maintained it for investments in cultural businesses and for certain direct investments by non-WTO investors.

On a date still to be fixed, new regulations under the ICA\(^1\) will come into force, the thresholds for WTO investments will be determined by “enterprise value” rather than the book value of assets, and the threshold for review will increase to $600 million, rising progressively to $1 billion over a four year period with further increases based on a prescribed formula.

B. Competition Bureau Policies

The Bureau has issued a number of important guidelines since March 2009.

In March 2009, the Bureau published a Bulletin on Efficiencies in Merger Review. Intended to supplement the Merger Enforcement Guidelines, the bulletin’s purpose is to provide practical guidance to merging parties with respect to information that would be useful to the Bureau in its analysis of efficiency claims, and to policy issues such as dynamic efficiencies and efficiency gains that are likely to be generated outside of Canada.

In September 2009, the Bureau published Merger Review Process Guidelines which provide guidance on the Bureau’s approach to administering the two stage merger review process that came into force under Bill C-10. The guidelines describe the SIR process and contain a discussion of the practices and procedures that the Bureau will follow.

In December 2009, the Bureau issued Competitor Collaboration Guidelines that describe the approach it will take in applying the new dual-track regime to agreements between competitors. Key features of the guidelines include:

- Specifying that the criminal conspiracy offence will apply only to agreements between competitors to fix prices, allocate markets and restrict output that constitute “naked restraints” on competition, \(i.e.,\) restraints that are not implemented in furtherance of a

\(^1\) The Regulations Amending the Investment Canada Regulations were published for comment in the Canada Gazette Part 1, Vol. 143, No. 28 in July 2009. These regulations have not yet been registered.
legitimate collaboration between competitors such as a strategic alliance or a joint venture.

- A discussion of factors that the Bureau will consider in order to determine whether parties to an agreement are potential competitors, i.e., whether they are likely to compete with respect to a product in the absence of the agreement under consideration (both the criminal and civil provisions apply to agreements among competitors and “potential competitors”).

- A strict interpretation of the ancillary restraints defence.

- Clarifying that vertical agreements between suppliers and customers, as well as dual-distribution agreements and franchise agreements, will be assessed under the civil, rather than criminal provisions (except where such agreements are used to cover agreements among distributors or franchisees to fix prices or allocate markets), and clarifying that the criminal provision will apply only to agreements between sellers and not between buyers.

- A discussion of the potential application of the new civil regime to different types of agreements including commercialization and joint selling agreements, information-sharing agreements, research and development agreements, joint production agreements, and joint purchasing agreements and buying groups.

In May 2010, the Commissioner and the Director of Public Prosecutions signed a Memorandum of Understanding (“MOU”) with respect to the investigation and prosecution of offences under the Competition Act, as well as the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act. The MOU is intended to provide greater transparency and predictability in the relationship between the Bureau and the Public Prosecution Service of Canada, setting out the guiding principles of the relationship and outlining each organization’s respective roles and responsibilities in investigations and prosecutions.

In the last year and a half the Bureau also issued Enforcement Guidelines on the following topics: Guidance on Labelling Textile Articles Derived from Bamboo (March 2009), Multi-level Marketing Plans and Schemes of Pyramid Selling (April 2009), Consumer Rebate Promotions (September 2009), Ordinary Price Claims and Promotional Contests (October, 2009), and “Product of Canada” and “Made in Canada” Claims for non-food products (December 2009). It also published a policy relating to information sharing in the context of hostile transactions (June 2010).

Other topics on which the Bureau has recently sought comments – and where we can expect to see publications – include the Draft Abuse of Dominance Guidelines (January 2009), the Draft Sentencing and Leniency Bulletin (March 2009) and the Draft Fee and Service Standards Handbook for Merger-Related Matters (May 2010). In September 2010, the Bureau also announced that it will hold a series of roundtables to assess the need to revise the 2004 Merger Enforcement Guidelines.
II. Transactions

A. Merger Review

The Bureau entered into a number of consent agreements with merging parties requiring divestitures in transactions or proposed transactions involving:

- Oil and gas (Suncor Energy Inc. and Petro-Canada, July 2009);
- Solid hazardous waste disposal (Clean Harbors Inc. and Eveready Inc., July 2009);
- Animal and human health products (Pfizer Inc. and Wyeth, October 2009; and Merck & Co., Inc. and Schering-Plough Corporation, October 2009);
- Nitrogen fertilizer (Agrium Inc. and CF Industries Holdings Inc., November 2009);
- Ticketing services (Ticketmaster Entertainment, Inc. and Live Nation, Inc., January 2010);
- Laser microdissection instruments (Danaher Corporation and MDS Inc., March 2010);
- Commercial waste collection services (IESI-BFC Ltd. and Waste Services Inc., June 2010);
- A herbicide ingredient (Nufarm Limited and AH Marks Holding Limited, July 2010);
- Generic pain relief medications (Teva Pharmaceutical Industries Ltd. and the Merckle Group (ratiopharm), July 2010); and
- Ophthalmic products (Novartis AG and Alcon, Inc., August 2010).

Supplementary Information Requests have been issued in at least five instances since inception of the process in March 2009.

B. Foreign Investment

In July 2009, the Attorney General of Canada filed an application with the Federal Court for an order directing U.S. Steel to comply with undertakings it gave in its 2007 acquisition of Stelco Inc. This is the first-ever formal enforcement action against a foreign investor for failing to live up to undertakings that were a condition of investment approval.\(^2\)


In response, U.S. Steel moved to challenge the validity of the enforcement proceedings on the basis that they contravened its rights under the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights. On June 14, 2010, the Federal Court of Canada dismissed U.S. Steel’s motion. U.S. Steel filed a notice of appeal of this decision and sought to stay the Attorney General’s application pending disposition of the appeal. On July 23, 2010, the Federal Court of Appeal dismissed U.S. Steel’s motion to stay the application.
The national security review process introduced in March 2009 has been invoked at least once already: in August 2009, George Forrest International received notification from Industry Canada pursuant to the national security provisions of the ICA that it was prohibited from implementing the proposed acquisition of Forsys Metals pending further notice.

III. Criminal Cases

A. Conspiracy

No significant contested domestic or international cartel prosecutions took place in Canada in the last year and a half. However, a number of charges were laid and pleas entered in relation to retail gas price fixing in Québec. As of December 2009, charges had been laid against 13 individuals and 11 companies accused of fixing the price of gas at pumps in four regional markets in Québec. Ten individuals and six companies have pleaded guilty so far with fines totaling over $2.7 million; and of the ten individuals who have pleaded guilty, six have been sentenced to terms of imprisonment totaling 54 months. In July 2010, the Bureau announced that charges had been laid against an additional 25 individuals and three companies. The Bureau has declared this investigation to be the largest criminal investigation in its history and notes that other investigations into price-fixing in industry outside of Québec are ongoing.

Pleas were also entered in relation to an international air cargo cartel affecting Canada. In October 2009, a fifth air cargo carrier pleaded guilty to fixing surcharges on the sale and supply of international air cargo exported on certain routes from Canada between 2002 and 2006. More than $14.6 million in fines has been collected to date, and the Bureau’s investigation into the alleged conduct of other carriers continues.

And in May 2010, a second chemical company pleaded guilty to fixing the price of hydrogen peroxide between July 1998 and December 1999. More than $5.6 million in fines has been collected to date in this ongoing investigation.

B. Bid-Rigging

In June 2009, an individual pleaded guilty to bid-rigging in connection to a Transport Canada tendering process for an information technology contract. He was fined $25,000. This was the second guilty plea in this case, and the case continues against seven companies and 12 individuals in relation to bidding for contracts related to IT services provided to a number of Canadian government agencies.

In January 2010, a company pleaded guilty to rigging bids for a contract to provide traffic signals to the City of Québec. It was fined $50,000 for its role and is subject to a court order for 10 years. Interestingly, on May 25, 2010, the Québec Superior Court acquitted Électroméga Limitée, the competitor with which the company was alleged to have engaged in bid-rigging.3

3 R. v. Électroméga Limitée, 2010 QCCS 2283 (CanLII).
The Court acquitted Électroméga on the basis that it could not be proven beyond a reasonable doubt that it had entered into the alleged agreement to rig the bid.

In a proactive move, in June 2009, the Bureau obtained a court order against the Saskatchewan Roofing Contractors Association to address potentially anti-competitive practices. Under the prohibition order, the association agreed to advise the Commissioner if it becomes aware of any unauthorized communications or activity relating to the pricing of products, as well as to implement a compliance program and educate its members about bid-rigging and conspiracy offences. The order followed a Bureau inquiry into allegations that some members of the association had discussed not submitting bids for a roofing project for a local school.

C. Deceptive Marketing and Telemarketing

Numerous pleas were entered and convictions and charges laid with respect to deceptive marketing and telemarketing practices. Some examples include:

- Four companies pleaded guilty and agreed to pay $725,000 for deceptive telemarketing activities involving the sale of business directories; two individuals who operated these companies were prohibited from engaging in telemarketing related to business directories for five years (June 2009).

- A deceptive telemarketer pleaded guilty and received a two year jail sentence, three year probation period, and 10 year ban on telemarketing activities for his involvement in a business directory scheme that generated roughly $158 million over a 10 year period (July 2009); his company received a record $15 million fine (December 2009).

- A direct mailer, David Stucky, pleaded guilty and received a record $2 million fine for his role in a deceptive direct mail promotion scheme; he was also placed on probation for 18 months, received a suspended sentence for a second deceptive scheme, and was prohibited from engaging in any form of mass marketing for 10 years (August 2009). The guilty plea followed a February 2009 decision from the Ontario Court of Appeal that overturned the trial judge’s ruling that Mr. Stucky was not guilty because the phrase “to the public” meant “to the Canadian public,” and none of the mailings had been made to persons in Canada. The Court of Appeal held that that “to the public” should not be limited exclusively to persons within Canada: it is sufficient that there was “a real and substantial connection between the offence alleged and Canada, notwithstanding the fact that the “public” to whom the representations were made was located outside Canada.”

- Three people pleaded guilty for deceptive telemarketing related to the promotion of business directories and received six month conditional sentences and strict curfew conditions, and were prohibited from engaging in telemarketing for 10 years (November 2009).

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4 R. v. Stucky, 2009 ONCA 151 (CanLII) at para. 32.
Charges were laid against three individuals and six companies allegedly involved in business directory telemarketing scams that generated an estimated $60 million over five years (April 2010).

An individual was convicted of one count of misleading representations under the *Competition Act*, in addition to counts under the *Criminal Code*, for his involvement in a GST refund scheme that defrauded victims of $3.6 million between 1999 and 2003 (July 2010).

### IV. Reviewable Matters

#### A. Abuse of Dominance

In February 2010, the Bureau announced that it would challenge the rules imposed by the Canadian Real Estate Association (CREA) with respect to the Multiple Listing Service (MLS). The Bureau alleges that CREA’s rules restrict the ability of consumers to choose the real estate services they want and prevent innovation in the market for residential real estate services. The hearing of the application before the Tribunal is scheduled for April 2011. The Bureau’s application is in line with new Commissioner, Melanie Aitken’s stated priorities, which include ensuring that the Bureau “bring forward responsible cases to clarify the law.”

In June 2009, two waste management companies agreed to rewrite their contracts to resolve Bureau concerns that they were abusing their jointly dominant position. These concerns arose from a Bureau inquiry into complaints that the companies’ long-term contracts resulted in substantially less competitive markets for commercial waste collection services in central Vancouver Island leading to higher prices and reduced choice for businesses.

#### B. Deceptive Marketing

Some civil deceptive marketing cases and events since March 2009 include:

- In October 2009, the Federal Court of Appeal overturned the 2008 ruling of the Competition Tribunal and found that a career management company had misled the public in selling job placement services. The Tribunal’s 2008 ruling had held that the representations, although misleading, were not “to the public” as required under the civil provisions because they were made in the privacy of the company’s office on an individual basis. Following the Federal Court’s decision, the Tribunal determined the appropriate remedy to be a cease and desist order and AMPs of $100,000 for the company and $50,000 for the company’s president.

- A resort company selling time shares agreed to pay $170,000 (including an AMP of $150,000) for running misleading promotional contests (November 2009).

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*McCarthy Tétrault LLP DOCs #4403629 v. 4*
- An Internet service provider agreed to clarify advertising claims about the speed of its Internet services in response to Bureau concerns (December 2009).

- A number of major clothing retailers agreed to correct misleading promotional materials to resolve Bureau concerns.

- The Bureau filed an application with the Tribunal against two hot tub and spa retailers and their directors for false energy efficiency claims (July 2010). The Bureau is seeking an order from the Tribunal for the directors and companies to cease the alleged conduct, publish corrective notices and pay AMPs. The Bureau has already entered into nine consent agreements with other hot tub and spa retailers for similar representations.

- A paint products company agreed to end alleged misleading environmental and “Made in Canada” claims (August 2010).

In private applications before the Tribunal, Nadeau Poultry Farm Limited, a chicken processor, failed in its refusal to deal application to have Groupe Westco Inc. continue to sell it chickens. In its August 2009 decision, the Tribunal held that Nadeau was substantially affected in its business due to its inability to obtain adequate supplies on usual trade terms, but that Nadeau had failed to establish that insufficient competition among suppliers was the reason why it could not obtain an adequate supply. Additionally, Nadeau failed to establish that the product was in ample supply and that that Groupe Westco’s refusal to deal was having, or was likely to have, an adverse effect on competition in the market: the refusal would not create, enhance or preserve market power for any remaining market participants.

V. Class Actions

Class proceedings for competition claims continue to increase in number in Canada and closely follow actions launched in the U.S. Two recent decisions from British Columbia and Ontario in which the courts certified classes of combined direct and indirect purchasers may encourage a continuation of this trend. Until recently, plaintiffs had limited success in contested certification applications; this was largely because price-fixing allegations raise difficult issues related to the pass-through of overcharges through the distribution chain and demonstrating loss on a class-wide basis.

In November 2009, in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, the British Columbia Court of Appeal certified a class of direct and indirect purchasers of DRAM (Dynamic Random Access Memory) products, which are memory chips used in personal computers and other high tech products. The British Columbia Supreme Court had previously refused to certify the class on the basis that the plaintiffs had failed to establish that liability to class members was a common issue. Without a methodology to identify harm on a class-wide basis, the case would dissolve “into a series of individual inquiries that would overwhelm the common aspects of the

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6 CT-2008-04.
7 2009 CarswellBC 3035, 2009 BCCA 503.
8 2008 CarswellBC 943, 2008 BCSC 575.
case.” The Court of Appeal overturned the lower court’s decision, finding that only a minimum evidentiary basis is necessary for each of the certification requirements and that plaintiffs need only show a “credible or plausible methodology” for establishing harm on a class-wide basis.

In June 2010, the Supreme Court of Canada dismissed the DRAM manufacturers’ application for leave to appeal, leaving issues surrounding the methodology of determining class-wide harm for trial.9

In June 2010, in Irving Paper Ltd. v. Atofina Chemicals Inc., the Ontario Superior Court of Justice dismissed a motion for leave to appeal from a decision to certify a class of direct and indirect purchasers of hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005.10 Justice Rady of the Superior Court had previously granted certification in September 2009 on the basis that (i) it is not necessary for plaintiffs to demonstrate that loss is a common issue for all members of the class, and (ii) with respect to pass-through, at the certification stage, the court only needs to be satisfied that a “methodology may exist for the calculation of damages.”11 Dismissing the motion for leave to appeal, Justice Leitch disagreed with the certification judge in finding that loss must be provable on a class-wide basis, but still concluded that there was no reason to doubt the correctness of the certification order. With respect to proving loss, Justice Leitch stated that the certification court must decide whether the evidence demonstrates the “existence of a viable methodology for proving loss on a class-wide basis,” but that the certification judge is not required to engage in a determination of the merits of the evidence: exacting scrutiny of the evidence can be left to trial.

The trend to lowering the threshold for certification is also apparent in a number of other recent class action certification decisions involving alleged breaches of the Competition Act (examples include Pro-Sys v. Microsoft,12 a March 2010 decision of the Supreme Court of British Columbia, Quizno’s Canada Restaurant Corporation v. 2038724 Ontario Ltd.,13 a June 2010 decision of the Court of Appeal for Ontario, and Sun-Rype Products Ltd. v. Archer Daniels Midland Company,14 a June 2010 decision of the Supreme Court of British Columbia).

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9 2010 CarswellBC 1361.
10 2010 CarswellOnt 3898.
12 2010 BCSC 285 (CanLII).
13 2010 ONCA 466 (CanLII).
14 2010 BCSC 922 (CanLII).