Litigating in the Post-Godfrey World: What You Need to Know About the New Ground Rules for Competition Class Actions in Canada

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On September 20, 2019, the Supreme Court of Canada released its long-awaited decision in two companion appeals in Pioneer Corporation v. Godfrey. The Godfrey decision arises out of the Canadian counterpart to the U.S. class action litigation, In re Optical Disk Drive Products Antitrust Litigation. Godfrey has significant implications for current and future class actions seeking damages for alleged conduct in contravention of the criminal provisions of the Competition Act (Canada).

Antitrust lawyers and class action litigators involved in cross-border matters should be aware that Godfrey is likely to result in many Canadian antitrust class actions being far broader in scope than their U.S.-based counterparts, and the decision may have substantial impacts on the potential quantum of liability for Canadian market participants. In particular, the decision impacts and clarifies the state of the law on several long-disputed issues in Canadian competition class action jurisprudence:

(1) Umbrella Purchasers: The Supreme Court of Canada held that “umbrella purchasers,” who purchased products from non-conspirators, have a cause of action under Section 36(1)(a) of the Act if the illegal conduct of the defendants led to higher prices in the overall market. This price movement is known as the “umbrella effect.” The proposed certification of classes including umbrella purchasers has been hotly contested in both Canada and the U.S. The issue of umbrella purchasers will be of particular interest to U.S. antitrust practitioners, as a claim brought on behalf of a class including claimants analogous to umbrella purchasers recently progressed to trial in the case of In re Processed Egg Products Antitrust Litigation. The Third Circuit, which has traditionally been hostile towards umbrella purchasers, granted the claimants standing.

(2) Evidentiary Standard at Certification: At the certification stage, the plaintiffs’ expert methodology need not be capable of either showing that all members of the proposed class were harmed or identifying who was harmed and who was not.

(3) Intersection of the Act and Common Law and Equitable Claims: The statutory cause of action under Section 36(1) of the Act does not supplant common law or equitable claims that are based on breaches of the Act, which may have longer limitation periods and a broader scope for damages.

1 Pioneer Corp v. Godfrey, 2019 SCC 42 (Can.).
2 Godfrey, 2019 SCC 42 (Can.); In re Optical Disk Drive Prods. Antitrust Litig., No. 3:10-md-02143 (N.D. Cal.).
(4) Discoverability and Fraudulent Concealment: Common law principles of discoverability and fraudulent concealment can toll the two-year limitation period for claims for damages under the Act.

The Court’s decision on these fundamental issues is likely to result in an increased number of complex competition class actions filed in Canada, seeking higher damages on behalf of larger classes of claimants.

Background

Godfrey stems from an alleged conspiracy amongst certain manufacturers, marketers, distributors, and sellers of optical disk drives (ODDs) to fix the prices of their products.

In 2010, a proposed class action was commenced in the province of British Columbia, with representative plaintiff Neil Godfrey seeking damages on behalf of all British Columbia residents who purchased ODDs between 2004 and 2010. The proposed class included persons who directly or indirectly purchased products from the alleged conspirators, as well as “umbrella purchasers” who purchased ODDs directly or indirectly from competitors of the defendants that were not alleged to have participated in the conspiracy. Umbrella purchasers are individuals or entities that purchased the products at issue directly or indirectly from non-conspirators, who are alleged to have been overcharged because non-conspirator firms were able to inflate the prices of their products as a result of the unlawful conspiracy (for example, because the conspiracy raised the market price generally).

In May 2016, the Supreme Court of British Columbia certified a class that included umbrella purchasers. The British Columbia Court of Appeal upheld the decision, which was subsequently appealed to the Supreme Court of Canada. The appellant-defendants challenged the lower courts’ decisions on the following grounds:

1. Umbrella purchasers do not have a cause of action under Section 36(1) of the Act, in part because recognizing a cause of action for umbrella purchasers would give rise to indeterminate liability;

2. The plaintiff failed to meet the requisite standard for certifying loss as a common issue, as articulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v Microsoft Corp.*;

3. The availability of a statutory cause of action under Section 36 of the Act bars a plaintiff from bringing concurrent common law and equitable claims (i.e., the Act forms a “complete code” for purposes of recovery by plaintiffs); and

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5 ODDs are small pieces of computer hardware which retrieve or store information on optical disks, such as DVDs or CD-ROMs. These drives may be sold alone or may be included in retail electronics, such as DVD players, computers, or stereos.

6 While the plaintiff brought the action against the majority of the defendants in 2010, claims against a subset of defendants were not commenced until 2012. Unlike the U.S., Canada does not have a national framework for multijurisdictional class actions. It is not uncommon for separate and overlapping class actions flowing from the same alleged misconduct to be commenced and proceed in multiple provinces.

7 Section 36(1) of the Act provides: “Any person who has suffered loss or damage as a result of (a) conduct that is contrary to [specified criminal offenses in the Act] may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.” Competition Act, R.S.C. 1985, c. C-34, § 36(1) (Can.).

(4) Certain of the defendants argued that the claims against them were time-barred by the statutory limitation period under the Act,⁹ and that the limitation period could not be extended by the common law doctrines of discoverability and fraudulent concealment.

Summary of the Godfrey Decision
In an 8–1 ruling written by Justice Russell Brown for the majority (with Justice Suzanne Côté dissenting in part), the Supreme Court of Canada made the following key rulings.

**Umbrella Purchasers.** The Court held that umbrella purchasers do have a cause of action under Section 36(1)(a) of the Act, based on the plain language of the statute (i.e., Section 36(1)(a) of the Act allows a claim by any person capable of demonstrating harm suffered as a result of the defendants’ actions; umbrella purchasers are included within “any person”).

The Court rejected the defendants’ concerns of indeterminate liability and potential difficulties in proving harm on a class-wide basis, while also noting that the practical difficulties involved in proving harm in umbrella-purchaser cases may ultimately limit the scope and utility of such claims.

In her vigorous dissent, Justice Côté disagreed with the majority’s conclusion on umbrella purchasers, drawing on the principles of remoteness and indeterminacy in concluding that defendants should not be forced to bear liability for the independent pricing decisions of non-parties.

**Evidentiary Standard at Certification.** Revisiting its 2013 decision in Microsoft, the Court clarified and confirmed that, at certification, plaintiffs need only provide a “plausible and credible” expert methodology that is capable of establishing that harm flowed to each relevant purchaser level (meaning in most cases that the methodology is capable of showing harm was suffered by at least one or more indirect-purchaser class members). The Court emphasized that, at the certification stage of proceedings, the plaintiffs’ methodology need not be capable of either showing that all members of the proposed class were harmed or distinguishing between those class members that were harmed and those that were not.

Justice Côté cautioned that this finding by the majority could result in the certification of classes for which harm can never be proved for many, if not most, class members. In support of her reasoning, Justice Côté referred to the 2002 decision of the United States Court of Appeals for the Third Circuit in In re Linerboard Antitrust Litigation, noting the requirement in U.S. antitrust class action jurisprudence that “sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class.”¹⁰

The Court also confirmed that, while harm need not be proven for all class members at certification, plaintiffs will eventually need to show who was harmed and who was not, at the ultimate trial on the merits. Notably, there have not to date been any decisions on the merits of a competition class action trial in Canada. Accordingly, it remains to be seen whether, and how, such determinations of harm can be made by the courts.

**Intersection of the Act and Common Law and Equitable Claims.** Based largely on “the presumption that Parliament does not intend to abrogate common law rights,” and that the Act does not “represent a comprehensive and exclusive code regarding claims for anticompetitive

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⁹ Section 36(4) of the Act provides: “No action may be brought under subsection (1), (a) in the case of an action based on conduct that is contrary to [the relevant offenses in the Act], after two years from (i) a day on which the conduct was engaged in, or (ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later.” Competition Act, R.S.C. 1985, c. C-34, § 36(4) (Can.).

¹⁰ In re Linerboard Antitrust Litig. 305 F.3d 145, 155 (3d Cir. 2002).
conspiratorial conduct,” the Court determined that Section 36(1) does not supplant common law or equitable claims that are based on alleged breaches of the Act.\(^{11}\) The Court confirmed that alleged breaches of the criminal provisions of the Act can satisfy the “unlawfulness” element found in certain common law torts, including unlawful means conspiracy.\(^{12}\)

Often pleaded in Canadian antitrust class actions, the tort of unlawful means conspiracy requires not only that the defendants’ conduct was directed at the plaintiff but also that the defendants knew (or should have known) that the plaintiff was likely to be injured, that the plaintiff was, in fact, injured, and that the conduct at issue was unlawful in its own right. Plaintiffs may wish to pursue an unlawful means conspiracy claim alongside claims under Section 36 of the Act in part due to the availability of punitive conspiracy damages under the former.\(^{13}\)

**Discoverability and Fraudulent Concealment.** Finally, certain of the defendants argued that the claims against them were barred by the statute of limitations. The Court held that the common law principle of discoverability operates to extend the two-year limitation period provided for in Section 36(4) of the Act. In other words, a cause of action under this Section does not begin to accrue for purposes of the limitation period until the underlying material facts are, or ought to have been, discovered by the claimant.

While it was not necessary for the Court to consider the applicability of the doctrine of fraudulent concealment in light of its conclusion with respect to discoverability, the Court clarified that fraudulent concealment is available to a claimant whenever the defendants’ own behavior means it would be “unconscionable” to permit the defendants to rely on the statutory limitation period.\(^{14}\) Though the Court did not wish to limit the behaviors that could potentially rise to this standard, it offered, by way of example, that fraudulent concealment may be found where the defendants have engaged in “some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts” that has prevented the cause of action from coming to light.\(^{15}\) As a result, there are likely to be circumstances where plaintiffs are permitted to pursue Section 36(1) claims against defendants even where the underlying actions occurred more than two years prior to the commencement of the claim.

**A Deeper Dive into the Approach to Umbrella Purchaser Claims in Canada and the United States**

Canadian and U.S. courts have taken markedly different approaches with respect to the recognition of antitrust damages for umbrella purchasers.

While U.S. law generally prohibits umbrella purchasers from seeking damages, there is some precedent in support of such claims. The state of the law on umbrella purchasers in the U.S. is decidedly unsettled, with some courts permitting umbrella purchaser claims, some outright barring them, and the remainder lacking any appellate authority on the issue.

Much of the controversy surrounding this issue stems from the application by U.S. courts of the principles set forth in *Hanover Shoe v. United Shoe Machinery Corp.* and *Illinois Brick Co.* v.

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\(^{11}\) Godfrey, 2019 SCC 42, paras. 85–88 (Can.).


\(^{13}\) This holding is in keeping with the Supreme Court of Canada’s previous decision in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59 (Can.), that plaintiffs in Québec (which employs a civil law system) are able to pursue similar claims based on breaches of the criminal offense provisions of the Act under the Civil Code of Québec.

\(^{14}\) Godfrey, 2019 SCC 42, paras. 51–55 (Can.).

\(^{15}\) Id. at para. 54 (Can.) (quoting *M. (K.) v. M. (H.)*, 3 S.C.R. 6 (1992), para. 57 (Can.)).
Illinois, which, unlike case law in Canada, serve to preclude indirect purchaser claims under federal antitrust laws. In some jurisdictions, this prohibition has been interpreted as a blanket prohibition on umbrella purchaser claims, on the basis that umbrella purchasers lack the requisite antitrust standing under Section 4 of the Clayton Act, which is necessary to bring a claim for treble damages. In other U.S. jurisdictions, courts have considered on a case-by-case basis whether or not the proposed umbrella purchaser plaintiffs have established antitrust standing through the application of the antitrust standing test, as they would with any other direct purchaser.

The U.S. antitrust standing assessment is a two-part, multi-factor test that considers: (1) whether the injury pleaded is an “antitrust injury”; and (2) whether the plaintiffs are “efficient enforcers.” With respect to part one, an injury is an “antitrust injury” if it satisfies two criteria, namely the injury is the “type [of injury] the antitrust laws were intended to prevent” and the injury flows “from that which makes defendants’ acts unlawful” (i.e., there is causal link between the injury and the anti-competitive conduct). As set out in Associated General Contractors of California v. California State Council of Carpenters—a case relied upon by the defendants in Godfrey to argue that umbrella purchasers were too remote to allow them to recover damages—part two of the antitrust standing assessment, i.e., the “efficient enforcers” inquiry, is itself a loosely constructed, multipart test. This test examines whether the plaintiffs have a relationship to the underlying facts such that they are appropriately suited to act as private enforcers of antitrust legislation through litigation (e.g., including by considering whether anyone else is better placed to bring the action).

In 2018, the Third Circuit addressed the issue of umbrella purchasers in its decision in In re Processed Egg Products Antitrust Litigation. The court found that certain of the plaintiffs were well placed as efficient enforcers and had antitrust standing where they had purchased the relevant egg products directly from the alleged conspirators, regardless of whether the eggs themselves were subject to the conspiracy or if their price had simply been moved by the umbrella

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16 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). Though outside the scope of this article, it should be noted that many “Illinois Brick repealer” states have enacted state-level consumer protection acts which permit recovery by indirect or similarly situated purchasers. As noted by the plaintiff in Godfrey, the supreme Court of Canada rejected Illinois Brick concerns respecting indirect purchasers in Microsoft, 2013 SCC 57 (Can.). See also Bodrug et al., supra note 8.


19 For example, in In re Loestrin 24 Fe Antitrust Litigation, No. 13-2472-WE-S-PAS, 2019 U.S. Dist. LEXIS 118308 (D.R.I. July 2, 2019), the court found that umbrella purchasers had successfully demonstrated antitrust standing following a lengthy antitrust standing analysis. In Gelboim v. Bank of Am. Corp., 823 F.3d 759, 778–80 (2d Cir. 2016), the court, though ultimately denying certification to umbrella purchasers, conducted a thorough analysis of antitrust standing for the umbrella purchasers in that case and further canvassed the mixed state of the law with respect to umbrella purchasers. Only a few months later, a district court bound by Gelboim performed an antitrust standing analysis on a class which included umbrella purchasers and found antitrust standing, such that the class was certified. In re Foreign Exch. Benchmark Rates Antitrust Litig., No. 13 Civ. 7789, 2016 U.S. Dist. LEXIS 128237 (S.D.N.Y. Sept. 20, 2016). In the Fifth Circuit, In re Beef Indus. Antitrust Litigation, 600 F.2d 1148, 1167 n.24 (5th Cir. 1979), confirms that umbrella purchaser status need not be determinative of antitrust standing. In the Seventh Circuit, district courts have rejected the concerns of Illinois Brick in analyzing antitrust standing for umbrella purchasers and analogous claimants in In re Copper Antitrust Litigation, No. 1303, 2000 U.S. Dist. LEXIS 23741 (W.D. Wis. Jul. 7, 2000) and In re Uranium Antitrust Litigation, 552 F. Supp. 518 (N.D. Ill. 1982).


23 Id.

24 In re Processed Egg Products, 881 F.3d 262.
effect. What differentiated the case from prior Third Circuit decisions was the direct relationship between the plaintiffs and the alleged conspirators, which the court relied upon to establish antitrust standing. This direct relationship provided a basis to distinguish the case from precedents such as Mid-West Paper and Illinois Brick, which otherwise would seem to bar recovery of umbrella damages. With this decision, the Third Circuit effectively certified a class involving umbrella-like claims, which has been described by some as “a crack in the ‘umbrella damages’ prohibition.” While the plaintiffs’ claims of conspiracy in In re Processed Egg Products Antitrust Litigation were recently rejected by a jury at a trial on the merits, the jury’s finding does not negate the significance of this “crack” in Third Circuit jurisprudence.

Unlike the fact-heavy analysis seen in the U.S. jurisprudence relating to umbrella purchasers, the Supreme Court of Canada in Godfrey approached the issue of umbrella purchaser standing as a pure question of law, specifically one of statutory interpretation. For an issue that has created so much tension in U.S. jurisprudence, the Supreme Court of Canada’s analysis was surprisingly simple. The majority relied on the plain language reading of Section 36: “Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI . . .” and noted that “Parliament’s use of ‘any person’ does not narrow the realm of possible claimants. Rather, it empowers any claimant who can demonstrate that loss or damage was incurred as a result of the defendant’s conduct to bring a claim.” The Court also engaged with the purposes of the Act, concluding that its decision with respect to umbrella purchasers would increase the intended deterrence effect of the statute, while enabling more people suffering harm to be made whole.

The defendants in Godfrey argued that recognizing a cause of action for umbrella purchasers would impermissibly expose the defendants to indeterminate liability. The Supreme Court engaged with, but declined to resolve, the question of whether indeterminate liability is relevant at all in assessing the availability of a cause of action to claimants under Section 36 of the Act. Instead, the Court appeared to be satisfied that the restrictions implicit in the timeframe defined in the class, and the identity of the specific products whose prices were alleged to have been fixed, would be sufficient to permit the alleged conspirators to know the scope of the alleged harm. In contrast to U.S. cases, which have used the complexity of proving damages as a basis for not permitting umbrella purchaser claims, the majority in Godfrey noted that complexity is an unavoidable reality in antitrust cases, and a plaintiff willing to bear the burden of proving a complex case should not be prevented from seeking to do so.

While the U.S. maintains a patchwork of case law relating to the permissibility of umbrella damages and antitrust standing in umbrella claims, these issues are now effectively settled in Canadian law. In sum, umbrella purchaser claims are no more or less permissible in Canadian law than direct or indirect purchaser claims, and the decision in Godfrey provides no requirement that such claims be subjected to special analysis or additional scrutiny at the certification stage.

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26 Godfrey, 2019 SCC 42, paras. 57, 61.
27 Id. para. 64.
28 Id. 65–68.
29 Rejecting the majority’s position, the dissenting Justice Côté relied in part upon Illinois Brick and Associated General Contractors in arguing that the “there is a point beyond which the wrongdoer should not be held liable,” and that defendants of price-fixing claims should be liable for losses flowing from their own pricing decisions, not those of third parties. Godfrey, 2019 SCC 42, para. 187.
30 Id., para. 77.
than direct or indirect purchaser claims, and the decision in *Godfrey* provides no requirement that such claims be subjected to special analysis or additional scrutiny at the certification stage.

Going forward, umbrella purchaser claims are likely to be included in many Canadian class actions alleging anticompetitive conduct (including multijurisdictional class actions). This is likely to result in larger and more complex classes, challenges for plaintiffs related to proving damages caused to umbrella purchasers (should the action proceed to a trial on the merits), and increased costs for defendants at both the certification and the merits stages required to defend such expanded claims.

### Competing Approaches to Proof of Harm at Class Certification in Canada and the United States

The Canadian approach at certification

The Canadian and U.S. courts have developed distinct approaches to assessing harm at class certification. In the United States, Rule 23(a) of the Federal Rules of Civil Procedure sets out the requirements that a plaintiff must meet in order to succeed in certifying a class action, including in particular numerosity, commonality, typicality, and adequacy (and the predominance requirement under Rule 23(b)(3)). Predominance requires that “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy . . . .”

Individual injury, known as antitrust impact, is “often critically important for the purposes of evaluating Rule 23(b)(3)’s predominance requirement.” To demonstrate predominance, the plaintiffs at certification need not prove antitrust impact, but must demonstrate, based on the available evidence and their proposed methodology, that the antitrust impact is capable of proof at trial across the class. In taking a “close look” at the evidence put forward to show predominance, it is both appropriate, and often necessary, to probe the merits of the claims advanced by plaintiffs at the certification stage.

In determining whether the requirements of Rule 23 have been met, U.S. courts will engage in a “rigorous analysis” of the expert methodologies put forth by the parties at certification. This represents a significant departure from the Canadian approach, wherein certification is viewed as being purely procedural in nature. The Canadian approach at certification “does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial.” Thus, while U.S. courts are often required at certification to assess the merits of competing expert methodologies purporting to show antitrust impact, such an analysis is

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31 FED. R. CIV. P. 23(b)(3).
33 *Id.*
36 This is not to say that Canadian courts will never consider the legal merits of a proposed class action prior to certification. For example, in Hughes v. Liquor Control Board of Ontario, 2018 ONSC 1723 (Can. Ont. Super. Ct.), a proposed class action was dismissed on summary judgment before reaching the certification stage given the availability of a complete legal defense. See Kent E. Thomson, John Bodrug, Matthew Milne-Smith, Michael H. Lubetsky & David Feldman, *Ontario Court Applies Regulated Conduct Defence on Summary Motion to Dismiss Class Action Alleging Market Allocation Conspiracy*, DAVIES INSIGHTS (Mar. 23, 2018), https://www.dwvp.com/en/Insights/Publications/2018/Ontario-Court-Applies-Regulated-Conduct-Defence-on-Summary-Motion-to-Dismiss-Class-Action?mode=pdf.
37 *Microsoft*, 2013 SCC 57, para. 105. It should be noted that on December 9, 2019, the Provincial Government of Ontario introduced Bill 161, which proposes substantial changes to the provincial Class Proceedings Act, 1993, including by introducing a predominance requirement.
impermissible in Canadian law.\textsuperscript{38} The increased propensity to look ahead to trial in the United States may stem in part from a greater body of experience in actually seeing class actions through to trials on their merits.

Moreover, when certifying antitrust class actions, U.S. courts are comparatively intolerant of the presence of uninjured class members.\textsuperscript{39} While U.S. courts do not require proof of harm to all members of a proposed class at certification, plaintiffs must be able to put forward a methodology at certification that can ultimately be used to separate the injured from the uninjured class members.\textsuperscript{40} Regardless of the availability of such a methodology, for certification to be successful, there cannot be more than a de minimis number of uninjured members in a class. The precise meaning of de minimis remains the subject of much debate.\textsuperscript{41} In \textit{Godfrey}, however, the Supreme Court confirmed that to certify loss (or antitrust impact) as a common issue, plaintiffs need only proffer a methodology capable of establishing that overcharges were passed on to the requisite purchaser level—i.e., that one indirect purchaser, or one umbrella purchaser, suffered a loss, as a result of the alleged conduct.\textsuperscript{42}

\textit{Godfrey} effectively shifts the issue of commonality of harm from certification to trial, and hypothetically permits the certification of a class in which many members either cannot be shown to have suffered a loss, or whose loss is not capable of common proof.

In confirming that “a plaintiff’s expert’s methodology need only be sufficiently credible or plausible to establish that loss reached the requisite purchaser level,” the Supreme Court of Canada has endorsed a low bar for certification of antitrust class actions. This makes it increasingly likely that more antitrust class action cases will proceed to trial, which will serve to increase costs to all parties involved in such litigation.

**Conclusion**

The Supreme Court of Canada's decision in \textit{Godfrey} has put to rest several of the most contentious issues recently debated in Canadian antitrust class action litigation. In doing so, the decision has not only set the stage for larger and costlier claims with the addition of umbrella purchasers, it has also increased the potential that battles between plaintiffs and defendants with respect to central issues of proof of harm will be fought at trial, as opposed to at certification. Many proposed antitrust class actions across Canada were stayed pending the outcome of \textit{Godfrey}—their resumption will no doubt provide an interesting window into its practical implications for both plaintiffs and defendants.

Like many antitrust cases, \textit{Godfrey} is the Canadian iteration of a class action that was also pursued by plaintiffs in the United States. Given the frequency of antitrust allegations involving harm in both Canada and the United States, it is important that U.S.-based participants in Canadian markets understand the ramifications of the decision in \textit{Godfrey} on the liability they could face for allegedly anticompetitive conduct.

\textsuperscript{38} \textit{Hydrogen Peroxide}, 552 F.3d at 13–14; \textit{Microsoft}, 2013 SCC 57, para. 102.

\textsuperscript{39} \textit{In re Asacol Antitrust Litig.}, 907 F.3d 42 (1st Cir. 2018); \textit{In re Nexium Antitrust Litig.}, 777 F.3d 9 (1st Cir. 2015); \textit{In re Rail Freight Fuel Surcharge Antitrust Litig.}, 725 F.3d 244 (D.C. Cir. 2013).

\textsuperscript{40} \textit{In re Nexium}, 777 F.3d at 9–11 (collecting cases). U.S. case law provides a broad continuum of how developed and particularized such an expert methodology must be at certification. See, e.g., \textit{Comcast Corp.}, 569 U.S. at 27: Nguyen v. Nissan N. Am. Inc., 932 F.3d 811 (9th Cir. 2019).

\textsuperscript{41} \textit{In re Asacol}, 907 F.3d at 42; \textit{In re Nexium}, 777 F.3d at 30–31; \textit{In re Rail Freight Fuel Surcharge}. 725 F.3d at 244.