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INSTITUTING AN INDIRECT PURCHASER CHECKPOINT: A CASE FOR BLOCKING ILLINOIS BRICK AT THE CANADIAN BORDER

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L'adoption de législations provinciales en matière de recours collectifs aux côtés de l'article 36 de la *Loi sur la concurrence* a mené à une augmentation fulgurante du nombre de recours en compensation pour pertes résultant de complots de fixation des prix. Ce développement a incité des spécialistes en droit de la concurrence à se demander si des acheteurs indirects en aval d'un long réseau de distribution peuvent réclamer des dommages-intérêts de ceux qui fixent les prix en amont de ce réseau de distribution. Pour bien analyser cette question, Aaron Levenstadt juxtapose des précédents et des politiques canadiens et américains. Au terme de son analyse, M. Levenstadt conclut que l'interdiction aux acheteurs indirects de réclamer des dommages-intérêts en vigueur aux États-Unis ne devrait pas être incorporée en droit de la concurrence canadien.

In contrast to the American antitrust experience Canadian competition laws, for most of their history, have been characterized exclusively by public enforcement. In Canada, anti-competitive monitoring has largely been left to the Competition Bureau, a governmental agency responsible for responding to complaints, conducting investigations and levying fines on violators.[1] It was not until 1975, when the predecessor to the current section 36 of the *Competition Act* was enacted, that private parties were given the right to seek damages resulting from violations of competition laws.[2] Section 36 affords any person who has incurred a loss as a result of conduct that the Act deems criminal, to recover an amount equal to the loss proved to have been suffered.[3] As detailed in Part VI, the Act imposes criminal liability on "Every one who conspires, combines, agrees or arranges with another person to prevent or lessen, unduly, competition in the production, manufacture, purchase... sale... or supply of a product."[4] According to this provision, since 1975, injured parties have had the opportunity to recover damages against cartelized companies that have conspired to fix prices.

Despite the harm caused by the anticompetitive conduct, very few cases alleging price-fixing have been brought under the private action provided for by s.36.[5] The complexity and expense associated with competition-related litigation rendered the Canadian justice system largely inaccessible: the costs incurred to privately pursue a claim would, in all likelihood, be greater than the damages awarded to any one claimant. This cost-oriented calculus is particularly vexing for price-fixing victims as the losses suffered, more often than not, are trivial in comparison to the expense and effort entailed in a lawsuit. For that reason, prior to the enactment of class action statutes in Ontario, Quebec and British Columbia, there were virtually no Canadian cases seeking compensation for losses resulting from price-fixing conspiracies.[6]

The introduction of Canadian class actions has been correlated with a sharp rise in private claims alleging price-fixing. As Jason MacLean, a competition lawyer at Osler, Hoskin & Harcourt LLP notes, "There has been a surge in competition class actions in Canada in recent years."[7] Mr. MacLean is certain that bolstering the *Competition Act* with provincial class action statutes has contributed to the dramatic increase in Canadian price-fixing litigation.[8] MacLean explains that banning together similarly afflicted claimants renders it rational to pursue the action because the aggregate damage claim can outweigh the litigation expense.

At the center of an expanding array of price-fixing class actions rests an important precedent. Until November of 2009, *Chadha v. Bayer [2002]* was the only contested price-fixing class action certification motion

that had been entertained by a Canadian appellate court.[9] The logical framework detailed by the Ontario Court of Appeal (OCA) in *Chadha* formed the basis for the courts' analyses of contested price-fixing class action certification motions. More recently, however, *Chadha* has come under attack by an emergent line of precedents. The Ontario Superior Court (OSC) in *Irving Paper Ltd. v. Atofina Chemicals Inc. [2009]*[10] and the British Columbia Court of Appeal (BCCA) in *ProSys Consultants Ltd. v. Infineon Technologies AG [2009]*,[11] faced fact patterns that were remarkably similar to *Chadha*. Yet, they dramatically departed from *Chadha* in much the same way. The rigid doctrine detailed in *Chadha*, sits in irreconcilable conflict with the permissive and flexible approach adopted in *Irving Paper* and *ProSys*. In this paper, I strive to illuminate the benefits and drawbacks of the contrasting approaches as the inter-provincial nature of the conflict renders the contest ripe for Supreme Court review.

This paper begins by detailing the benefits of private actions. Then, I will summarize the Canadian experience with private price-fixing class action certifications. More specifically, I will emphasize differences between the stringent *Chadha* approach and the more recent case law. After examining the cases, I will train my focus on the policy implications of endorsing the rigid *Chadha* logic as opposed to the contemporary and progressive mode of analysis. This policy discussion will be illuminated by American and Canadian literature and precedents.

On first blush, *Chadha* might be applauded for its strict application of the *Competition Act*. A close reading of the Act would seem to support the bright-line rule it inscribes because s.36 demands each plaintiff demonstrate actual loss suffered as a result of the defendant's conduct.[12] However, the modern architecture elaborated in *Irving Paper* and *ProSys* more closely conforms to the intentions of the legislative draughtsmen and to the mutually reinforcing purposes underlying the *Competition Act* and the provincial *Class Proceedings Acts*. With respect to price-fixing private actions, Canada currently finds itself at a crossroads. Forty years of American experience with indirect purchaser class actions offer instructive signposts for charting the debate that the Supreme Court of Canada will likely entertain. After reviewing the work of American legal scholars, I find, for reasons pertaining to policy and principle, the Supreme Court of Canada should endorse the modern liberal certification structure. In so doing, the Court would overrule *Chadha*, endorse *ProSys* and *Irving Paper*, and it would ensure that the *Illinois Brick* doctrine does not encroach on core principles of Canadian justice.

The Case for Private Enforcement of Competition Laws

Although Canada's private enforcement experiment in the competition sphere is but 35 years old, private enforcement of antitrust laws has a long history. The U.K. Statute of Monopolies, enacted in 1623, provided that an individual, financially injured by a restraint of trade, could bring suit and collect treble the quantum of damage suffered as a result of the anti-competitive activity.[13] Modeled on the U.K. Statute, section 7 of the American *Sherman Act* of 1890 stated, "any person who shall be injured in his business or property... by reason of anything forbidden... by this Act may sue therefore... and shall recover three fold the damages by him sustained..."[14] In the fifty years following the passage of the *Sherman Act*, only 175 cases were filed.[15] However, more recent American experience reflects a larger role for private antitrust suits. The Georgetown Private Antitrust Litigation Project collected and analyzed data on private antitrust cases filed between 1973 and 1983.[16] In 1977, across the five American districts analyzed, 1,611 private cases were recorded and the ratio of private to public cases was greater than 20:1.[17] In a separate study, Richard Posner concluded that, between 1890 and 1969, 9,728 private antitrust suits were filed in the U.S.[18]

While the Canadian experience with private actions has comparatively been limited, the robust private regimes operating in Britain and America attests to the possibility that meaningful policy objectives are advanced vis-a-vis the private right. For instance, in considering the goal of deterring would-be competition violators, Gary Becker and George Stigler have argued that the deterrence objective could be as effectively achieved if private individuals, as opposed to governmental entities, enforced the law.[19] This contention is premised on the notion that the aggrieved person, rather than the public official, has a greater incentive to seek justice. The injured individual, rather than the dispassionate public official, has a stronger reason

to exert the effort required to recover damages. For example, as Becker and Stigler point out, bureaucratic apathy, inaction and the possibility of malfeasance could all dissuade the Bureau from prosecuting a violator. According to this argument, it is more effective to reward private enforcers with a "bounty" instead of paying a fixed salary to public enforcers.[20]

When considering the deterrence objective, Becker and Stigler's rationale resonates with the opinion of American Judge Jerome Frank. In the seminal case of *Associated Industries of New York State v. Ickes [1943]*, Frank J. discussed the importance for what he referred to as "private attorney generals" (PAG). Frank J. noted that private litigants could usefully supplement the enforcement efforts of public authorities in achieving critical deterrence objectives.[21] Judge Frank's PAG theory is grounded in the notion that a positive public good can be secured when a private litigant, in advancing her own interests, also vindicates a publicly endorsed standard or norm.[22] Akin to Becker and Stigler's analysis, Frank J.'s PAG theory also focuses on incentives. The theory assumes that private litigants, because of their financial or ideological interests in the matter, will have the requisite incentives to invest in investigation and litigation. Should the PAG be successful in her quest for justice, the public interest would also be decisively advanced.[23]

Judge Frank's PAG theory has been endorsed outside of the courtroom. Professor John Coffee, in his article, *Rescuing the Private Attorney General*, notes, "absent these private actions, the monetary penalties for antitrust... plainly would be insufficient to deter."[24] In Coffee's opinion, from a deterrence perspective, it is better to "leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics."[25] As PAGs have a vested interest in recovering damages, they are more likely than their public counterparts to initiate challenging competition actions. The incentives are strengthened by the PAG's close proximity to the violation, which likely means that the costs to detect the infringement and to gather evidence are less than would be incurred by a governmental bureau that is removed from the circumstances surrounding the offence.[26] Put differently, a firm operating within the impugned industry has regular and repeated interactions with the alleged violator; a critical perspective that a bureaucrat would lack. The firm would therefore have better knowledge about industry practice and would be better able to detect aberrations in industry pricing. From this privileged position, the PAG is able to conduct relatively inexpensive investigations, altering the litigation cost/benefit calculus.[27] In thinking about the deterrence objective, the PAG can reinforce public efforts securing fuller compensation for the damages caused by violations of the *Competition Act*. Larger awards levied on violators will have a stronger deterrent effect.

Canadian academics also note that supplementing public with private actions meaningfully advances the deterrence objective. In a recent article, Michael Trebilcock and Margaret Sanderson noted that the Competition Bureau is constrained both by finances and politics.[28] In speaking to the Bureau's incapacity, the authors find, "The probability of the penalty being successfully imposed will depend on the probability of detection, which in turn is a function of the resources dedicated to uncovering the offence, and the probability that following detection the penalty will in fact be imposed."[29] This finding should be a cause for concern because it implies that public enforcers may be more interested in maximizing their own budgets or political support than in enforcing the law.[30] Coffee, concurring with his Canadian colleagues, discussed a phenomenon whereby institutional pressures can suffocate enforcement efforts:

> Private enforcement also performs an important failsafe...by... ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers or the vagaries of the budget process and that the legal system emits clear and consistent signals to those who might be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies.[31]

In other words, according to Coffee, Trebilcock and Sanderson, at times, public enforcers may be more interested in advancing their own agenda than in purely enforcing competition law. Seen from this vantage point, it is better to have many private enforcers to complement the public bureau; as the latter might be buckling under budgetary constraints or retreating in the face of political pressures. The public prosecutor's decision not to prosecute a matter can be scrutinized by the private enforcer who elects to bring the claim.

Challenging bureaucratic apathy in such a manner can be an important incentive for public enforcers, as a successful private action would lead to the inevitable determination that the government's reluctance would have resulted in a violator's reaping the proceeds of anticompetitive conduct.[32] In this sense, private enforcement imposes an important check on public accountability.

Gary Becker's article, *Crime and Punishment*, supports the notion that private enforcement can increase public agency accountability, especially in compelling the agency to justify its expenditures.[33] By challenging the government's resource expenditure decisions, private enforcers, impose additional accountability on the Bureau's Commissioner. In bolstering Becker's claim, Roach and Trebilcock point to our limited understanding of the incentives operating on politicians and bureaucrats, "...it is inconsistent with general norms of public accountability to vest an enforcement monopoly in the Bureau and its political overseers."[34] Somewhat ironically, the authors conclude, it is particularly incongruous to maintain a public monopoly in the context of the enforcement of competition laws that aim to redress the undesirable social consequences of private monopoly.[35]

On the whole, the case for private enforcement of *Competition Act* violations is strong. For one, private enforcers often find themselves better situated to detect anticompetitive behaviour. Second, because the private actor will be compensated directly for damage sustained, the PAG might be more motivated than the public enforcer to bring the violator to justice. Finally, compared to private enforcers, the Competition Bureau operates under political and financial pressures, and bureaucrats have limited knowledge regarding the impugned industry, rendering it more expensive for them to conduct the investigation. For all these reasons, private parties may be better equipped to effectively investigate and litigate competition violations. From a public interest perspective, private litigants are valuable as a means of holding the Bureau responsible for its prosecutorial decisions. In conclusion, as Jerry Mashaw asserted, "That private parties should want to add resources to those currently available, take on hard cases, or swim against local political currents when seeking to enforce nationally established or approved rules of conduct is no cause for alarm."[36]

Activating the Private Right of Action in the Canadian *Competition Act*

It took nearly one hundred years before a private remedy would be inscribed into the Canadian *Competition Act*. This occasion was supposed to signal a significant step toward furthering the deterrence and compensatory goals that lie at the Act's core. However, in 1975, Mr. Herb Gray, then Canadian Minister of Consumer and Corporate Affairs, stated, "Equally new is the proposal that anyone injured by a violation of the act would be able to sue for full damages and costs ... I believe that to be meaningful this right should be exercisable not only by an individual citizen or government but also by citizens through class or representative actions. It is my hope that the bill in the form in which it is finally approved by parliament will enable class actions to take place for damages caused by violations of it..."[37] Prior to the inscription of the private action into the *Competition Act*, Minister Gray foresaw the amendment's futility. Without a class or representative remedy, awards to be issued in individual cases would not be sizable enough to offset the costs of bringing the proceeding: the private remedy, standing alone, would not be able to provide the practical benefits it promised. Minister Gray's prediction would prove true. For nearly twenty years, price-fixing victims were consistently dissuaded from marshalling their claims.[38]

Chadha v. Bayer [2002] – The Continued Plight of the Indirect Purchaser

With class action legislation now available to bolster s. 36 claims, the injured claimant had overcome a significant hurdle. However, a new set of challenges pertaining to class action certification emerged. The certification decision is pivotal because, should the court fail to certify the class, the action is halted and compensation will, in all likelihood, not follow. As the first contested class action certification motion to be heard by an appellate court, *Chadha* became a landmark decision.[39] Throughout the first decade of this century, the logical framework constructed by the Ontario Court of Appeal (OCA) in *Chadha*, has been the precedential authority governing the courts when evaluating price-fixing class action certification motions.

Chadha is also relevant because it marked the first time that a Canadian appellate court faced the ques-

tion of whether a class of indirect purchasers could recover under the *Competition Act*. In *Chadha*, the plaintiffs were considered indirect purchasers because they did not purchase the price-fixed goods directly. Rather, they were ultimate consumers at the end of a long distribution chain starting at the price-fixer at the top and ending with the plaintiffs' final purchase.

In the case itself, the plaintiff class alleged that between 1985 and 1991 the defendant corporations, major manufacturers and suppliers of iron oxide pigments, illegally colluded to fix and maintain prices of the bricks that were incorporated into their homes and buildings. In the class' pleading, it was alleged that as a result of the conspiracy, the price of real estate containing the price-fixed bricks was greater than what it would have been in a freely competitive market, and all class members suffered damage as a result of overpaying for their homes and buildings.[40]

At this early stage of the proceeding, the critical question was whether the Appellate Court would certify the plaintiff class. A positive decision would permit the action to proceed, whereas, a certification denial would effectively end the action. According to s.5(1) of the Ontario Class Proceedings Act, to certify a class action, the plaintiff must demonstrate: (a) a viable cause of action, (b) an identifiable class of two or more people who are willing to be represented by the representative plaintiff, (c) meaningful common issues, (d) that the class action is the preferable procedure and (e) an adequate representative plaintiff.[41]

From the outset, Justice Feldman, writing for the majority of the OCA, indicated that the court's certification decision would pivot around s.5(1)(c). To borrow Feldman's phraseology, this proceeding "turns on whether this is a case where all end-purchasers paid a higher price for their homes and therefore the loss can be proved on a class wide [common] basis."[42] This sort of evidence would, in Justice Feldman's estimation, satisfy the s.5(1)(c) commonality criterion. In an effort to meet this burden, the plaintiffs called on an expert witness to show that the class of indirect purchasers absorbed the anti-competitive damages stemming from the price-fixing conspiracy at the top of the distribution chain.[43] While not discrediting the expert testimony outright, Feldman expressed concern as, "That evidence does not address the issue of what method could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result."[44] Feldman J. then pointed out what she considered to be the expert's and, by extension, the plaintiffs' fundamental flaw: "... the appellant's expert effectively assumes that higher costs of products containing the respondents' iron oxide pigment would have been passed on to end-users."[45] In Feldman J.'s opinion, this unsupported premise was detrimental to the plaintiffs' case as, "it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified...."[46] In the majority's opinion, the plaintiffs' inability to trace the impact of the collusion from the price-fixers at the top of the distribution chain to the final purchaser at the end was a fatal omission; it left open the possibility that other participants in the distribution chain absorbed the overcharge. The defendants successfully countered the plaintiffs' claims by asserting that it was not possible to prove that that the overcharge was passed through the chain to any of the end-user class members.

For Feldman J., it was important that the plaintiffs show a workable methodology to calculate the magnitude of the damage borne by the class members.[47] The plaintiffs' failure to distinguish between the fact that damage was levied, and the extent to which they were affected by it, precluded certification. In the judge's words, "By seeking to equate the respondents' gain with the class members' alleged loss, the appellants effectively skip over the process of determining who in the chain... absorbed the loss."[48] Although the existence of the cartel was uncontested, Feldman J. was not "... satisfied of certain basic facts required by s.5 of the CPA as the basis for a certification order."[49] In so holding, Justice Feldman set a high evidentiary bar for indirect purchasers alleging price-fixing crimes pursuant to the *Competition Act*.

Section 24 of the Ontario CPA – A New Hope

On the facts of *Chadha*, Feldman concluded that the obstacles to an effective class proceeding overrode its potential benefits.[50] However, she was careful to limit the scope of her decision. In obiter, Feldman noted, "The appellants were unsuccessful in this case because they did not present the evidentiary basis for a certi-

fying court to be satisfied that loss as a component of liability could be proved on a class-wide basis. Whether such evidence could have been obtained is not clear."[51] Therefore, "in this jurisdiction it remains to be determined whether in a particular case a sufficient evidentiary record can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done is a question left open for future cases."[52]

Justice Rady, writing on behalf of the Ontario Superior Court (OSC) in *Irving Paper Ltd. v. Atofina Chemicals Inc. [2009]*, sought to answer that question. This case featured a class of indirect purchasers of hydrogen peroxide alleging that between 1984 and 2005 the defendants "conspired to and did, in fact, allocate markets, restrict supply and increase the price of hydrogen peroxide in Canada..."[53] In a similar fashion to the *Chadha* defendants, here, the hydrogen peroxide manufacturers pointed to serious issues with respect to the 'passing-on' defence; it is not clear whether direct purchasers passed on all, some, or any of the price increase to the indirect purchaser class. [54] The defendant manufacturers maintained that the evidence required to demonstrate any overcharge was passed through all points in the chain, without being absorbed, was too complex and costly to decipher.[55] The defendants cited *Chadha* in an effort to persuade the court that the same complicated individual inquiries that overwhelmed the *Chadha* court were as relevant here. Extending the *Chadha* reasoning, the defendants submitted that the complexities relating to proof of damage should cause the certification test to fail on the s. 5(1)(c) commonality prong.

Justice Rady reviewed the array of post-*Chadha* price-fixing certification motions and concluded, "For those cases that have proceeded to a certification hearing, the results have not been encouraging to plaintiffs."[56] This observation was disconcerting because "the Ontario legislature in drafting the CPA... made a conscious attempt to avoid setting the bar for certification too high."[57] In addition, the Supreme Court of Canada stated that, "The CPA is to be given a broad and liberal interpretation. It should be construed generously and an overly restrictive approach must be avoided in order to realize the objectives of the legislation, namely access to justice, judicial economy and behaviour modification."[58] Given the legislative intent, and the Supreme Court's interpretation of the statute, Rady J. was concerned with the barrier *Chadha* erected.[59]

With that concern in mind, rather than rely solely on *Chadha* and its progeny, Rady J. turned to certification assessments outside of the competition sphere. She shifted her focus to the credit card interest rate cases of *Markson v. MBNA Canada Bank of Canada [2007]* and *Cassano v. Toronto Dominion Bank [2007]*.[60] Justice Rady readily acknowledged, "Neither of these cases were price-fixing conspiracies but some have argued that they represent a sea change in the approach motions judges should take to certification."[61]

In *Markson*, the plaintiffs alleged that the defendant received illegal interest on cash advances in violation of s. 347(1)(b) of the *Criminal Code*.[62] The motions judge held that because the class action would require the bank to review approximately eight million transactions it would be unmanageable. In a decision that mirrored the *Chadha* reasoning, the judge denied certification because many individual, rather than common, issues would dominate the class action.[63] On appeal to the OCA, Justice Rosenberg reasoned that s.24 provided a mechanism by which to calculate class-wide damages for claims that would otherwise have to be determined on a case-by-case basis.[64] The relevant portion of s. 24 states, "The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where... no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability."[65] On his reading of s. 24, Rosenberg J. determined that the purpose of the section was to offer a solution to the common issues problem. Markedly departing from *Chadha*, Rosenberg J. opined, "The defendant submits that liability turns on individual assessments. If the defendant is correct, the kind of action sought to be pursued in this case will almost never be capable of certification... In my view... liability and entitlement to a remedy are sufficient to trigger the application of s.24."[66]

Justice Winkler, in *Cassano*, reinforced Rosenberg J.'s reading of s.24.[67] Winkler J. proclaimed, "It would hardly be sound policy to permit a defendant to retain a gain made from a breach of contract because the defendant estimates its costs of calculating the amount of the gain to be substantial...To give any effect to [this] economic argument... would be to pervert the policy undermining the statute."[68] In sharp contrast to

Chadha, *Markson* and *Cassano* stand for the proposition that certification should not be denied because the defendant's business affairs masks the evidence the plaintiff class requires to prove it suffered damage.

Both *Markson* and *Cassano* held s.24 to mean that even when damages are not amenable to aggregate assessment, certification can still be granted. Supporting this statutory interpretation, Rosenberg J. held, "The subsection [of s.24] therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient... It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2)"[69] Justices Rosenberg and Winkler realized that there was a tradeoff to be made between plaintiff class and defendant corporations. In light of the fact that guilt was established, Rosenberg J. and Winkler J. preferred some class members be overcompensated then the defendant go unpunished. In infusing s.24 with this policy tradeoff, the justices ushered in a paradigm shift in how the judiciary conceived of class action certifications – the plaintiff class need not provide a workable methodology showing that all class members were similarly affected by the impugned conduct.

In extending the s. 24 analyses from the credit card cases to the case at hand, Rady J. noted that the defendants had already entered guilty pleas in criminal proceedings in the United States and Europe.[70] She assumed that these admissions carried over to the Canadian context. Hence, with the admissions on the record, in applying her s.24 test, no questions of law or fact pertaining to liability remained. In examining the competition claim Rady J. reiterated, "*Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis."[71] According to Rosenberg J., the purpose of s. 24 is to offer a solution to the common issues problem. More precisely, "...condition (b) [of s.24] is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments."[72] Armed with this flexible and permissive ruling, Justice Rady extended the implications of the *Markson-Cassano* s.24 analyses to price-fixing class actions.

With the s.24 threshold set at the low *Markson* level, Rady examined the possibility that the overcharge reached at least some class members. Both experts agreed that "the more inelastic the demand, the more profitable it is for a seller to pass on increases in its prices to those who purchase from it."[73] The experts also agreed that certain products at issue, including paper, which requires significant amounts of hydrogen peroxide, have an inelastic demand profile. Such products "possess market characteristics that would enable suppliers to passthrough anti-competitive increases in the price of hydrogen peroxide."[74] Following this assessment through, Justice Rady was satisfied in that the overcharge might have been passed on to class members, and with the *Markson-Cassano* tradeoff in mind, she certified the indirect purchaser class. By invoking s. 24 to override the commonality prong of s.5 of the CPA, Rady J. broke with the OCA's decision in *Chadha*, and carved out a more promising path for classes alleging price-fixing.

Chadha Reexamined at the Appellate Level

While Justice Rady was considering *Irving Paper* in Ontario, *ProSys* was working its way through the courts in British Columbia. In *ProSys*, the plaintiffs were a group of computer purchasers who indirectly bought pre-installed dynamic access random memory (DRAM). They alleged that the defendants, a consortium of DRAM manufacturers, were part of a global price-fixing scheme setup to artificially raise the price of DRAM and, hence, the computers they purchased.[75] Although it was handed down in a different province, Justice Marshura, of the British Columbia Supreme Court (BCSC) acknowledged the Ontario decision of *Markson*. However, unlike Rady J. who read the case as stating "that not every class member need have suffered a loss... to show damages on a class-wide basis,"[76] Marshura J. took the precedent to mean that the plaintiff still needs to show a model to prove that at least some class members suffered harm at the hands of the defendants. He concluded, only if "this hurdle is overcome, the aggregate damage provisions of the act are triggered."[77] On this interpretation of *Markson*, Marshura J. found that the plaintiff class had not demonstrated that it could prove on common evidence that the overcharge was passed through the distributing and marketing chains. Therefore, Marshura J. concluded that the indirect purchasers did not meet the evidentiary burden estab-

lished in *Chadha*. He stated, "In my view, *Chadha* remains good law in precluding the plaintiff from resorting to the aggregation provisions of the Act to establish liability."[78]

In November of 2009, Justice Smith, of the British Columbia Court of Appeal (BCCA) overruled the lower court's holding. Smith J. "necessarily rejected the conclusion... that an aggregate award cannot be a common issue..."[79] In *ProSys*, like in *Irving Paper*, the defendants' entered guilty pleas to the conspiracy charges in the United States. Thus, Smith J. took wrongful conduct as a given and held the defendants' attempt to unjustly enrich themselves as sufficient to establish liability.[80] This section of the holding critically breaks from *Chadha* wherein Feldman J. demanded expert evidence tracing the overcharge from the price-fixer at the top of the supply chain through to the class members at the bottom. Without that guidance, she refused to certify the class because she held that the liability the defendants owed the plaintiffs had not been established. To the contrary, Smith J. was satisfied certifying the class with only the expert's aggregate assessment alongside the defendants' wrongful conduct.

The BCCA deviated from the OCA in *Chadha* in a remarkable fashion. Smith J. held that certification need not hinge on the class' capability to prove that they, in fact, suffered any damage. Theoretically speaking, all of the price-fixing impact could have been absorbed upstream yet, according to *ProSys*, the class could still be certified. To support this decision, Smith interpreted s.29 of the B.C. CPA, the analogue to Ontario's s.24, as affording him the power to "affirm the certification of an aggregate monetary award under the CPA as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct..."[81] On this flexible reading of s.29, *ProSys* sits in irreconcilable conflict with *Chadha*. The former permits, and the latter precludes, certification simply by proving that the gains to the defendant would not have been amassed but for their wrongful conduct.

The Canadian Judiciary at a Crossroads

Two competing lines of logic, one elaborated in *Chadha* and the other in *ProSys* are courting the Canadian judiciary. Each mode of reasoning professes to provide the most appropriate evaluative framework for determining whether classes of indirect purchasers alleging price-fixing should be certified. In weighing the benefits and drawbacks of the divergent approaches, I turn to key American precedents and legal scholarship that will serve to illuminate the Canadian debate.

Eight years ago when *Chadha* was handed down, a very heavy evidentiary burden was placed on the plaintiff class. At the time, Michael Osborne, a class action lawyer at Affleck Greene McMurtry LLP stated, "...class actions for price-fixing by indirect purchasers that are at the end of a long distribution chain are virtually dead in Canada."[82] *Chadha* seemed to de facto, if not de jure, impose a complete bar on indirect purchaser claims. In that respect, *Chadha* mirrors the American case of *Illinois Brick Co. v. Illinois [1977]*.[83] The bright-line rule had, until the *Irving Paper-ProSys* renaissance, also been the status quo in Canada. I now turn to arguments canvassed in the United States, with the aim of questioning whether the Supreme Court of Canada should endorse the bar on indirect purchaser standing.

The Development of the American *Illinois Brick* Doctrine

Throughout the 1960s, a number of consumer class actions were launched in various American states wherein both plaintiffs and defendants invoked passing-on to bolster their respective arguments.[84] Defendant-sellers argued that direct purchaser plaintiffs sustained no injury because overcharges were passed on to the next participant in the distribution chain. Conversely, plaintiff-purchasers sought to prove injury by showing that middlemen passed overcharges on to them.[85]

Given the complexity associated with passing-on generally, the judiciary was rightly confused regarding how to handle the contrasting claims. Various district and appellate courts recognized passing-on as a valid defence to private antitrust claims.[86] For example, in a series of actions known as the "oil jobber" cases, courts permitted the passing-on defence.[87] The permissive stance that US courts had adopted, was altered by the Court's ruling in *Hanover Shoe, Inc. v. United Shoe Machinery Corp. [1968]*. [88]

The plaintiff, Hanover Shoe, a shoe manufacturer and customer of United Shoe Machinery Corp., brought the action against United Shoe alleging monopolization of the shoe machinery industry.[89] The question was whether Hanover Shoe could recover damages for United Shoe's decision to not sell certain manufacturing machines. The plaintiff sought damages for the difference between the amount it paid for the machines and the amount it would have paid had it been able to purchase the machines from United Shoe. In response, the defendant argued that any loss suffered by Hanover Shoe has been passed on to its customers and that the company therefore suffered "no legally cognizable injury."[90]

The U.S. Supreme Court rejected the pass-on defence, holding that a direct purchaser could recover all illegal overcharges, whether or not they had passed them on.[91] Justice White, writing for the majority, stated, "We think it sound to hold that, when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high, and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of § 4 [of the Clayton Act]."[92] Moreover, "...if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product."[93] In addition to this compensatory rationale, the majority also noted that permitting the passing-on defence reduces the efficacy of the deterrent force of private antitrust enforcement. Reason being, direct purchasers will be reluctant to launch suits if manufacturers can relieve themselves from liability by deploying the passing-on defence. The majority was troubled by the prospect of monopolizing manufacturers using the passing-on defence to retain the "fruits of their illegality."[94] To compensate victims and to dissuade would-be offenders, in *Hanover Shoe*, the U.S. Supreme Court categorically rejected the use of the passing-on defence.

The implication of this decision was that direct purchasers were assumed to have fully absorbed the illegal price increases. Nearly a decade later, in *Illinois Brick*, the Court converted this logical corollary into law. In the case itself, the State of Illinois and 700 governmental affiliates alleged that a cartel of concrete block manufacturers were illegally conspiring to raise the prices of the bricks bought by the indirect purchaser governmental organizations.

In keeping with *Hanover Shoe*, Justice White also delivered the opinion of the *Illinois Brick* Court, and he extended the passing-on prohibition from the defendant to the plaintiff. White J. held, "If a pass-on theory may not be used defensively by an antitrust violator (defendant) against a direct purchaser (plaintiff), that theory may not be used offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant). Therefore, unless *Hanover Shoe is* to be overruled or limited, it bars respondents' pass-on theory."[95] Justice White continued, "The Court's perception in *Hanover Shoe* of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world, rather than an economist's hypothetical model,' applies with equal force to the assertion of pass-on theories by plaintiffs as it does to such assertion by defendants."[96]

In extending the prohibition to indirect purchaser plaintiffs, one of the Court's main concerns pertained to duplicative liability. Should an indirect purchaser successfully establish a claim for damages, under *Hanover Shoe*, the direct purchaser would still automatically recover the full amount of the overcharge.[97] In large part, to avoid the prospect of multiple recoveries, the United States Supreme Court barred any indirect purchaser from bringing an antitrust claim in the federal courts.

Unlike *Hanover Shoe*, which was well received by those who regarded private actions as an important means of deterring antitrust violation, *Illinois Brick* was far more contentious. George Benston, a law and economics professor at Emory University, observed, "The *Illinois Brick* decision...brought forth a flood of protests..."[98] Editorials in some of the country's largest newspapers framed the decision as manifestly unjust to consumers.[99] In response to the public outcry, various American states put forward bills and, in some cases, enacted legislation that granted indirect purchasers standing. These *Illinois Brick* repealer states were motivated because of the perceived need to compensate those "actually harmed" by price-fixing.[100]

The following section of this paper strives to assess the merits of the arguments for and against upholding *Illinois Brick* in the United States and more formally adopting the rule in Canada. I will pivot this analysis around the deterrence and victim compensation objectives. Finally, I will evaluate the tradeoffs of the different approaches and will conclude with a recommendation.

The Case for the *Illinois Brick* Doctrine

In 1986, George Benston published an article in the Antitrust Law Journal in which he comprehensively examined the costs and benefits associated with the *Illinois Brick* rule. After weighing all the factors, Benston came out in support of the doctrine. His primary reason for bolstering *Illinois Brick* revolved around the costs and complexities of proving that the illegal overcharges were, in fact, passed on. Benston noted that because elasticity of demand varies amongst consumers, passing-on is rarely an "all or nothing" phenomenon.[101] Rather, because suppliers must contend with the possibility that customers will substitute products, the percentage passed on will be strategically set to retain as many elastic customers as possible.[102] Thus, theoretically speaking, it should be possible to estimate the percentage passed on after determining the elasticity of the intermediary's customer base. However, in practice, as Benston discovered, predicting price elasticities is nearly impossible. For example, assume a restaurant has purchased price-fixed produce from a supplier. The same restaurant then uses some of these vegetables, along with other ingredients, as part of an entrée. Benston asks, "How does one determine how much a restaurant patron pays for a meal as a consequence of price-fixed food... and how much is absorbed by the restaurant?"[103] If the elasticity of the meal purchaser is near impossible to decipher, than predicting the portion of the overcharge passed on is equally challenging.[104]

In addition to the expense entailed in proving passing-on, a second reason to support *Illinois Brick* is related to the efficiency of the damage recovery process. According to American academic William H. Page, the most efficient plaintiffs are direct purchasers because they have the greatest knowledge of the market in issue. As a consequence of their close proximity to the alleged price-fixer, they often have knowledge of the costs of production and industry-standard "markups."[105] Hence, direct purchasers are best situated to distinguish legitimate price increases from illegal price hikes.[106] As an additional benefit, because of the direct purchaser's specific knowledge of the alleged conspirator, they will be less likely to bring an action against an innocent producer. By decreasing the potential for frivolous and vexatious suits, while increasing the likelihood that true criminals are held accountable, Page concludes that *Illinois Brick* should be upheld.

Illinois Brick proponents also argue that restricting standing to direct purchasers instills an incentive structure that promotes the deterrence objective. Launching a lawsuit is an expensive endeavour. Moreover, as the class expands the costs increase, while the potential benefit to each class member decreases. Page found that, "While the evidence shows that direct purchasers will sue for the full overcharge, it is less clear that they will have adequate incentive to sue for an indeterminate share of the overcharge."[107] In other words, price-fixers are more likely to be sued when the potential rewards to direct purchasers are not diluted by indirect purchaser claims.

This concern is heightened because the number of indirect purchasers is likely to be greater than the number of direct purchaser class members. Take the case of manufacturer-wholesaler-consumer relationship, there will likely be more end consumers than direct purchasing wholesalers. If the end consumer is granted standing, then, according to this argument, the wholesaler who detects price-fixing will be less likely to bring a claim. Reason being, if there are many indirect purchasers, the wholesaler's share of the "bounty" might not only be diluted; it could effectively be drowned out. Overturning *Illinois Brick*, and thereby expanding the pool of potential claimants, would decrease the deterrent force dissuading would-be violators, as they would be cognizant of the collective action problem impeding the initiation of a lawsuit.

The Argument against the *Illinois Brick* Doctrine

When *Illinois Brick* was handed down, advocates arguing against the bright-line rule were vociferous. The criticism began with the dissenters in the case itself. Justice Brennan emphasized the primary purpose

underlying American antitrust legislation: "Today's decision goes far to frustrate Congress' objectives in creating the treble-damages action.... In the Clayton Act of 1914, Congress extended the § 7 remedy to persons injured by 'any violation of the antitrust laws. These actions were conceived primarily as opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giving the injured party ample damages for the wrong suffered."[108] Brennan J. centered his dissent on the majority's neglecting to account for the legislature's intent with respect to victim compensation.

One year after *Illinois Brick* was handed down, the U.S. Supreme Court in *Reiter v. Sonotone Corp. [*1978*]* accredited Brennan J's dissent.[109] In *Reiter*, the Court held, "Congress designed the Sherman Act as a consumer welfare prescription."[110] This sentiment guided the Court's decision in that case. By upholding *Illinois Brick* on the one hand, and vindicating consumer rights on the other, the Court has attempted an awkward balancing act. Both before and after *Illinois Brick*, state and federal courts have struggled in weighing these competing interests.

The American academy has attempted to articulate a more methodical, and less arbitrary, approach to balancing the interests. The legal-academic team of Bares, Fanelli, Gordon and Murphy put forward a compelling case against the continued application of the *Illinois Brick* doctrine. According to the authors, the difficulty with the decision begins with the realization that the direct purchasers very rarely absorb the entire overcharge.[111] The authors found that the bulk of price-fixing damage is passed on and eventually falls on the consumer.[112] Building on this finding, the authors deduced, "the lack of direct compensation for purchasers actually injured reduces the *[Illinois Brick]* mechanism's attractiveness... to the extent that those injured are not those who benefit... windfall gains result, thus compromising the compensatory goal of the antitrust laws."[113] The crux of their claim revolves around aggressive direct purchasers that can "game" the system by passing-on the entirety of the overcharge and then suing the cartel. Thus, direct purchasers stand to gain a windfall by recovering damages that they did not suffer.

With competing concerns in mind, the authors conclude, the legislatures "should acknowledge the competing policies identified in *Illinois Brick*, and require courts to balance them on a case-by-case basis."[114] In summary, the authors argue that *Illinois Brick* is an overly broad solution to a nuanced and complicated problem.

Another reason to support the anti-*Illinois Brick* movement is grounded in the supposition that direct purchasers will pass-on the overcharge when it is risk-free to do so and, at the same, avoid litigation. Lawsuits are expensive and there is no guarantee that the plaintiff class will be rewarded for their efforts. The time, cost and effort required to extract a potential reward might dissuade the rational direct purchaser from pursuing a legal avenue. Even if the direct purchaser is reasonably certain of the cartel's existence, in simply passing-on the overcharge no expense has been incurred and resources that would have been absorbed by a lawsuit can be redirected to the intermediary's core business. In *Illinois Brick*, the high likelihood that the direct purchaser would simply pass on the overcharge was not lost on Justice Brennan. In dissent he noted, "Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers."[115] Assuming elasticities permit, the direct purchaser would be acting rationally by deferring legal action and selecting the risk-free passing-on option.

Instead of acknowledging the possibility that the overcharge would be passed on, the *Illinois Brick* majority concentrated on the complexity and expense associated with proving that the overcharge was, in fact, passed on. Justice Feldman, in *Chadha*, mirrored the *Illinois Brick* mode of analysis when referring to the "... massive record-tracing exercise [that] will be required to establish the inclusion of the respondents' product in any particular structure. The respondents point out that the period over which records must be obtained spans seventeen years. The respondents also point to the many intermediary parties from whom those records, if they exist, must be sought."[116] The implication to be drawn from the *Illinois Brick—Chadha* reasoning is disconcerting because price-fixers can shield themselves from legal recourse by enmeshing their operations in sufficiently complicated corporate infrastructure.

Courts in the *Illinois Brick* repealer states have been particularly sensitive to this inference. In *Hyde v. Abbott Labs [1996]*, the North Carolina Court of Appeal rejected the pharmaceutical company's complex corporate organization defence. In certifying the indirect purchaser class the *Hyde* majority explicitly rejected the *Illinois Brick-Chadha* rationale: "... fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser.[117] Then, in *Goda v. Abbott Laboratories [1997]* the District of Columbia Superior Court held, "If we disdain the expert's theories as does the *Illinois Brick* majority, and demand singular facts involving the particular individuals in the specific context of their market, the class action is virtually doomed in indirect purchaser cases. But if we assume the commission of a wrong that has resulted in some injury, albeit one difficult to measure, the allowance of 'reasoned estimation' and 'approximation' is not without appeal."[118]

Even American academic William Page who has argued in support of the *Illinois Brick* doctrine appears uncomfortable with the ramifications stemming from the complexity defence. Page wrote, "Most of the factors that preclude certification of classes of indirect purchasers have little to do with whether a price-fixing conspiracy actually existed or whether indirect purchasers bore an overcharge... Yet these factors may preclude certification because they make it impossible to establish harm to each class member by any kind of common proof."[119] In many cases, the harms resulting from price-fixing will "dissolve into the currents of the channels of distribution."[120]

The arguments proffered against the continued application of *Illinois Brick* are compelling. Although the *Illinois Brick* majority inscribed a bright line rule that denies indirect purchasers the opportunity for compensation, a chorus of American scholarship has staunchly supported a case-by-case approach to the question of indirect purchaser recovery.

The Current Canadian Stance on Passing-on

While the arguments pertaining to the passing-on defence have been thoroughly canvassed in the United States, the issue is not all together foreign to the Canadian judiciary. In fact, the Supreme Court's decision in *British Columbia v. Canadian Forest Products Ltd. [2004]* squarely addressed the passing-on question.[121] In that case, the province claimed lost revenue from the destruction of harvestable trees that were damaged in a forest fire caused by the defendant company.[122] In its defence, the company claimed that the plaintiff suffered no loss because it proportionately raised the price for the other trees sold, leaving the province with the same overall revenue. In assessing this argument, Justice Binnie, held, "...it is not generally open to wrongdoers to dispute the existence of a loss on the basis that it has been passed on by the plaintiff."[123] In holding the defendant company liable, even though the plaintiff had not suffered any measureable loss, the Supreme Court of Canada supported the principle that defendants should not be able to avoid liability because of a fortuitous turn of events.

Policy Reasons for Extending *CFP* to Price-Fixing Cases

Canadian Forest Products (CFP) encompassed a specific set of facts; however, Binnie's majority opinion addressed a broader inquiry. In his decision, Binnie questioned whether his refusal to accredit the 'passing-on' defence should "be extended to the whole of private law?"[124] In response, Binnie unequivocally stated, "My overall conclusion is that the passing-on defence, on the facts of this case **and generally**, must not be allowed to take hold in Canadian jurisprudence."[125] [emphasis added]

In analogous fashion to *Hanover Shoe*, the Supreme Court of Canada's categorical rejection of the passing-on defence in *CFP* was grounded in sound policy reasons. The Court felt it unjustly burdensome to request the plaintiff "engage in a very difficult economic analysis to show that it did not recoup losses by charging higher prices to customers."[126] Because, "On a macro-economic level, the Crown would be unable to separate the effect of the increased stumpage fees resulting from the forest fire from the effect of the increased stumpage stemming from other factors affecting the timber harvesting market in B.C."[127] The Court was concerned about the challenge the Crown would face in adducing the economic proof required to show that, after a lengthy period of post-tort business activity, it had suffered the same quantum of loss that was initially attributed to the tortious conduct.

In describing this difficulty, the Court points to a number of variables that could change between the time the tort was committed and the date of the trial. These factors include, "a single supply less expensive, general economic conditions more buoyant, or the labor marker tighter"[128] To ask the plaintiff to account for these virtually unascertainable figures, all of which fluctuate with regular business activity, is to make a near-impossible request. Employing Justice Binnie's turn of phrase, placing this burden on the Crown is unfair because of the "endlessness and futility of the effort the Crown would have to make to rebut the presumption that has been held against it."[129]

The plaintiffs in price-fixing class action certifications face equally daunting economic terrain. In *Chadha*, Feldman pointed to a plethora of factors that preclude the plaintiffs from adducing the proof that a strict reading of s. 36 requires:

> The appellants would have to show that the price increase (or a part of it) was passed through from the respondents to the building materials manufacturer and distributor, to the builder, to the purchaser and on to any subsequent purchaser. If the price increase was absorbed at any point, the chain would be broken. [130]

Feldman J. essentially concedes the impossibility of proving loss on a class-wide basis. Yet, because of her strict construction of the statute, she opined, "It is my view that the complexity of the proceeding favours rather than detracts from a class proceeding."[131]

Justice Rosenberg, writing for the majority in *Markson*, took issue with Feldman's perspective. The crux of his certification decision also turned on the complexity surrounding corporate activity. However, in contrast to *Chadha*, Rosenberg J. refused to hold the plaintiffs accountable for their inability to adduce evidence when this incapacity was a direct result of the defendant's enigmatic corporate design. In speaking to the plaintiffs' plight, Rosenberg J. stated, "the defendant has structured its affairs such that it is practically impossible to determine the extent of its breach... I should not be taken as having found that the defendant deliberately structured its affairs to avoid a possible class proceeding... The fact remains... that the precise extent of any violation of s. 347 can be determined only at great cost."[132] Rosenberg J.'s policy concern seamlessly transfers to the price-fixing arena: Permitting an alleged conspirator to avoid liability by structuring its corporate affairs in a manner that conceals the exact evidence that the statute demands the plaintiff produce leads to an unconscionable result – defendants can retain unlawful gains by ensconcing themselves in complicated corporate arrangements.

Complementing Rosenberg J's rationale, Roach and Trebilcock offer an anti-*Illinois Brick* corrective justice argument. The authors begin by pointing to a postulate of corrective justice theory: "where one party engages in a form of wrongdoing... a legal obligation is recognized to correct for the consequences of that wrongdoing. This theory of corrective justice best explains why in various areas of private law we recognize the right of innocent parties to secure compensation from those who have wronged them."[133] The authors then turned to well-trodden areas of the law wherein linking chains of causality can also be an arduous undertaking. For instance, they note, "In many tort and breach of contract actions, the ultimate incidence of an otherwise uncompensated loss is equally difficult to determine, yet this has not been regarded as a persuasive objection to the award of compensation for tortious and contractual wrongdoing."[134] If in tort and contract cases plaintiffs are offered the opportunity to connect the causal chain, why should indirect purchasers be denied that same privilege in the competition arena? Roach and Trebilcock regard this difference in treatment as illogical, arbitrary and unjust. [135]

Critical Cross Border Differences

In addition to the principled and policy reasons discussed in the previous section, the Supreme Court of Canada should refrain from endorsing the *Illinois Brick* doctrine because of three critical factors that differentiate Canada from its southern neighbour.

The first dissimilarity relates to the possibility that indirect purchasers launch vexatious "strike suits" against innocent corporate citizens.[136] As George Benston noted, "treble damage awards increase the incen-

tive for people to sue. The plaintiff incurs only the costs of time and of investigating and filing a complaint."[137] Moreover, the reputational costs and legal fees associated with merely the prospect of facing a price-fixing action are formidable. Because of the costs that defendants, innocent or guilty, incur, "Attorneys, therefore, can find it desirable to threaten actions and then be willing to settle early in the game. This practice is particularly effective where there are a relatively large number of potential defendants... For lawyers who play this game, it matters less whether the producer actually is guilty of price-fixing than whether the producers are likely to settle."[138] One of the reasons Benston supported *Illinois Brick* was because he was concerned with the possibility that innocent companies would be "bullied" into unjust settlements by entrepreneurial attorneys.

Benston's apprehension over the extraction of illegitimate settlements should be alleviated in Canada. For one, Canadian law does not permit the court to award treble damages in antitrust actions. This difference, in and of itself, reduces the incentive to bring unmeritorious claims. Second, in Canada, courts review all class action settlements. Canadian judges can strike down any settlement considered to be unjust or counter to the CPA's objectives. By comparing counsel's proposed fee structure against its own calculations, "Canadian courts have avoided the enormous U.S.-type fees resulting from fee awards based on thirty-three or forty percent of the settlement amount."[139] In sum, Benston's compunctions regarding vexatious lawsuits are less prevalent in the Canadian context.

A second critical distinction between Canada and the US appertains to the possibility of multiple recoveries. In *Illinois Brick*, Justice White bolstered his decision to bar indirect purchasers because he was disturbed by the possibility that a defendant might be over penalized. For, "Allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants, since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still automatically recover the full amount of the overcharge that the indirect purchaser had shown to be passed on..."[140]

Canadian courts have been sensitive to concern. For example, in *ProSys*, Justice Smith, of the BCCA, acknowledged the lower court's uneasiness and fashioned a solution by narrowing the proposed class "...to the exclusion of direct purchasers of DRAM who have settled in actions against the respondents in the United States"[141] By altering the class definition, Smith J. limited class membership to those purchasers who had not recovered in the American cases, and who had thus suffered an uncompensated loss. In practice, as *ProSys* attests to, class definitions have been deftly tailored to avoid the *Illinois Brick's* "unseemly specter of duplicative liability." [142]

Finally, the American apprehension associated with the complexity and expense of tracing the price-fixing impact is, in certain circumstances, not a relevant consideration in Canada. A modern line of Canadian case law interprets s.24 of the Ontario CPA, and its BC equivalent, as offering the courts the leeway to certify classes without considering complicated individual inquiries. Ostensibly, the purpose for including these "commonality override" provisions in the CPAs was to ensure that class actions are not derailed because of issues related to ultimate proof at the threshold certification stage when all questions regarding the defendant's liability have been resolved. The presence of Ontario's s.24, and its provincial equivalents are noticeably absent from the American class action statutes. Unlike courts in the United States, Canadian courts have been instructed to avoid the burdensome inquiries that the *Illinois Brick* and *Chadha* courts were distressed over.

These three critical differences significantly reduce the risks associated with indirect purchaser standing. In Canada, the absence of treble damages and court oversight reduces the risk of vexatious lawsuits. To date, Canadian courts have constructed classes to avoid duplicative liability. Finally, when no questions of liability remain, plaintiff classes are, vis-a-vis s. 24, exempt from the proof of passing-on requirement. For these three reasons, in conjunction with the policy reasons detailed above, the *Illinois Brick* doctrine should not be adopted in Canada. In comparison to the American system, the unique attributes of the Canadian judiciary render it particularly amenable to indirect purchaser class actions.

Conclusion

When it comes to contested price-fixing certification motions, Canada sits at a crossroads. *Chadha* and its progeny set a high threshold for price-fixing class action certifications. However, the argumentative architecture detailed in *Chadha* has come under attack by a recent line of precedents that has proposed a competing evaluative matrix. The BCCA, in *ProSys*, handed down a decision that undermined the OCA in *Chadha*. The inter-provincial nature of this tension will likely attract the attention of the Supreme Court. Should Canada's highest court elect to entertain an indirect purchaser class action certification, only one of these approaches can be endorsed.

I began this paper by juxtaposing the logic deployed by the OCA in *Chadha* with the more recent case law of *Markson, Cassano, Irving Paper* and *ProSys*. I then shifted my focus to the forty years of American academic commentary and jurisprudence. I discovered that the key arguments supporting *Illinois Brick* were related to deterrence, a concern over the complexity of proving passing-on, and finally, misgivings regarding frivolous strike suits and duplicative recovery. On the other side of the *Illinois Brick* wall stand a cohort of American legal-academics that have argued for a case-by-case approach instead of a complete bar. In Canada, Laskin, Roach and Trebilcock also prefer offering indirect purchasers the opportunity to make their case. Finally, I illuminated critical differences in the application and administration of the class proceeding acts in Canada as compared to the United States. North of the border, court oversight and the operation of s.24 of the CPA are additional reasons to prevent the *Illinois Brick* doctrine from being incorporated into Canadian common law.

In light of the policy goals emphasized by both the CPA and the *Competition Act*, the Supreme Court should uphold *Prosys* and overrule *Chadha*. While *Chadha* might be applauded for strictly construing s. 36 of the *Competition Act*, *ProSys* conforms to the purpose underlying the nexus of the *Competition Act* and the provincial CPAs – to provide an effective and efficient mechanism to compensate victims and to deter those seeking to engage in conduct that violates the price-fixing criminal prohibition of the *Competition Act*.

A final reason to support the overturning of *Chadha* has not yet been canvassed, but it is no less important. *Chadha* was decided in 2002 in the context of a very different economic climate. Following a brief post-9/11 recession, the North American economy began a strong recovery. While I am admittedly speculating, it seems at least likely that against a backdrop of optimism and widespread economic prosperity, the public would not have been much concerned with minor harms arising from price-fixing.

In 2010, the world is facing a very different economic situation. The developed world is currently in the midst of the worst recession since the Second World War. With corporate corruption seemingly rampant, every state institution, courts included, should be troubled by the weak economy and the correlative metric of consumer confidence. For this reason, at this moment in time, the low evidentiary bar set in *ProSys* should be preferred over the restrictive rulings in *Illinois Brick* and *Chadha*. The possibility of a court meaningfully punishing a price-fixing conspiracy through class action certification could infuse the contemporary economic environment with an incentive structure that promotes corporate accountability. This ethical injection might have a positive effect on an ailing North American economy. To the contrary, offering sanctuary to alleged criminals who cloak their crimes in complexity diminishes the integrity of a judicial system that purports to be principled and fair.

Endnotes

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[3] *Competition Act*, R.S.C. 1985, c. C-34., s. 36.
[4] See *Competition* Act, *ibid.*, s. 45.
[5] Glen Leslie & Stephen Bodley, "The Record of Private Actions under Section 36 of the Competition Act" (1993) 14 Can. Comp. Rec. 50.
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[10] *Irving Paper Ltd. v. Atofina Chemicals Inc.*, 2009 CarswellOnt 8610 (WLeC) [*Irving Paper*].
[11] *ProSys Consultants Ltd. v. Infineon Technologies AG*, 2009 CarswellBC 3035 (WLeC) [*ProSys*].
[12] *Supra* note 3.
[13] *An Act concerning monopolies and dispensations with Penal Laws and forfeitures thereof*, (U.K.), 21 Ja. I, c.3.
[14] *An Act to Protect trade and commerce against unlawful restraints and monopolies*, ch. 647, 26 Stat. 209 (1890).
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[16] *Ibid.*
[17] *Ibid.*
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[20] *Ibid.*
[21] *Associated Industries of New York State v. Ickes,* 1943, 134 F.2d 694 at 704.
[22] *Ibid.*
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[24] John Coffee Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working" (1983) 42 Md. L. Rev. 224-5.
[25] *Ibid.*
[26] *Supra* note 1 at 480.
[27] *Ibid.* at 479-80.
[28] *Supra* note 9 at 16.
[29] *Ibid* at 18.
[30] Mark Cohen & Paul Rubin, "Private Enforcement of Public Policy" (1985) 3 Yale J. on Reg. 170.
[31] *Supra* note 24 at 227.
[32] *Supra* note 1 at 483.
[33] Gary Becker, "Crime and Punishment: An Economic Approach" (1968) 76 Journal of Political Economy, at 169.
[34] *Supra note 1* at 500.
[35] *Ibid.*
[36] Jerry Mashaw, "Private Enforcement of Public Regulatory Provisions: The 'Citizen Suit'" (1975) 4 Class Action Rep. at 34.
[37] *Supra* note 6 at 466.
[38] *Ibid. at 463.*
[39] *Chadha. v. Bayer Inc.* ,(2002) 168 O.A.C. 143, 63 O.R. (3d) 22 [*Chadha*].
[40] *Ibid.* at para. 1-2.
[41] See S. 5. Class Proceedings Act, 1992, S.O. 1992, c. 6.
[42] *Supra* note 39 at para 20.
[43] *Ibid* at para 27.
[44] *Ibid.* at para. 30.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.* at para 4.
[48] *Ibid.* at para. 61.
[49] *Ibid.* at para 29.
[50] *Ibid.* at para.64.
[51] *Ibid.* at para 65.
[52] *Ibid* at par. 68.
[53] *Supra* note 10 at para 1.
[54] *Ibid.* at para 22.
[55] *Ibid.*
[56] *Ibid.* at para 36.
[57] *Ibid.* at para 50.
[58] *Ibid.* at para 32.
[59] *Ibid.* at para 64.
[60] *Ibid.* at paras 65-6.
[61] *Ibid.* at para 65.
[62] *Markson v. MBNA Canada Bank* (2007) ONCA 334, 85 O.R. (3d) 321 [*Markson*].
[63] *Ibid.* at para 23.
[64] *Ibid.* at para 43.
[65] See s. 24 . Class Proceedings Act, 1992, S.O. 1992, c. 6.
[66] *Supra* note 62 at paras 41-6.
[67] *Cassano v. Toronto Dominion Bank* (2007) ONCA 781, 87 O.R. (3d) 401 [*Cassano*].
[68] *Ibid.* at para 49.
[69] *Supra* note 62 at paras 49-50.
[70] *Supra* note 10 at para 3.
[71] *Ibid.* at 118.
[72] *Ibid.* at 71.
[73] *Ibid.* at 135.
[74] *Ibid. at 136.*
[75] *ProSys Consultants Ltd. v. Infineon Technologies AG*, 2008 CarswellBC 943 (WLeC) [*ProSys*].
Note: This citation references the British Columbia Supreme Court decision.
[76] *Supra* note 10.
[77] *Supra* note 75 at para 168.
[78] *Ibid.* at para 176.
[79] *Supra* note 11 at para 32.
[80] *Ibid.* at para 33.

[81] *Ibid.* at para 39.
[82] Michael Obsorne, "Complex Distribution Chain Kills DRAM Class Action – Pro-Sys Consultants Ltd. v. Infineon Technologies AG" *Canadian Competition Record* (7 April 2009) online: <www.thelitigator.ca>.
[83] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) *[Illinois Brick].*
[84] *See* Freedman v. Philadelphia Terminals Auction Co., 301 F.2d 830; Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 165 (1922).
[85] Barbra Bares, Cecilia Fanelli, Todd Gordon, William Murphy, "Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation" (1977-78) 63 Cornell L. Rev. 312.
[86] *Ibid.* at 314.
[87] *Ibid.*
[88] *Ibid.*
[89] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) *[Hanover Shoe].*
[90] *Ibid.* at 487.
[91] *Supra* note 85 at 314.
[92] *Supra* note 89 at para 489.
[93] *Ibid.*
[94] *Ibid* at para 494.
[95] *Supra* note 83.
[96] *Ibid.* at paras 731-33.
[97] *Ibid.* at paras 730-31.
[98] George Benston, "Indirect Purchasers' Standing To Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals To Change the *Illinois Brick* Rule" (1986) 55 Antitrust L.J. 214.
[99] *Ibid.*
[100] William Page, "The Limits of State Indirect Purchaser Suits: Class Certification In the Shadow of *Illinois Brick*" (1999-2000) 67 Antitrust L.J. 1-2.
[101] Supra note 98 at 221.
[102] *Ibid.* at 222.
[103] *Ibid.* at 225.
[104] *Ibid.* at 222.
[105] *Supra* note 100 at 29.
[106] *Supra* note 98 at 234.
[107] William Page, "Class interpleader: The Antitrust Modernization Commission's recommendation to overrule Illinois Brick" (2008) 53 Antitrust Bull. 737.
[108] *Supra* note 83.
[109] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978).
[110] *Ibid.* also see note 100 at 31.
[111] *Supra* note 85 at 312.
[112] *Ibid.* at 311.
[113] *Ibid.* at 327.
[114] *Ibid.* at 311.
[115] *Supra* note 83.
[116] *Supra* note 39 at para 57.
[117] *Supra* note 100 at 38.
[118] *Ibid.* at 20.
[119] *Supra* note 100 at 36.
[120] *Ibid.* at 36-37.
[121] *British Columbia v. Canadian Forest Products Ltd.* 2004 CarswellBC 1278 (WLeC) [*Canadian Forest Products]*
[122] *Ibid* at para 3.
[123] *Ibid* at para 111.
[124] *Ibid* at para 201.
[125] *Ibid* at para 197.
[126] *Ibid* at para 203.
[127] *Ibid* at para 205.
[128] *Ibid.*
[129] *Ibid.*
[130] *Supra* note 39 at para 45.
[131] *Ibid.*at para 23.
[132] *Supra* note 62 at para 67.
[133] *Supra* note 1 at 496.
[134] *Ibid* at 495.
[135] *Supra* note 1 at 498.
[136] *Supra* note 85 at 335.
[137] *Supra* note 98 at 231.
[138] *Ibid.* at 241-42.
[139] Gary Watson "Class Actions: The Canadian Experience" (2001) 11 Duke J. Comp & Int'l L. 269, at 281-2.
[140] *Supra* note 83.
[141] *Supra* note 11. at para. 17.
[142] *Supra* note 85 at 319.