THE CASE FOR PERMITTING INDIRECT PURCHASER CLAIMS IN CANADA: A CRITICAL ANALYSIS OF *PRO-SYS CONSULTANTS* AND *SUN-RYPE*

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Quand des manufacturiers ou fournisseurs de pièces complotent pour fixer et maintenir des prix anticoncurrentiels dans une chaîne de distribution, ce n'est souvent pas l'acheteur immédiat, mais plutôt l'intermédiaire et ses clients (c.-à-d., les clients ultimes) qui souffrent de cette conduite. Malgré le tort économique causé par de tels complots, les consommateurs ou autres acheteurs « indirects » dans la chaîne de distribution n'ont pas de recours en droit de la concurrence. Ceci étant, la Cour suprême pourrait faire changer cette situation suite à son examen de deux décisions de la Cour d'appel de Colombie Britannique datant d'avril 2011. Dans ces décisions, une majorité de la Cour d'appel a statué que les recours collectifs intentés au nom d'acheteurs indirects ne sont pas autorisés en droit canadien. Cet article explique pourquoi les décisions majoritaires de la Cour d'appel de Colombie Britannique sont mal fondées, et pourquoi les réclamations d'acheteurs indirects en vertu du droit de la concurrence canadien devraient être permises.

Part I — Introduction

Most companies do not sell their products directly to consumers. Manufacturers sell to intermediaries like wholesalers, who sell to retailers, who then sell to consumers. There are very few examples of "direct" relationships between consumers and manufacturers. A cursory tour of items purchased by consumers confirms this. Consumers buy cars from dealers, not from manufacturers. They buy cellular phones from retailers, not manufacturers. Appliances and electronics will generally fall in this category too. And so on.

When manufacturers or parts suppliers to manufacturers conspire to fix and maintain uncompetitive prices to the next purchaser in the chain of distribution, it is often not the direct purchaser, but the middlemen and their customers – the ultimate consumer – that bear the brunt of the conduct. And yet, despite the economic harm that such conspiracies cause, there may be no remedy available to consumers or other "indirect" purchasers in the distribution chain depending on the outcome of an appeal pending in the Supreme Court of Canada from two cases the B.C. Court of Appeal decided in April 2011.[2] In the

decisions, a majority of the Court of Appeal held that class actions could not be certified on behalf of downstream purchasers of products alleged to have been the subject of illegal price-fixing agreements.

In *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*,[3] the plaintiffs alleged that manufacturers of a sweetener called high fructose corn syrup ("HFCS") entered into illegal agreements to fix prices. The class action involved two plaintiffs: Sun-Rype, a direct purchaser of HFCS, and Wendy Weberg, an indirect purchaser.

In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[4] the plaintiffs alleged that Microsoft and "original equipment manufacturers" like Hewlett Packard and Sony carried out "schemes to exclude competition"[5] to keep the prices that consumers paid for Microsoft operating systems and applications higher than they would have been in the absence of any illegal price-fixing actions. The plaintiffs in *Pro-Sys* were indirect purchasers that purchased computers installed with the Microsoft software alleged to have been subject to the anticompetitive conduct.[6] They did not purchase the software directly from Microsoft.

In both *Sun-Rype* and *Pro-Sys*, the majority of the B.C. Court of Appeal found it plain and obvious that indirect purchasers have no cause of action against alleged antitrust conspirators because the law does not trace the effect of an unlawful overcharge beyond its effect on the direct purchaser. The majority so found based largely on the Supreme Court of Canada's 2007 decision in *Kingstreet Investments v. New Brunswick*.[7] In this paper, we explain the different circumstances under which *Kingstreet* (and a predecessor decision called *British Columbia v. Canadian Forest Products Ltd.*) were decided and why neither case is a complete answer to the pass-through argument in the competition law field.

In *Kingstreet*, the Supreme Court held that government could not defend an action by business owners to recover taxes paid pursuant to an unconstitutional law on the basis that any such illegal taxes would inevitably have been passed on by the business to its customers. Reasoning that "the Supreme Court of Canada [in *Kingstreet*] has definitively struck down the pass-through defence,"[8] the majority of the B.C. Court of Appeal in *Sun-Rype* and *Pro-Sys* concluded that a defendant cannot reduce its liability to those who paid an unlawful charge by establishing some or all of it was passed on to others.[9]

Because the majority in *Sun-Rype* and *Pro-Sys* interpreted *Kingstreet* as prohibiting a defendant, in all cases, from asserting that the plaintiff "passed on" the damages to its customer, it established a corollary rule that only plaintiffs who purchased the product directly from an alleged price fixer could sue for price fixing. Indirect purchasers – i.e. middlemen and ultimate consumers – cannot maintain an action against the price fixers, even if no direct purchaser steps forward to sue.

The rationale for the majority's conclusion was that if defendants were prohibited from raising a "passing on" defence, there would be a risk of double recovery if direct and indirect claims were allowed in the same claim. As a result, the B.C. Court of Appeal held that direct purchasers are entitled to recover the whole of the amount of the proven overcharge, regardless of how much of it had been passed on.[10] Indirect purchasers, on the other hand, are left without recourse.

In this paper, we explain why the majority decisions of the B.C. Court of Appeal in *Sun-Rype* and *Pro-Sys* are wrong, and why antitrust claims by indirect purchasers in Canada should be permitted. A brief summary is provided below.

The majority proceeded on the false premise that the Supreme Court of Canada's decision in *Kingstreet* prohibited "passing on" in all contexts. It did not. *Kingstreet* engaged principles of constitutional law arising from the government's wrongful collection of taxes. The decision rests on principles of restitution law specific to wrongfully levied taxes. The underlying principles in this area, as the Supreme Court expressly noted, differ significantly from traditional tort law principles. The majority of the B.C. Court of Appeal should not have relied on *Kingstreet* for the proposition that passing on was barred in antitrust actions.

We then address the U.S. Supreme Court decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[11] and *Illinois Brick Co. et. al. v. Illinois et. al.*,[12] which had the effect of prohibiting indirect purchaser claims under U.S. federal antitrust law. We explain problems with importing these doctrines to Canada.

We consider the purpose and language of s. 36 of the *Competition Act*.[13] Stripped of the policy considerations involved in *Kingstreet* and the thirty-plus year debate over the wisdom of *Illinois Brick*, the plain language of s. 36 permits "any person" to bring a claim for compensation. There is no legislative signal that Parliament intended to limit standing to direct purchasers and omit indirect purchasers from bringing s. 36 *Competition Act* claims. Indeed, the policy behind the private law remedy favours a broad interpretation allowing all persons who can establish that they suffered harm to sue. A robust private remedy is an essential feature of Canada's competition regime.

Lastly, much of the rationale for barring indirect antitrust claims is the difficulty of proof. Some indirect claims may indeed be too remote and diffuse to prove. However, this does not mean that all will be. Canadian courts have proven adept at analyzing complex questions of liability and damages. There is no reason that indirect antitrust claims present such a heightened degree of complexity as to strike all such claims at the pleadings stage.

Part II — The Supreme Court of Canada's decisions in *Canadian Forest* and *Kingstreet*

A key aspect of the B.C. Court of Appeal's decisions in *Sun-Rype* and *Pro-Sys* was its analysis of the Supreme Court of Canada's decisions in *British Columbia v. Canadian Forest Products Ltd*[14] and *Kingstreet.*

The majority of the B.C. Court of Appeal held that the combined effect of these decisions "made clear beyond question"[15] that the Supreme Court of Canada rejected the "passing on" defence for all purposes.

The majority erred in this analysis. The Supreme Court of Canada did not decide the question of "passing on" for all purposes. In *Kingstreet*, the Court repeatedly referred to its decision being guided by "constitutional principles,"[16] "constitutional rules,"[17] and basic principles relating to "the rule of law."[18] None of these principles is applicable to the very different facts and issues relating to antitrust claims made under the *Competition Act.* These conclusions are explained below.

Kingstreet limited to recovery of unconstitutional taxes

Kingstreet involved a claim by a nightclub owner to obtain repayment of taxes that were collected and paid to the province of New Brunswick. The statute that implemented the tax was found to be *ultra vires* the taxing powers of the province.[19] The issue for the Supreme Court of Canada was whether the taxes paid to the government pursuant to the *ultra vires* legislation should be returned to the plaintiff. The province argued that the nightclub suffered no losses because the illegal taxes were passed on to and paid by the nightclub's customers.[20]

In its decision, the Court based its analysis on the constitutional principle that taxes should not be levied without proper legal authority.[21] The Court rejected the passing-on defence in the context of the recovery of taxes paid pursuant to *ultra vires* legislation.[22] It is clear that the Court's overall concern with "passing on" was the effect any such defence could have on recovery of illegal taxes (and the resulting impact on the rule of law if government could charge illegal taxes with impunity).

The "passing on" defence was considered in the narrow context of a restitutionary claim for recovery of illegal taxes. The Court ultimately rejected the passing-on defence "in the context of the recovery of taxes paid pursuant to *ultra vires* legislation."[23] The Court emphasized the narrow basis of its decision, holding:

- "This case raises the [...] constitutional principle that taxes should not be levied without proper legal authority."[24]
- It would "[...] decide the case on the basis of constitutional principles rather than unjust enrichment";[25]

- "The Court's central concern must be to guarantee respect for constitutional principles";[26]
- The case involved "claims for the recovery of monies paid pursuant to a statute held to be unconstitutional."[27]

The claim in *Kingstreet* rested on restitution on constitutional grounds, not traditional civil law compensatory principles. Claims against a government for disgorgement of unconstitutional taxes evolved differently from other private law remedies and do not share the same underlying goals. Most notably, as the Court noted, restitution law is "not founded on the concept of compensation for loss." For this reason, the possibility of the plaintiff obtaining a windfall does not come into consideration under a restitutionary analysis.[28] By contrast, the private remedy under s. 36 of the *Competition Act* is aimed precisely at compensation for loss and damage.

Kingstreet was not a case about compensatory damages. It was about restitution of unconstitutional taxes. In the restitutionary context, it is understandable that the focus should be on disgorgement and less on actual damages suffered by a claimant. The court in *Kingstreet* did not fully consider the implications of barring the pass-through defence in contexts where a claimant seeks to recover "loss or damage" pursuant to a public policy statute. The Court's statement that the pass-through defence had developed "almost exclusively in the context of recovery of taxes and other charges paid under a mistake of law"[29] suggests that different contexts, such as competition law, were not squarely within the contemplation of the Court.

Canadian Forest Products Ltd. did not decide issues relating to "passing on"

The Court's decision in *Kingstreet* was informed by the dissenting judgment of Justice LeBel in *Canadian Forest.*

In *Canadian Forest*, the province of British Columbia made a claim for damages caused by a forest fire negligently started by the defendant, Canadian Forest Products Ltd. The province sued for lost stumpage revenue from harvestable trees as a result of having less forest land to sell to forest companies that harvest timber.[30] The defendant argued that the province did not suffer any loss of revenue because the province had simply raised the prices to all other logging companies.[31] The effect of this made the fire revenue-neutral to the province.[32]

At the Supreme Court of Canada, the issue was whether the province could recover for lost stumpage revenue in light of the fact that it collected the same revenue in total by charging higher stumpage rates to other forestry companies.

The majority of the Court held that the passing on defence did not arise on the facts of the case, concluding that "no revenue loss was suffered in the

first place, no loss was "passed on," and the whole "passing on" concept is irrelevant."[33] Therefore, although the majority held that "it is generally not open to a wrongdoer to dispute the existence of a loss on the basis that it has been 'passed on' by the plaintiff,"[34] the majority also held that "as the 'passing on' defence does not properly arise on the facts of this case there is no need to discuss it further."[35] This important qualifier was overlooked by the majority of the B.C. Court of Appeal in *Pro-Sys* and *Sun- Rype*.

Justice LeBel dissented,[36] concluding that the defence of passing on did not exist in tort law, citing the famous *dictum* of Justice Holmes of the U.S. Supreme Court in *Southern Pacific*[37] that such an argument would require the court to engage in "the endlessness and futility of the effort to follow every transaction to its ultimate result." He held that pass-through should not be recognized as a legal defence because of the "endless and futile" analysis and the impossible burden on a plaintiff to show that the loss was not passed-on.[38] He expressly cited the U.S. Supreme Court's decision in *Hanover Shoe* approvingly.[39]

Conclusion regarding effect of the decisions in *Canadian Forest* and *Kingstreet*

At its highest, the commentary on "passing on" was *obiter* in the majority decision in *Canadian Forest*. In the subsequent decision in *Kingstreet*, the context for the Supreme Court of Canada's analysis of passing on involved concern about constitutional principles and the recovery of illegal taxes, principles which the Court expressly held have "developed almost exclusively in the context of recovery of taxes and other charges paid under a mistake of law."[40] Neither case can stand for the proposition that it is "clear beyond question"[41] that the passing-on defence is barred in all areas of the law.

The Court in *Pro-Sys* and *Sun-Rype* overlooked important differences between a restitutionary claim for the disgorgement of unconstitutional taxes by a government on the one hand, and a claim by indirect purchasers to recover loss or damage suffered by reason of anticompetitive conduct on the other. This overextension of *Kingstreet* led the B.C. Court of Appeal directly to its conclusion that indirect purchasers could not assert a claim against alleged price fixers.

When viewed against the background of the thirty-plus year debate that surrounds the issue of "passing on" in U.S. antitrust law, as described in the next section of this paper, it is difficult to justify the B.C. Court of Appeal's conclusion that the effect of *Canadian Forest* and *Kingstreet* is to bar the pass-through defence in all cases.[42]

Part III — The U.S. Supreme Court decisions in *Hanover Shoe* and *Illinois Brick*

Part of the origin for the Supreme Court's decisions in *Canadian Forest* and the B.C. Court of Appeal's decisions in *Pro-Sys* and *Sun-Rype* were the U.S. Supreme Court's decisions in *Hanover Shoe* and *Illinois Brick.*

The U.S. Supreme Court decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*

In *Hanover Shoe*, a shoe manufacturer called Hanover Shoe ("Hanover") alleged that a company called United Shoe Machinery Corporation ("United") had monopolized the shoe machinery industry. Hanover brought an action alleging a monopolistic overcharging scheme by United alleging that United's practice of leasing and refusing to sell its more complicated and important shoe machinery had amounted to unlawful monopolization. Hanover sought to recover from United the difference between what it paid United in shoe machine rentals and what it would have been paid had United been willing during the relevant period to sell those machines. United defended on the basis that Hanover did not suffer any damages because all increased costs were passed on to its customers.

Justice White wrote the unanimous Court opinion. In a short judgment, only four paragraphs of which were devoted to an analysis of the "passing on" defence, he rejected the defence largely due to the difficulty and complexity that such a defence would raise. Justice White found that many factors may influence a company's pricing policies, which are difficult to calculate. Without citing any empirical evidence or jurisprudence, he held the task of extricating the overcharge that was passed on by the direct purchaser to downstream purchasers "would normally prove insurmountable" and would require "additional long and complicated proceedings involving massive evidence and complicated theories."[43] Therefore, he declared that the passing on defence could not be raised. The damages inquiry ended with the unlawful overcharge to the direct purchaser.

The U.S. Supreme Court decision in *Illinois Brick Co. et al. v. Illinois et al.*

Nine years after *Hanover Shoe* was decided, the U.S. Supreme Court handed down its decision in *Illinois Brick*. In *Illinois Brick*, the plaintiffs alleged a price fixing conspiracy by cement brick manufacturers. The manufacturers sold their bricks to general contractors, who were hired by government organizations to construct public buildings.

The government organizations brought claims as indirect purchasers against the brick manufacturers, alleging that the overcharge on bricks to the general contractors resulted in higher construction costs. In response, the cement

brick manufacturers defended on the basis that they could only be liable to the direct purchasers, *i.e.* the general contractors, and not to purchasers further down the supply chain. The manufacturers' defence was based on the earlier decision in *Hanover Shoe*, which prohibited defendants from defending on the basis that damages were "passed on" to another rung of the purchasing chain. If defendants are prohibited from defending on the basis of passing on, the manufacturers argued, there would be an unjust risk of double recovery if indirect plaintiffs whose claim is premised on the very idea that damages were passed on and suffered by them could recover damages.

As in *Hanover Shoe*, Justice White wrote the decision of the majority of the U.S. Supreme Court, which split 6-3. Justice White framed the legal issue as largely one of adherence to precedent, holding:

> [W]hatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants. Because *Hanover Shoe* would bar petitioners from using respondents' pass-on theory as a defense to a treble-damages suit by the direct purchasers (the masonry contractors), we are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this pass-on theory offensively.[44]

Relying on *Hanover Shoe*, Justice White concluded that if passing on was a prohibited defence, permitting indirect purchasers to bring antitrust claims would raise a serious risk of double recovery for plaintiffs. As in *Hanover Shoe*, Justice White described the uncertainties and difficulties involved with proving that illegal pricing activities resulted in damages that were "passed on" to an indirect purchaser.[45] He concluded that if passing on theories were permitted, treble-damages cases would be transformed into "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers."[46] Justice White concluded that effective antitrust enforcement could perhaps best be achieved by permitting a direct purchaser to recover the full amount of the overcharge, regardless of whether any such overcharge was passed on in full to its customers.[47]

Justices Brennan, Marshall and Blackmun dissented. Justice Brennan held:

- The purpose of U.S. antitrust laws is to provide comprehensive protection to consumers, competitors and sellers.[48]
- Section 4 of the *Clayton Act* "was clearly intended to operate to protect individual consumers who purchase through middlemen."[49]
- Often, it is the indirect purchasers – the ultimate consumers of a product – who bear the brunt of antitrust injuries, as increased costs are passed along the chain of distribution.[50]

- Direct purchasers who act as middlemen have little incentive to sue their suppliers where they are able to pass on the bulk of the illegal overcharges to their own consumers.[51]

Justice Brennan concluded that while tracing a cost increase through several levels of a chain of distribution could be difficult in some cases, the same was true in almost all antitrust cases.[52] In essence, he held, estimating the amount of damages passed on to an indirect purchaser is no more complicated than estimating what the middleman's selling price would have been, absent the violation.[53]

The dissent therefore concluded that the principle in *Hanover Shoe* ought to be limited to cases of the defensive assertion of the passing-on defence, where direct and indirect purchasers are not parties in the same action.[54]

Part IV — Problems with Applying *Hanover Shoe* and *Illinois Brick* to Canadian Law

In the thirty-plus years since *Illinois Brick* and *Hanover Shoe* were decided, dozens of articles and reports have been written about the benefits and disadvantages of prohibiting indirect antitrust claims at the federal level.[55] Some groups were very disappointed with the result. Shortly after the U.S. Supreme Court's decision was released in *Illinois Brick*, a coalition of state attorneys-general[56] circulated a bill designed expressly to overrule *Illinois Brick*.[57] Others were pleased by the result, reasoning that allowing indirect purchasers to sue "would probably retard rather than advance antitrust enforcement."[58]

Direct purchasers may not sue

From the plaintiff's perspective of enforcing antitrust laws, the major benefit of *Illinois Brick* (and of *Pro-Sys* and *Sun-Rype*) is that proof of harm is greatly simplified. All damages arising out of the anticompetitive conduct are aggregated at the direct purchaser level. Defendants cannot escape liability by arguing that their customers passed on the unlawful overcharge to their downstream purchasers.

However, this simplicity is also its biggest disadvantage. Because all damages are aggregated at the direct purchaser level, there can be no recovery unless a direct purchaser agrees to sue. If the direct purchaser does not sue, no recovery is possible. The majority in *Illinois Brick* itself recognized this, holding that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers."[59] Thus, the *Illinois Brick* rule has the effect in some cases of allowing antitrust conspirators to escape civil liability for their conduct.

As a practical matter, contrary to *Illinois Brick* principles, a number of antitrust class actions in Canada have been brought on behalf of both direct purchasers and indirect purchasers. The decision in *Sun-Rype* is a good example

of this. Claims were made by a juice company that bought HFCS directly from the alleged price fixers and by a consumer who bought indirectly. In cases like these, there is some assurance that the wrongdoer's actions will not go unpunished even if indirect claims are prohibited.

However, there are many reasons why a direct purchaser may be unwilling to make a claim. For example:

- The greater the market power of the alleged price-fixers, the less likely it is that direct purchasers will agree to sue (particularly if there is an ongoing business relationship.) A hypothetical example illustrates the problem. Suppose an industry in Canada involved two or three companies. They agree to fix prices. They are caught and guilty pleas occur. A direct purchaser with an ongoing relationship with a supplier would be reluctant to bring an antitrust claim against the supplier because there are few alternative options for supply. For these reasons, Professors Harris and Sullivan argue that direct purchasers may lack an incentive to sue "because they risk termination by their suppliers if they do so [...]."[60]
- The greater the market power of the direct purchasers, the less likely it is that they will agree to sue. Direct purchasers with market power can sometimes obtain "self-help" without requiring a lawsuit. They can negotiate lower prices with the price-fixers to compensate for the illegal activity without having to bring a class action claim. Again, a simple hypothetical example will explain the problem. Suppose a group of pickle manufacturers agree to fix prices because their prices have been driven down by retailers like Walmart and Loblaws. If the illegal activity is discovered, retailers can obtain "self-help" by extracting concessions from the price-fixers in future supply negotiations without having to bring a class action and keep the benefits for themselves. The more power the direct purchasers wield over the price-fixers, the less likely they will need to sue.
- In any case where a direct purchaser is able to pass on any alleged overcharge to its customers, it is less likely to be inclined to sue because it may have suffered no damages.

In the United States, the lack of incentive for direct purchasers to sue is largely addressed by the availability of treble damages under s. 7 of the *Sherman Antitrust Act*.[61] As Professor Calkins savvily concludes, "the lure of treble damages can make a plaintiff out of the most conservative businessman."[62] Likewise, Professors Landes and Posner suggest that direct purchasers are given maximum incentives to sue "by allowing the direct purchasers to sue for treble the entire overcharge, without subtracting the amount of that overcharge passed on to more remote purchasers."[63]

Treble damages are not available in Canadian law. Section 36 of the *Competition Act* permits persons to recover "[...] an amount equal to the loss or damage proved to have been suffered by him [...]." In *Chadha et al. v. Bayer et al.*,[64] Justice Sharpe (then sitting as a judge of the Superior Court of Justice) held that this was a significant difference underlying the reasoning of the U.S. Supreme Court decisions in *Hanover Shoe* and *Illinois Brick*, concluding that "[o]ne need look no further than the treble damage remedy which played a significant role in the Supreme Court decisions."[65]

It is easy to imagine cases in which direct purchasers would be unwilling to sue without treble damages. In one price-fixing case,[66] eight manufacturers of LCD panels pleaded guilty in the U.S. to agreeing to fix prices of LCD panels. They paid fines totalling $892 million.[67] After the guilty pleas occurred, a class action was commenced in Ontario seeking compensation for consumers harmed by the anticompetitive conduct.[68] The LCD products were used in laptops, computer monitors, iPods, cellular phones and other commonly-used consumer products. The only putative representative plaintiff in the LCD class action was an indirect purchaser, an entity that bought the product from an intermediary, not "directly" from one of the manufacturers involved in the price-fixing activity. Despite the scope of the alleged conspiracy, no direct purchaser had stepped forward.

If the law prohibited indirect purchaser claims, it is very likely that no civil relief could be obtained against the price-fixers in the LCD class action.[69] The same problem occurred in *Pro-Sys* because the putative representative plaintiff had no privity of contract with Microsoft, the alleged price-fixer.[70]

In light of the B.C. Court of Appeal's prohibition on indirect purchaser claims, it is not surprising that one commentator noted that "the harm to someone in Canada is usually indirect so excluding indirect purchasers could be a crippling development to the plaintiffs' class action bar."[71] The effect of *Pro-Sys* and *Sun-Rype* is that some companies that are guilty of price fixing will never have to pay damages because no direct purchaser can be found who is willing to be a plaintiff. This is contrary to tort and class action law principles, both of which emphasize the goal of behaviour modification. The problem is more acute in Canada than it is in the United States because treble damages, which can be an inducement to a reluctant direct purchaser, are not available in Canada.

Even in cases where a direct purchaser can be found, damages will not be paid to consumers

Another major problem with the *Illinois Brick* doctrine is that even if a direct purchaser can be found who is willing to be a putative representative plaintiff, consumers will be denied any damages. The direct purchaser will be entitled to keep for itself all of the damages suffered by it and any other subsequent

purchasers. The majority of the Court of Appeal in *Sun-Rype* held that "the [direct purchasers] are in law entitled to recover the whole of the amount of the overcharge for which they may establish the defendants are liable to them, regardless of how much of it had been passed on."[72] Normally, an injured person is compensated to the extent of, and only to the extent of, his or her injuries. These are the primary goals of tort law.[73] By allowing a direct purchaser to claim and keep for itself all of the damages suffered by itself and downstream purchasers, the *Illinois Brick* doctrine creates two exceptions to the goals. First, the direct purchaser will be overcompensated to the extent that it passed on some or all of the losses to its customers. Second, indirect purchasers who suffered pass-through losses have no recourse.

Other than for principles of subrogation (which are agreed to in advance by contract), we know of no principle of law that allows one party to recover damages on behalf of another without the other party's consent and without having to share the recovery. The B.C. Court of Appeal's decision is unique in this respect. Nor do we know of another case where a judicial decision bars injured parties from suing for losses under a statutory provision expressly intended to permit such recovery.

Part V — Barring Indirect Purchaser Actions Contrary to the Purpose of the *Competition Act*

The starting point for any analysis of whether an indirect purchaser has standing to sue under s. 36 of the *Competition Act* should be the language and purpose of the section itself. Private prosecutors have an important role to play in competition law enforcement. Section 36 of the *Competition Act* permits "any person who has suffered loss or damage" as a result of certain anticompetitive activities to "sue for and recover [damages] from the person who engaged in the conduct [...]." Section 36 states:

> 36(1) Any person who has suffered loss or damage as a result of:
>
> **(a)** conduct that is contrary to any provision of Part VI, or
>
> **(b)** the failure of any person to comply with an order of the Tribunal or another court under this 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 damages 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.[74]

This civil remedy was not an original feature of Canada's competition law. It was added in 1975 as part of a package of reforms to the Act's predecessor, the *Combines Investigation Act*.[75] Before the introduction of the civil remedy, the only mechanisms for enforcing the competition laws were criminal prosecutions or the administrative provisions of the Act. Both depended on the will of public authorities and the availability of scarce prosecutorial resources. The civil remedy added a vital enforcement mechanism to the Act.

The introduction of the civil remedy followed recommendations made by the Economic Council of Canada in its *Interim Report on Competition Policy*, released in July 1969.[76] The Council recommended greater emphasis on prevention and deterrence of anti-competitive activities as the primary enforcement mechanism over criminal prosecutions. The Council suggested that Parliament consider including a private right of civil action to improve the Act's "relevance to economic goals, its effectiveness, and its acceptability to the general public."[77]

When this provision was first introduced in the Act, the then-Minister of Consumer and Corporate Affairs explained that for rights under the Act to be meaningful, powers needed to be provided not only to government but also to "citizens through class or representative actions."[78]

Upon examining the constitutional basis for the civil remedy, enacted as s. 31.1 of the *Combines Investigation Act*, Chief Justice Dickson for the Supreme Court of Canada found that the remedy was more than a pure civil remedy deriving its legislative origin from the property and civil rights domain exclusive to the provinces. Chief Justice Dickson found that the private remedy was "fundamentally integrated into the purpose and underlying philosophy of the *Combines Investigation Act*."[79]

Although the effect of the remedy was to allow private citizens to recover their losses and damages arising from a breach of the Act or an Order made under the Act, this was not its predominant purpose. The civil remedy was part of an integrated scheme aimed at deterring antitrust activity through public and private enforcement. In an era where public bodies lack resources to prosecute commercial wrongdoing, the civil remedy fills the void by empowering private citizens and corporations to enforce laws prohibiting anticompetitive behaviour. Citing Justice Black of the United States Supreme Court,[80] Chief Justice Dickson likened the civil damage remedy to "a bulwark of antitrust enforcement."[81] He concluded there was an "intimate tie" between the purpose of the Act "and a privately initiated and privately conducted enforcement mechanism."[82]

Thus, the private right of action under the Act is both an expression of the civil law maxim "for every wrong a remedy," and an additional tool for achieving the public policy goals expressed in the Act. Those goals are described in

s. 1.1 of the Act as follows:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices. (Emphasis added)

Bearing in mind the importance of the civil remedy within the competition law machinery, it is unlikely that Parliament intended to restrict its application to a relatively small field of potential "private enforcers," namely direct purchasers, and exclude the vast cadre of indirect purchasers who may ultimately have suffered antitrust injury. As noted above, direct purchasers are often unwilling enforcers of competition laws. Paradoxically, their reluctance to sue may be greatest where they are most vulnerable to oligopolistic price-fixers or where the direct purchasers have in fact passed on much of the loss to their customers. Direct purchasers may sooner allow the anticompetitive conduct to go without any remedy than jeopardize their businesses by suing a key supplier.

A basic goal of a civil litigation system is to compensate persons to the extent they have been harmed by wrongful conduct. The same goal applies with greater force where the civil remedy is an integral component of a broader public policy statute aimed at deterring pernicious commercial conduct. Allowing both direct and indirect purchasers to bring action furthers the overriding purpose embodied in s. 1.1 of the Act of ensuring that customers receive competitive prices and product choices. The goals of the Act support a broad reading of the private enforcement mechanism.

Ultimately, the judicial and academic debate about the public policy issues engaged by "passing on" is akin to the problem the Supreme Court of Canada considered in *Canada 3000 Inc.; Re; Inter-Canadian (1991) Inc. (Trustee of).*[83] In *Canada 3000*, the issue was whether airports had rights to detain aircraft for the failure to pay fees. Although the language of the statute made no reference to a "lien," the Supreme Court found that "there was considerable debate [in the lower courts] about whether the [statutory] detention remedy created a [remedy akin to a] lien."[84] The Supreme Court concluded that whether or not a lien arose by operation of law was perhaps of theoretical interest but it had no practical bearing on the appeal. The Court concluded that "the remedy is purely a creature of statute," and that "this case is from first to last an exercise in statutory interpretation."[85]

Likewise, in *Seidel v. Telus Communications Inc.*,[86] the majority of the Supreme Court brushed away public policy issues in holding that "the Court's job is to give effect to the intent of the legislature as manifested in the provisions of its statutes."[87]

Section 36 of the Act allows "any person" who can establish loss or damage falling within the two categories in s. 36 of the Act to sue for loss or damages. The Act contains no qualifiers that would limit "any person" to a direct purchaser. An interpretation that limits standing under s. 36 to direct purchasers amounts to a "reading down" of this important statutory remedy that is not supported under a plain reading of the Act.[88]

Part VI — Solutions to Indirect Purchaser Difficulties

How difficult will it be to make claims on behalf of indirect purchasers?

One of the major advantages of the B.C. Court of Appeal's approach in *Pro-Sys* and *Sun-Rype* is that proof of damages is simplified. The direct purchaser claims damages on behalf of all other purchasers. There is no need to allocate damages between the different purchasing groups. If the Court of Appeal's decisions are reversed, what difficulties of proof would be created?

In his dissenting reasons for decision in *Sun-Rype*, Justice Donald concluded that if the plaintiffs were willing to shoulder the burden, they should be allowed to do so. He held "the plaintiffs willingly take on the burden of proving that the overcharge passed to them and they have engaged competent experts to provide the evidence. The defendants' experts say it cannot be done but that must be left for trial upon a showing of a 'credible or plausible methodology' at the certification stage."[89]

Proof of damages can be difficult in many different kinds of cases. Remoteness, causation and mitigation are all examples of principles that require the application of abstract principles to assess harm even in the most basic tort or contract claim. In personal injury cases, "the cost of future care and future lost earning are always, by their nature, uncertain, especially in the case of young children."[90] Yet these are principles that are applied every day in courts across Canada to determine damages.

A bedrock principle of Anglo-Canadian law is that "if the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages."[91] In *Penvidic Contracting Co. v. International Nickel Co. of Canada*,[92] the Supreme Court of Canada cited approvingly the 1915 Supreme Court decision in *Wood v. Grand Valley R. Co.*[93] for the proposition that the impossibility of estimating "anything approaching to mathematical accuracy the damages sustained by the plaintiff" cannot "relieve the wrongdoer of the necessity of paying damages."[94] The court

must do "the best it can." Its conclusion will not be set aside "even if the amount of the verdict is a matter of guess work."[95]

There may be some class actions on behalf of indirect consumers where the damages analysis is so complicated that certification of an indirect claim will not be warranted. The *Chadha v. Bayer*[96] decision is an example of a claim at the more challenging end of the spectrum. In that case, the plaintiffs alleged a price-fixing scheme in respect of iron oxide pigment supplies used to colour bricks used in the construction of homes. The plaintiffs were persons who purchased a new home that contained bricks coloured with iron oxide. They alleged they overpaid for their home because of the price-fixing scheme.

Notably, the reason why the Ontario Court of Appeal in *Chadha* refused to certify was not because it concluded there was an absolute prohibition on indirect purchaser claims. The problem was the claim's perceived factual complexity. The Court of Appeal held that the plaintiffs would have to show that part or all of the price increase was passed through "from the [alleged price-fixers] to the building materials manufacturer and distributor, to the builder, to the purchaser and on to any subsequent purchaser."[97] If the price increase was fully absorbed at any point, the chain would be broken. Compounding these problems was the fact that the iron oxide pigment represented such a miniscule portion of the purchase price of a building as to be virtually untraceable through the chain. Ultimately, the Court of Appeal declined to certify the action as a class proceeding because the plaintiff's expert proposed no methodology for resolving these issues. The Court of Appeal held that "the evidence of the [plaintiffs'] expert assumes the pass-through of the illegal price increase, but does not suggest a methodology for proving it or for dealing with variables that affect the end price of real property at any particular point in time."[98] Had the expert put forward a credible methodology for tracing the pass-through to the ultimate purchasers who were the class members, the result might have been different.

Not all indirect claims are as complicated as the one in *Chadha*. Some will be quite simple by comparison. A simple example is a product that undergoes no transformation into something else and is not incorporated into another product (unlike the bricks in *Chadha* that were incorporated into a home), and involves only one purchaser between the alleged price-fixer and the consumer. An indirect claim of this type would not be unduly complex, especially when balanced against the principle that if a plaintiff establishes that a loss has probably been suffered, "the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages."[99]

Another example of a straightforward claim is a purchaser who buys a product directly from a price-fixing conspirator and sells to its customer on a cost-plus basis. In this case, the harm suffered by the indirect purchaser is equal to

the entire amount of the overcharge. Indeed, the U.S. Supreme Court in *Hanover Shoe* recognized that a defendant should be permitted rely on the pass-through defence if sued by a purchaser who sold the good on a cost-plus basis.[100] The majority in *Illinois Brick* implicitly accepted that the indirect purchaser under a cost-plus arrangement should have standing to sue the price fixer.[101] However, the majority of the B.C. Court of Appeal in *Pro-Sys* and *Sun- Rype* admitted of no exception to the blanket prohibition on indirect purchaser suits.

Determining the degree of pass-through will be very difficult in some cases. That is not to say, however, that it will always be too difficult.[102] The plaintiff's challenge in any particular case is to prove though a credible methodology the existence and extent of the overcharge at each level of distribution.

Part VII — Conclusion

The Supreme Court of Canada has held that "the primary purposes of tort law are to provide compensation to the injured and deterrence to the tortfeasor."[103] In addition, two of the express purposes of the *Competition Act* are to "maintain and encourage competition in Canada" and to "provide consumers with competitive prices and product choices."[104]

The problem with the majority decisions of the B.C. Court of Appeal in *Pro-Sys* and *Sun-Rype* is that they raise serious risks of undermining these purposes in the area of competition law. If direct purchasers decide not to sue, injured persons will not be compensated. The problem is compounded by the fact that even if direct purchasers sue, indirect purchasers who suffered damages cannot be compensated. Their damages will be enjoyed by others. In addition, apart from the risk of criminal fines and prosecutions under the *Competition Act*, tortfeasors will also not be deterred. This is contrary to the Supreme Court of Canada's decisions that highlight the importance of strong criminal and civil remedies in competition law.

Applying the plain language of s. 36 of the *Competition Act*, "any person," including indirect purchasers, should indeed be allowed to sue to recover losses or damages sustained by reason of illegal conduct. Courts have proven adept at resolving difficult questions of proof of damages in many different cases. There is no reason to think they cannot do so in appropriate antitrust claims.

Endnotes

[1] Partners, Sotos LLP, Toronto. The authors wish to express their sincere gratitude to Andy Seretis, associate, and Stuart Freen, articling student at Sotos LLP for their invaluable assistance in researching and preparing this paper.

[2] There is also a pending application for leave to appeal from the Quebec Court of Appeal's decision in *Option Consommateurs v. Infineon Technologies ag.*, 2011 QCCA 2116, in which the Quebec Court of Appeal disagreed with the majority decisions of the B.C. Court of Appeal in *Sun-Rype* and *Pro-Sys*, relying largely on the dissenting

reasons of Justice Donald in *Sun-Rype*.
[3] 2011 BCCA 187 [*Sun-Rype*].
[4] 2011 BCCA 186 [*Pro-Sys*].
[5] *Ibid.* at para. 4.
[6] *Ibid.* at para. 3.
[7] 2007 SCC 1 [*Kingstreet*].
[8] *Pro-Sys*, *supra* note 4 at para. 27. The dissent and the majority agreed in this respect. See *e.g. Pro-Sys*, *supra* note 4 at para. 75.
[9] *Ibid.*at para. 75.
[10] *Sun-Rype*, *supra* note 3 at para. 76.
[11] (1968) 392 US 481 [*Hanover Shoe*].
[12] (1977) 431 US 720 [*Illinois Brick*].
[13] RSC 1985, c C-34.
[14] [2004] 2 SCR 74 [*Canadian Forest*].
[15] *Sun-Rype, supra* note 3 at para. 76.
[16] *Kingstreet, supra* note 7 at para. 14.
[17] *Ibid.* at para. 13.
[18] *Ibid.* at para. 21.
[19] *Ibid.* at para. 4.
[20] *Ibid.* at para. 5.
[21] *Ibid.* at para. 33.
[22] *Ibid.* at para 42.
[23] *Ibid.* at para. 42 (emphasis added).
[24] *Ibid.* at para. 33.
[25] *Ibid.* at para. 12.
[26] *Ibid.* at para. 14.
[27] *Ibid.* at para. 39.
[28] *Ibid.* at para. 47.
[29] *Ibid.* at para. 45.
[30] *Ibid.* at para. 112.
[31] *Ibid.* at para. 48.
[32] *Ibid.*
[33] *Ibid.* at para. 111.
[34] *Ibid.*
[35] *Ibid.* at para. 115.
[36] Justices Bastarache and Fish agreed with Justice LeBel's decision.
[37] *Ibid.* at para. 206, citing *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 US 531 (1918).
[38] *Ibid.* at para. 205.
[39] *Ibid.*
[40] *Kingstreet, supra* note 7 at para. 45.
[41] *Sun-Rype, supra* note 3 at para. 76.
[42] *Ibid.*
[43] *Hanover Shoe, supra* note 11 at 493.
[44] *Illinois Brick, supra* note 12 at 728.
[45] *Ibid.* at 731.

[46] *Ibid.* at 737.
[47] *Ibid.* at 745-746.
[48] *Ibid.* at 748.
[49] *Ibid.* at 749.
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.* at 758.
[53] *Ibid.* at 758-759.
[54] *Ibid.* at 753.
[55] See *e.g.* Report of the American Bar Association Antitrust Law Section Task Force on Legislative Alternatives Concerning *Illinois Brick Co. v. Illinois* (1978) 46 Antitrust L.J. 1137; S. Calkins, "*Illinois Brick* and its legislative aftermath" (1978) 47 Antitrust L.J. 967; W.M. Landes & R.A. Posner, "Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*" (1979) 46 *University of Chicago Law* Review 602; Robert G. Harris and Lawrence A. Sullivan, "Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis" (1979) 128 U. Pa. L. Rev. 269; G.J. Werden & M. Schwartz, "*Illinois Brick* and the Deterrence of Antitrust Violations – An Economic Analysis" (1984) 35 Hastings L.J. 629; G.J. 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; W.H. Page, "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of *Illinois Brick*" (1999), 67 Antitrust L.J. 1; R.D. Blair & J.L. Harrison, "Reexamining the Role of *Illinois Brick* in Modern Antitrust Standing Analysis" (1999) 68 Geo. Wash. Law Rev. 1; E.D. Cavanagh, "*Illinois Brick*: A Look Back and a Look Ahead" (2004), 17 Loy. Consumer L. Rev. 1; D.R. Karon, "Your Honor, Tear Down that *Illinois Brick* Wall!" (2004) 30 WM. Mitchell L. Rev. 1351; B.D. Richman & C.R. Murray, "Rebuilding *Illinois* Brick: A Functionalist Approach to the Indirect Purchaser Rule" (2007) 81 Southern California Law Rev.; Antitrust *Modernization Commission, Report and Recommendations* (April 2007).
[56] Calkins, *ibid.* at 967.
[57] *Ibid.*
[58] See *e.g.* Landes & Posner, *supra* note 55 at 604.
[59] *Illinois Brick, supra* note 12.
[60] G.J. Werden & M. Schwartz, *supra* note 55 at 636, citing Robert G. Harris and Lawrence A. Sullivan, "Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis" (1979) 128 U. Pa. L. Rev. 269.
[61] 15 USC §§ 1-7, s. 7: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."
[62] Calkins, *supra* note 55 at 974.
[63] Landes & Posner, *supra* note 55 at 614-615.
[64] (1999), 45 OR (3d) 29 (SCJ); rev'd (2003) 63 OR (3d) 22 (CA); leave to appeal dismissed [2003] SCCA No 106.

[65] *Ibid.*
[66] *Fanshawe College of Applied Arts and Technology v. LG Phillips LCD Co.*, [2011] OJ No 2337 (SCJ).
[67] *Ibid.* at para. 6.
[68] *Ibid.*
[69] The law in Ontario is clear that a class action must have a representative plaintiff with a personal cause of action. "Public interest" class actions involving plaintiffs with no cause of action are not allowed. See generally *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 OR (3d) 433 (C.A.).
[70] There is one potential solution to the problem in *Pro-Sys* that could address the direct purchaser problem even if the law is that indirect purchasers cannot sue. In *Pro-Sys*, the alleged price-fixers were Microsoft and OEM vendors like Toshiba, Sony, LG Electronics and Panasonic. Having purchased the Microsoft products subject to the alleged price-fixing activity from OEM vendors, the putative representative plaintiff had no direct relationship with Microsoft. One solution could be to join the OEM vendor from whom the plaintiff purchased the computer containing the Microsoft software as co-defendants, thus giving the plaintiff a direct cause of action against one of the co-conspirators, namely the OEM vendor, assuming the vendor sold the computer directly and not through another retailer. The plaintiffs could then seek to claim all damages on a joint and several basis against the OEM vendor.
[71] J. Melnitzer, "Class Actions: Indirect purchaser issue goes to Supreme Court of Canada", *Legal Post* (see online: http://business.financialpost.com/2011/12/07/class-actions-indirect-purchaser-issue-goes-to-supreme-court-of-canada/)
[72] *Sun-Rype, supra* note 3 at para. 76.
[73] See *e.g. Dobson (Litigation Guardian of) v. Dobson* [1999] 2 SCR 753 at para. 48 ("The primary purposes of tort law are to provide compensation to the injured and deterrence to the tortfeasor.")
[74] *Supra* note 13, s. 36.
[75] RSC 1970, c C-23.
[76] Canada, Economic Council of Canada, *Interim Report on Competition Policy* (1969). For a full treatment of the history of the *Competition Act*, see Barry R. Campbell, "Canadian Combines Law: A Perspective on the Current Combines Investigation Act and Recent Case Law" (1980) 5 *N.C.J. Int'l L. & Com. Reg.* 57.
[77] *Ibid.* at 109.
[78] Hansard, 4th Sess., 30th Parliament, March 14, 1974 (Herb Grey).
[79] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.
[80] *In Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 US 134 (1967).
[81] *Ibid.* at 139.
[82] *Ibid.*
[83] 2006 SCC 24 [*Canada 3000*].
[84] *Ibid.* at para. 76.
[85] *Ibid.* at para. 36.
[86] 2011 SCC 15.
[87] *Ibid.* at para. 3.
[88] Many state courts in the United States have interpreted their state antitrust laws as permitting indirect purchasers to sue for antitrust injury despite the *Illinois Brick*

ruling. In some cases, the decisions were rooted in the language of state laws that is similar to the language in s. 36 of the *Competition Act*. For example, in *Comes v. Microsoft Corp.*, 646 N.W.2d 440, the Iowa Supreme Court held that the language of its state antitrust legislation, which permitted "a person" who is injured to bring a claim, was "clear on its face" that it created a cause of action for "all consumers, regardless of one's technical status as a direct or indirect purchaser" (p. 445). Similar results were reached by state courts in Arizona (*Bunkers Glass Co. v. Pilkington PLC* 75 P 3d 99 (Ariz. 2003)), Tennessee (*Sherwood v. Microsoft Corp.*, 2003 Tenn App LEXIS 539 (Tenn Ct App July 31, 2003)) and North Carolina (*Hyde v. Abbott Laboratories, Inc.* 473 SE 2s 680 (NC Ct App 1996)).

[89] *Sun-Rype, supra* note 3 at para. 22.

[90] S.M. Waddams, *The Law of Damages* (Toronto: Canada Law Book), looseleaf edition at para. 13.60.

[91] *Ibid.* at para. 13.30.

[92] [1976] 1 SCR 267.

[93] (1915), 51 SCR 283.

[94] *Ibid.* at 289.

[95] *Ibid.*

[96] (2003), 63 OR (3d) 22 (CA) [*Chadha*].

[97] *Ibid.* at para. 45.

[98] *Ibid.* at para. 52.

[99] Waddams, *supra* note 91 at para. 13.60.

[100] *Supra* note 11 at 392.

[101] *Ibid.* at 431.

[102] J.A. Brander and T.W. Ross, "Estimating Damages from Price Fixing" in S. Pitel, ed., *Litigating Conspiracy: An Analysis of Competition Class Actions* (Toronto: Irwin Law, 2006) at 364.

[103] *Dobson (Litigation Guardian of) v. Dobson*, *supra* note 74 at para. 48.

[104] *Competition Act*, *supra* note 13, s. 1.1.