

**OFFENSIVE PASSING ON
THE SUPREME COURT OF CANADA'S INDIRECT PURCHASER
TRILOGY**

W. Michael G. Osborne¹

Affleck Greene McMurtry LLP, Toronto ON

Canada's Supreme Court dealt with two of the most vexing issues in price fixing class actions in a trilogy of decisions released on October 31, 2013.ⁱ

The first issue is whether indirect purchasers can sue for the overcharge passed on to them by direct purchasers and other indirect purchasers above them in the distribution chain. The court held that its earlier rejection of the passing on defence did not entail, as a necessary corollary, that indirect purchasers have no cause of action. Double recovery can be avoided, the court held, by modifying awards or deny claims to take account of parallel proceedings with overlapping claims. However, this necessarily entails a limited recognition of the passing on defence, notwithstanding the court's apparent rejection of it.

The second issue involves the evidentiary standard to be met by plaintiffs in certifying loss as a common issue for indirect purchasers. The court held that plaintiffs propose a methodology that can demonstrate that the overcharge has been passed on to the indirect purchaser level. It is not clear whether the court requires plaintiffs to show that all members of the class have suffered damages. As well, although the court expressly rejected the contention that aggregate assessment of damages can be used to establish loss as a component of liability, the methodology approved of by the court in one of the cases essentially involves using an assessment of damages in the aggregate to establish liability.

In an article published in the Canadian Competition Law Review in 2012, I traced the history of these issues and argued that indirect purchaser claims should not be allowed.ⁱⁱ Jean-Marc Leclerc and David Sterns argued the other side of the issue in a companion article.ⁱⁱⁱ This comment discusses the Supreme Court's treatment of these issues and assumes a certain degree of familiarity with the subject.

La Cour suprême du Canada a statué sur deux des plus délicates questions concernant les recours collectifs en matière de fixation des prix dans une trilogie d'arrêts publiée le 31 octobre 2013.ⁱ

La première question était de savoir si les acheteurs indirects peuvent intenter une action pour la majoration qui leur a été transférée par les acheteurs directs et par les autres acheteurs indirects les devançant dans la chaîne de distribution. La Cour a déclaré que son rejet antérieur du transfert de la perte comme moyen de défense n'implique pas, comme le corollaire nécessaire, que les acheteurs indirects n'ont pas de cause d'action. La Cour a estimé que la double indemnisation peut être évitée en modifiant les dommages-intérêts ou en rejetant les demandes pour tenir en compte les recours parallèles présentant les mêmes revendications. Cependant, ceci entraîne nécessairement une reconnaissance restreinte du moyen de défense fondé sur le transfert de la perte, malgré sa désapprobation apparente par la Cour.

La deuxième question concernait le fardeau de preuve que doivent respecter les plaignants dans la certification de la perte en tant que question commune pour les acheteurs indirects. La Cour a estimé que les plaignants ont proposé une méthodologie qui peut prouver que la majoration a été transférée au niveau des acheteurs indirects. Il n'est pas clair si la Cour exige que les plaignants démontrent que toutes les personnes participant au recours collectif ont subi un préjudice. En plus, même si la Cour a expressément rejeté l'affirmation selon laquelle la détermination globale des dommages-intérêts peut servir à établir l'un des préalables à une déclaration de responsabilité, la méthodologie acceptée par la Cour dans l'un des pourvois implique essentiellement la détermination globale des dommages-intérêts pour établir la responsabilité.

Dans un article publié dans la Revue canadienne du droit de la concurrence en 2012, j'ai retracé l'historique de ces questions et soutenu que les demandes des acheteurs indirects devraient être rejetées.ⁱⁱ Jean-Marc Leclerc et David Sterns ont soutenu le point de vue inverse dans un article complémentaire.ⁱⁱⁱ Le présent commentaire examine les opinions de la Cour suprême sur ces questions et suppose un certain degré de familiarité avec le domaine.

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I. Indirect purchasers and the passing on problem

Indirect purchasers

Direct purchasers are purchasers who buy directly from the participants in a price fixing conspiracy. They pay more for the product than they would otherwise. Indirect purchasers are those purchasers who

buy the product itself from the direct purchasers, or who buy products that include the product whose price was fixed. Some indirect purchasers, particularly consumers, may be at the end of a long line of intermediate purchasers. Indirect purchasers only suffer a loss if the purchasers above them in the distribution chain pass the overcharge on instead of absorbing it. Competitive factors at each level of the distribution chain will impact whether the overcharge is passed on at all, and in what amount.

Section 36 of the *Competition Act* creates a statutory cause of action allowing anyone who has suffered loss or damage as a result of, among other things, price fixing, to sue and recover that loss. In principle, therefore, a person who has suffered a loss as a result of an overcharge that has been passed on through a distribution chain ought to be able to sue.⁵

The passing on problem

Claims based on losses that have been passed on to indirect purchasers raise a number of problems, however.

First, indirect purchaser claims are for losses passed on by direct purchasers. However, passing on as a defence was rejected by the Supreme Court in two decisions issued in 2004⁶ and 2007,⁷ as well as by other courts in the 1970s and 1980s.⁸ In the US, this same rejection of passing on as defence in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*⁹ led the US Supreme Court to reject indirect purchaser claims in *Illinois Brick Co. v. Illinois*,¹⁰ as these claims are founded on losses passed on by direct purchasers.

Second, even if indirect purchaser claims are allowed, it is extremely difficult, if not impossible, to determine on a class-wide basis, whether the loss has been passed on to individual indirect purchasers at various levels in the distribution chain. Since the statutory cause of action in the *Competition Act* for price fixing, and other common law causes of action typically pleaded, require proof of loss as a component of liability, the difficulty of proving loss on a class-wide basis has made it difficult to certify loss as a common issue.

This problem was first considered by the Ontario courts in *Chadha v. Bayer Inc.*¹¹ In that case, the Ontario Court of Appeal refused to certify a class action alleging that manufacturers of iron oxide pigments for bricks, paving stones, and other building materials conspired to fix prices for the pigments over a 17 year period because the indirect purchaser plaintiffs had not proposed a methodology for proving on a class-wide basis that homeowners and other end users, who were at the bottom of a complex distribution chain, suffered damages. The court recognized the difficulty of proving that damages were passed on, but refused to follow *Illinois Brick* and bar indirect purchaser claims.

In later cases, plaintiff lawyers adopted three main ways of avoiding or overcoming the difficulties identified in *Chadha*: (a) combining direct and indirect purchasers in one plaintiff class; (b) reliance on causes of action that may not require damages as an element in order to invoke aggregate assessment of damages; and (c) submitting economic evidence regarding pass on. These techniques were largely successful. Price fixing class proceedings continued to be launched and settled. What few contested certification hearings there were tended to result in certification.¹² Throughout, until the decisions of the BC Court of Appeal in *Sun-Rype* and *Pro-Sys*, courts avoided dealing with the problems inherent in indirect purchaser class actions.

In my 2012 article, I outline this problem and its history in detail.¹³

From sweetener to software

The trilogy of cases before the Supreme Court involved different products with different distribution chains.

In *Sun-Rype*, the plaintiffs allege price fixing by producers of high-fructose corn syrup (HFCS) from January 1988 to June 1995. The plaintiff class includes both direct purchasers (such as Sun-Rype itself), and indirect purchasers, for example consumers who bought juice containing high-fructose corn syrup. The plaintiffs brought the action under section 36 of the *Competition Act*, as well as the usual common law and equitable causes of action (conspiracy, intentional interference with economic interests, unjust enrichment, waiver of tort, and constructive trust).

In *Pro-Sys*, the plaintiffs allege that Microsoft conspired with various entities, including computer manufacturers and its own affiliates, to maintain a dominant position in the market for computer operating systems. The plaintiff class includes computer resellers and consumers. This case was initially pleaded as an abuse of dominance case. When the court struck out this claim in 2006,¹⁴ the plaintiffs repleaded it as a conspiracy case. As presently structured, the action is under section 36 of the *Competition Act*, plus the same common law and equitable causes of action as *Sun-Rype*.

In *Infineon*, the plaintiffs allege price fixing by manufacturers of dynamic random access memory (DRAM) between 1999 and 2002. Since this is a Quebec class action, the plaintiff class consists mainly of consumers and small businesses. Since the action was commenced after the expiry of the two year limitation period in section 36(4), the action was brought under article 1457 of the *Civil Code of Quebec*.¹⁵

The courts of appeal disagree

In *Sun-Rype*¹⁶ and *Pro-Sys*,¹⁷ the BC Court of Appeal held that indirect purchasers cannot recover losses caused by price fixing conspiracies, even if the loss was passed on by direct purchasers. The court's reasoning was based on simple math. The Supreme Court's rejection of a defence of passing on means that direct purchasers are entitled to collect the entire overcharge caused by the conspiracy, leaving nothing left for the indirect purchasers to claim, since the law prevents double-recovery of losses from a defendant.

Donald JA dissented, however. He distinguished between passing-on as a defence and passing-on as a factual occurrence. He accepted that "the rule against double recovery is a bedrock principle."¹⁸ Double recovery is avoided by including direct and indirect purchasers in one class, so that damages are assessed once, for all purchasers, thus avoiding double recovery.

In *Infineon*, the Quebec Court of Appeal essentially adopted Donald JA's dissent.¹⁹

My 2012 article contains a full discussion of these decisions.²⁰

The issues before the Supreme Court

The three cases were heard together by the Supreme Court in October, 2012. There were two major issues before the court, as well as a constellation of minor ones. The major issues were:

1. Can indirect purchasers sue to recover an overcharge passed on to them?
2. The evidentiary requirements for certifying harm or loss as a common issue.

The court released decisions in all three on October 31, 2013. The court certified class proceedings in *Pro-Sys* and *Infineon*, but not in *Sun-Rype*. Rothstein J. wrote for the court in *Pro-Sys*, and for the majority in *Sun-Rype*. Karakatsanis J. wrote dissenting reasons for herself and Cromwell J. in *Sun-Rype*. LeBel and Wagner JJ. co-wrote for the court in *Infineon*. The court's main reasons on the indirect purchaser and evidentiary issues are found in *Pro-Sys*.

II. Indirect purchasers can sue for price fixing overcharges passed on to them

The first issue before the court was whether indirect purchasers can sue for price fixing overcharges that are passed on to them by purchasers ahead of them in the distribution chain. The defendants argued that the rejection of the passing on defence entailed, as a necessary corollary, that indirect purchasers could not sue.

The defendants contended that *Kingstreet* stood only for the rejection of the passing on defence in cases where governments collect taxes under *ultra vires* laws.

Offensive, not defensive, passing on

Rothstein J. began, in *Pro-Sys*, by considering the status of the passing-on defence. He rejected the plaintiff's contention that *Kingstreet* stands only for the rejection of the defence in *ultra vires* tax cases. Rather, "the defence is rejected throughout the whole of restitutionary law," he held.²¹

The rejection of defensive use of passing does not, however, entail, as a necessary corollary, the rejection of offensive use of passing on, Rothstein J. held. He considered three arguments in support of the “necessary corollary” argument: (a) double or multiple recovery; (b) remoteness and complexity; and (c) deterrence.

The double recovery problem stems from the inadmissibility of passing on as a defence. This means that passing cannot be used to reduce the direct purchasers’ recovery. Thus the direct purchasers will recover the entire overcharge. If the indirect purchasers are also compensated, the defendant will be forced to pay twice, violating the principle against double recovery.

Rothstein J. relied on two considerations to resolve this problem.

First, the complexity of price fixing class actions coupled with the two year limitation period on private actions under section 36 of the *Competition Act* means that potential plaintiffs cannot wait to sue until after judgment in an earlier lawsuit.²² In other words, all potential plaintiffs will need to sue at the same time or risk losing their cause of action.

Second, when parallel suits in the same or other jurisdictions have the potential to result in double recovery, a judge may deny claims or modify awards to prevent double recovery. Rothstein J. wrote:

[40] Likewise, if the defendant presents evidence of parallel suits pending in other jurisdictions that would have the potential to result in multiple recovery, the judge may deny the claim or modify the damage award in accordance with an award sought or granted in the other jurisdiction in order to prevent overlapping recovery.²³

In *Sun-Rype*, Rothstein J. extended this principle to encompass cases where there is overlap between awards in other countries (notably, the United States) and Canada.²⁴

The second argument was the remoteness and complexity argument. This argument relies on the complexities associated with tracing the loss down the chain of distribution, from one layer to the next.

Rothstein J. held these issues are factual questions to be decided on a case-by-case basis, and are not a reason to bar indirect purchaser claims:

[45] In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss. This task may well require expert testimony and complex economic evidence. Whether these tools will be sufficient to meet the burden of proof, in my view, is a factual question to be decided on a case-by-case basis. Indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages.²⁵

The final argument addressed by Rothstein J. relates to deterrence. This argument comes from *Illinois Brick*; it was not raised by Microsoft. The argument is that direct purchasers are in a better position to sue for damages, while indirect purchaser actions are more complex and prone to fail. Thus indirect purchaser actions are less effective at enforcing competition laws, and allowing them reduces the deterrent effect of private actions.

Rothstein J. disagreed, holding that allowing the offensive use of passing on creates little danger that the overcharger will escape liability and frustrate deterrence objectives. On the contrary, policy favours allowing indirect purchasers to claim, he held, citing Brenna J. in *Illinois Brick*. Moreover, it is sometimes the direct purchasers who are reticent to bring an action, he noted.

After disposing of the three arguments in favour of the “necessary corollary” argument, Rothstein J. turned to a consideration of restitutionary principles. He had earlier relied on Bastarache J.’s finding in *Kingstreet* that the passing on defence was inconsistent with the basic premise of restitution law.²⁶ Those same principles support allowing indirect purchaser claims, Rothstein J. held. He wrote:

Restitution law is remedial in nature and is concerned with the recovery of gains from wrongdoing (see Maddaugh and McCamus, at pp. 3-1 to 3-3). In my view, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties

who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge.²⁷

Next, Rothstein J. discussed the response to the rule in *Illinois Brick* in the US, noting that it has been repealed in a number of state antitrust statutes, and that recent academic commentary favours overturning the rule.²⁸

A defence by any other name

Disallowing the passing on defence while allowing offensive use of passing on inevitably raises the spectre of double recovery. Rothstein J. attempted to solve the problem by permitting a trial judge to modify awards or even deny claims in order to avoid double recovery.

Rothstein J.'s solution amounts to nothing other than the recognition of the passing on defence, albeit in very limited circumstances, as the following analysis shows.

Price fixing class actions in Canada are typically structured as one big class that includes all direct and indirect purchasers. Following a trial, the court will allocate the award between the various classes, presumably following economic evidence as to the incidence of the overcharge. There will thus be no double recovery. But the direct purchasers will not recover 100% of the overcharge they paid. Their recovery will have been reduced on account of passing on. As between the direct purchaser and the defendant, this is nothing other than the application of the passing on defence to reduce the direct purchaser's recovery.

To make this clearer, suppose that the direct purchaser decides to opt out of the class action in order to maximize its potential recovery. Opting out of the class is a fundamental right; the judge cannot force the direct purchaser to remain in the class.²⁹ The defendant will plead that the recovery to the plaintiff should be reduced to take into account the portion of the overcharge that plaintiff passed on to indirect purchasers, who will be compensated in the class action. What is the trial judge to do? If the judge follows Rothstein J.'s solution and does so, then the judge has given effect to the passing on defence, which is contrary

to the Supreme Court's rejection of that defence. If the judge instead relies on the Supreme Court's rejection of the passing on defence and awards the direct purchaser 100% of its recovery, the judge must then reduce the award in the class action to the indirect purchaser customers of that direct purchaser to 0% in order to avoid double recovery. This amounts to denying the indirect purchaser a cause of action, contrary to the Supreme Court's holding that indirect purchasers should be allowed to recover.

In short, Rothstein J.'s reasoning puts trial judges in an impossible situation: they must choose which part of the Supreme Court's decision to follow, and which to breach.

This is not a rare problem: it exists in every single class action that includes direct and indirect purchasers, regardless of whether any direct purchasers opt out. If no one opts out, the problem is less obvious, but it exists nonetheless. Class actions involving plaintiffs at different levels of the distribution chain are inherently parallel proceedings containing overlapping claims for recovery.³⁰

An expansion of restitutionary law?

The central positive reason cited by Rothstein J. for allowing indirect purchaser claims was restitutionary principles. He wrote:

[50] Restitution law is remedial in nature and is concerned with the recovery of gains from wrongdoing (see Maddaugh and McCamus, at pp. 3-1 to 3-3). In my view, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge.³¹

This statement would appear to suggest that Rothstein J. is characterizing the cause of action under section 36 of the *Competition Act* as restitutionary in nature. Elsewhere, however, he lists the restitutionary causes of action pleaded by *Pro-Sys* as unjust enrichment, constructive trust, and waiver of tort.³² It is thus not entirely clear why Rothstein J. appealed to restitutionary principles in his analysis of the problem,

if those principles did not apply to the major cause of action pleaded (section 36).

In any event, a characterization of the section 36 cause of action as restitutionary in nature is problematic. In the passage cited above, Rothstein J. says that restitution is “concerned with the recovery of gains from wrongdoing.” Rothstein J. also cited a passage from *Kingstreet* wherein Bastarache J., writing for the court, explained that the passing on defence was inconsistent with restitutionary principles because restitution is not founded on the concept of compensation for loss:

As mentioned earlier, restitutionary principles provide for restoration of “what has been taken or received from the plaintiff without justification” (Royal Insurance, at p. 71). Restitution law is not concerned by the possibility of the plaintiff obtaining a windfall precisely because it is not founded on the concept of compensation for loss.

Section 36, by contrast, is *not* concerned with recovery of *gains* made by overchargers. On the contrary: it is explicitly founded on the concept of compensation for loss. The section 36 cause of action is available only to those who suffer “loss or damage,” and their recovery is restricted to “an amount equal to the loss or damage proved to have been suffered by him.” It should also be noted that this loss or damage is not necessarily the same as the amount of the overcharge. For example, the overcharge may increase the price of downstream products sold by a purchaser, reducing demand, and thus the profits from those products. In principle this loss should be recoverable.

Moreover, the statutory cause of action in section 36 sits uncomfortably with broader principles of restitutionary law. While restitution is not limited to claims in unjust enrichment, the various causes of action that make up the law of restitution tend to be founded on the notion that the defendant has received something from the plaintiff that it not ought to have received.³³

An action under section 36 partakes of the notion of unjust enrichment, but only so far as the direct purchaser is concerned: an overcharge exacted from direct purchasers as a result of an unlawful

price fixing conspiracy is certainly similar to an unjust enrichment. But so far as the indirect purchasers are concerned, the overcharge they bear is passed on to them by the direct purchasers, *after* the direct purchasers have already borne the overcharge in the first place. In other words, no part of the overcharge paid by the indirect purchasers is paid to the conspirators. There is thus no benefit passing from the indirect purchasers to the conspirators. By the time the indirect purchasers pay the overcharge, the conspirators have already received the benefit from the direct purchasers.

Rothstein J. rejected a similar argument in *Pro-Sys* when considering the unjust enrichment pleading. He acknowledged that *Peel (Regional Municipality) v. Canada*³⁴ would appear to foreclose indirect benefits. Indeed, in that case, McLachlin J. wrote:

58 While not much discussed by common law authorities to date, it appears that a further feature which the benefit must possess if it is to support a claim for unjust enrichment, is that it be more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice -- once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. See, for example, *Fridman and McLeod*, supra, at p. 361; *Maddaugh and McCamus*, supra, at p. 717; and, *Gautreau*, supra, at pp. 265 et seq. It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant.³⁵ [Emphasis added]

In *Pro-Sys*, Rothstein J. commented:

The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent

that the benefit to Microsoft is an “incidental blow-by” or “collateral benefit.” Second, Pro-Sys relies on *Alberta Elders*, which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.³⁶

In *Alberta Elders*, the mechanism by which the benefit was conferred was unusual. The plaintiffs claimed that the accommodation charges paid by nursing home residents had been increased so as to help cover the cost of medical care. Since the cost of medical care was, by law, a responsibility of the Alberta government, the Alberta government was getting a benefit from the nursing home residents in that the amount it had to pay nursing homes for their medical care was reduced. Importantly, the Alberta government controlled the amount of accommodation charges through Regulations.³⁷

The benefit in *Alberta Elders* was a “negative benefit” – an expense spared – which does count as a benefit for purposes of unjust enrichment.³⁸ On the facts outlined in that case, the accommodation charges paid by the nursing home residents saved the government money it would otherwise have had to pay for the medical care of those same residents. The government’s benefit came as a result of the payments made by the residents. This is quite different from the case with indirect purchasers, where the conspirators receive the benefit *before* the overcharge is passed on, and there is no direct causal connection between the passing on of the overcharge to the indirect purchasers and the conspirators’ receipt of the overcharge from the direct purchasers. The conspirators are mostly indifferent as to whether the overcharge is passed on or not. Indeed, they may prefer that the overcharge were not passed on.³⁹ It must be acknowledged that at some level, there is a connection between indirect purchasers and the profits made by the conspirators. This is because direct purchasers will generally base their purchases on projections of demand from their customers, which in the end are based on projections of the ultimate demand by end users. There may also be particular contractual relationships that would create a causal relationship between payment of the overcharge by an indirect purchaser and receipt of the benefit by

the overcharger. Examples might include consignment sales, cost-plus contracts between the direct purchaser and the indirect purchaser,⁴⁰ vertical price maintenance, and contractual rights of return.

That being said, there is a category of restitution that may not require a corresponding deprivation: restitution for wrongdoing. This category has been referred to as “unjust enrichment by doing wrong to the plaintiff.”⁴¹ Even here, treating section 36 as restitutionary in nature remains problematic. There needs to be a causal link between the harm suffered by the plaintiff and the benefit to the defendant.⁴² That causal link is indirect at best in most indirect purchaser cases. One category of restitution for wrongdoing involves cases seeking disgorgement of profits from criminal activity. Successful claims of this nature are very rare.⁴³ As noted above, however, the measure of damages in a section 36 claim is *not* the profits earned by the cartelists. Any claim for disgorgement of those profits must be founded on a cause of action other than section 36.

Restitution has been evolving in Canada over the last generation or so.⁴⁴ As this evolution is not yet complete, it would be unsafe to suggest that restitution could never encompass the section 36 cause of action. That being said, statutory causes of action do not need to be merged into broader theories, nor should they be. Unlike common law and equitable causes of action, whose development is entrusted to our courts, which developed them in the first place, statutory causes of action are defined and circumscribed by statute. The role of the court in relation to a statutory cause of action is one of statutory interpretation.

III. Proving loss as a common issue

The second major issue before the court related to the evidence required to certify harm or loss as a common issue, and the degree to which a court should examine the expert evidence filed by the parties.

Some basis in fact

In *Hollick v. Toronto*,⁴⁵ the Supreme Court held that the plaintiff show some basis in fact for each of the certification requirements. The “some basis in fact” standard has been used since.

Rothstein J. rejected Microsoft's attempt to reinterpret this standard to require the plaintiff to prove the certification requirements on a balance of probabilities. He did, however, reaffirm the importance of certification as a meaningful screening device. He and adopted a goldilocks approach to this screening; it should neither be strict, nor superficial. He wrote

[103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.⁴⁶

Rothstein J. also pointed out that the evidence required at the certification stage is evidence establishing the commonality of issues, and not evidence that the alleged acts actually occurred.⁴⁷

Evidentiary basis for certifying loss as a common issue

Turning to the evidentiary basis needed for loss to be certified as a common issue, Rothstein J. rejected Microsoft's assertion that the plaintiff's expert evidence should be subjected to a robust analysis.

In order to obtain certification of loss as a common issue, plaintiffs need to show that they have a methodology that can prove an "impact common to all members of the class," he held, citing the leading US case *In Re Linerboard Antitrust Litigation*. This means that the methodology

must be able to show that the overcharge was passed on to the indirect purchaser level in the distribution chain. He wrote:

In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a classwide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.⁴⁸

Aggregate damages provisions cannot be used to establish liability

Having concluded that loss could be certified as a common issue, Rothstein J. went on to consider a related issue that has bedevilled price fixing class actions: whether aggregate damages provisions in class proceedings legislation can be used to establish liability.

Class proceedings legislation typically contain provisions allowing a court to determine damages for a class in the aggregate, instead of on an individual basis, but only if “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.”⁴⁹

Notwithstanding this restriction, some courts, including the certification judge in the *Microsoft* case, have held that aggregate damages can be used to establish loss as a component of liability.⁵⁰

Rothstein J. expressly rejected this position, holding that the aggregate damages provisions relate to remedy and are procedural. An antecedent finding of liability is required before the court can resort to the aggregate damages provisions, he concluded. For private damages actions under section 36 of the *Competition Act*, this includes proof of loss. He wrote:

The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1) (b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*. This includes, where required by the cause of action such as in a claim under s. 36 of the Competition Act, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability.

Rothstein J. held, nevertheless, that whether damages should be assessed in the aggregate could be certified as a common issue, but that issue can only be determined at trial after a finding of liability has been made.

The debate in *Sun-Rype*

There is nevertheless an inherent tension between Rothstein J.'s rejection of the use of aggregate damages to establish liability, and his acceptance of the possibility of establishing the fact of loss, which is a component of liability, on a class-wide basis.

This tension is further complicated by the debate in *Sun-Rype*. The Supreme Court certified *Microsoft* and *Infineon* as class proceedings, but not *Sun-Rype*.

In *Sun-Rype*, the problem was that HFCS and liquid sugar were used interchangeably by direct purchasers during the period of the alleged conspiracy, without any distinction between the two in labeling of end products. As a result, indirect purchasers could not know whether they had bought products containing HFCS or not, making it impossible to determine who is a member of the class. The proposed class proceeding thus failed a fundamental requirement of having an identifiable class of two or more persons and could not be certified.

Karakatsanis J. penned a dissent in which Cromwell J. concurred. In a sweeping reinterpretation of class proceedings legislation, she held that class proceedings legislation is designed to permit recovery for the benefit of the class as a whole, without requiring proof of individual loss. Aggregate damages provisions can be used once “liability to the class” has been determined.

Karakatsanis J. then went further still, holding that class proceedings legislation does have “substantive implications.” In the case of price fixing actions under section 36 of the *Competition Act*, it allows individuals to obtain remedies that would not otherwise be available to them because “of difficulties of proving the extent of their individual loss.” The entire passage is worth quoting at length:

[107] For these reasons, I am not persuaded that the issue of whether an individual can prove individual loss is a necessary enquiry at certification. In sum, while class actions are a procedural vehicle, they are not merely procedural. They make possible claims that are very complex or could not be prosecuted individually, not only because it would be inefficient or unaffordable, but also because it may be extremely difficult to prove individual claims. The CPA does have substantive implications: it creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual member’s damages is impractical, and that is available even if those who are not members of the class can benefit.

[108] I agree with Justice Rothstein that the aggregate damages provisions relate to the assessment of damages and cannot be used to establish liability. However, where proof of loss or detriment is essential to a finding of liability, for example in a cause of action under s. 36 of the *Competition Act*, or in tort, expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis. See *Pro-Sys*, at paras. 120 and 140. While these provisions do not create new causes of action, they permit individual members of the class to obtain remedies that may not be available to them on an individual suit because of difficulties of proving the extent of their individual loss. The aggregate damage provision and cy-près awards promote behaviour modification and provide

access to justice where it otherwise may be difficult to achieve.
[Emphasis added]

The problem with this analysis is that the *Competition Act* could not be more clear: a private action is available only to those who have “suffered loss or damage as a result of” price fixing (and other competition crimes), and plaintiffs can recover “an amount equal to the loss or damage proved to have been suffered by him.”⁵¹

It is hard to interpret this passage as anything other than a finding that class proceedings legislation modifies the requirement of proving damages expressly set out in the section 36. This contravenes a basic principle of Canada’s federal structure that provincial legislation cannot amend federal legislation, nor *vice versa*. As a matter of constitutional law, provincial class proceedings legislation cannot substantively change a federal statute.

In any event, the majority, led by Rothstein J., expressly rejected Karakatsanis J.’s approach since it conflicts with the well-established principle that class proceedings legislation does not create new causes of action or alter existing ones. He wrote:

[75] As I understand it, Justice Karakatsanis’s point is that where liability to the class has been proven there is no requirement to prove any person is a member of a class or that any person has suffered individual damage. The necessary implication is that class proceeding legislation alters existing causes of action. For example, s. 36 of the *Competition Act* creates a cause of action for “[a]ny person who has suffered loss or damage.” My colleague’s approach would suggest a class action claim could proceed under s. 36 of the *Competition Act* without any person establishing that they had suffered loss or damage. However, the *CPA* neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants with causes of action to unite and pursue their claims as a class.

Here, Rothstein J. appears to recognize that section 36 requires that each and every member of the class must prove damages, and that class proceedings legislation cannot remove this requirement. Yet his own reasons in *Microsoft* and *Sun-Rype* appear to do just that.

Rothstein J. accepted, from the leading US case, *Linerboard*, that the plaintiffs “must demonstrate that ‘sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class.’”⁵² But Rothstein J. then reformulated the test, holding that “the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser *level* in the distribution chain.” He returned to this theme a few paragraphs later, writing:

...the methodology must offer a realistic prospect of establishing loss on a classwide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred).⁵³

The key difference between Rothstein J.’s formulation and the formulation of this test in *Linerboard* is the recognition, in *Linerboard*, the methodology be able to establish that *all* members of the class suffered a loss.

To be fair, this difference may be more apparent than real. In *Linerboard* the court relied on the so-called Bogosian Shortcut in addition to expert evidence that advanced econometric models could establish class-wide impact. The Bogosian Shortcut involves a presumption that all purchasers suffer a loss if a price fixing conspiracy raises prices in the market place above what they would be in a competitive market.⁵⁴

It is, however, worth noting that Rothstein J. has moved from dealing with the question of whether all members of the class have suffered a loss, to asking whether the loss was passed on to particular levels in the distribution chain. In other words, there is an assumption that if an overcharge was passed on to a particular level in the distribution chain, the fact of loss will be considered proven for all class members at that level. Effectively, a sort of collective personality has been attributed to class members at each level of the distribution chain.

As well, notwithstanding Rothstein J.’s rejection of aggregate assessment of damages as a means of proving loss as a component of liability, the methodology he accepted for proving that the overcharge was passed on to the indirect purchaser level involves assessing damages in the aggregate at the retail level:

[122] Dr. Netz describes the price premium method as follows: Under this method, one calculates the retail price premium that Microsoft products have relative to competing products for the products at issue and for a set of benchmark products where there have not been allegations of anticompetitive conduct. The overcharge equals the percentage decrease in the retail price of the products at issue such that Microsoft would still realize the same retail price premium as it does on the benchmark products (i.e., products in markets not affected by Microsoft's unlawful conduct). [2010 BCSC 285, at para. 26]

[123] Once the retail price overcharge is calculated, the total class member expenditure on the products should then be multiplied by the overcharge percentage in order to arrive at the quantum of damages.⁵⁵ [Emphasis added]

There is in this methodology no attempt to prove that each and every member of the class suffered a loss. It is a top-down methodology that purports to establish damages for the class as a whole. It is, in short, an aggregate assessment of damages.

IV. Minor issues

The indirect purchaser trilogy deals with a number of minor issues, some of which are worth highlighting.

Conspiracy between affiliated corporations

One of the causes of action pleaded by Pro-Sys was predominant purpose conspiracy. This tort makes it unlawful for two or more people to conspire to injure someone, even if the means employed are lawful. It is essential that the predominant purpose of the conspiracy be to injure the plaintiff. The Supreme Court described this tort as an anachronism whose scope should be restricted in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*,⁵⁶ but refused to eliminate it.

Microsoft alleged two defects in Pro-Sys' predominant purpose pleading. The first was that it failed to identify injury to the plaintiffs as the one predominant purpose, but instead identified it as one of several

purposes. Rothstein J. dismissed this concern by reading the pleadings generously, finding that he could not “rule out Pro-Sys’s explanation that Microsoft’s primary intent was to injure the plaintiffs and that unlawfully increasing its profits was a result of that intention.”⁵⁷

The second defect identified by Microsoft was that the conspiracy upon which it the predominant purpose conspiracy claim relied was a conspiracy between a parent (Microsoft) and its wholly-owned subsidiary (Microsoft Canada). Microsoft contended that affiliates always act in combination.

Rothstein J. relied on a statement in *Smith v. National Money Mart Co.*⁵⁸ that “there can be a conspiracy between a parent and a subsidiary corporation” to conclude that it would not be appropriate to make a definitive ruling on the issue at the pleadings stage.⁵⁹

There are two problems with this. First, competition law recognizes that affiliated companies generally coordinate their activities. In Canada, this recognition is codified in the *Competition Act*.⁶⁰ In the US, the affiliates exemption was created by the US Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*⁶¹ In that case, the court noted that it was generally agreed that internally coordinated conduct within a corporation, between the officers of the corporation, or between unincorporated divisions of a corporation, did not raise antitrust dangers. It would not make sense to have a different rule for corporations that incorporate a division as a subsidiary. The court wrote:

For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do “agree” to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.⁶²

This is the policy basis upon which the statutory affiliates' exception in the *Competition Act* rests. While there may be some justification for allowing theories based in inter-affiliate conspiracies in some areas of law, where the conspiracy alleged fundamentally relates to the competitive practices of a firm, to allow the plaintiffs to proceed on a theory involving conspiracy between affiliates undermines, if not negates, the statutory presumption that affiliates are entitled to coordinate their activities, including pricing and other competitive responses, and risks producing results that are inconsistent with the objectives of the *Competition Act*.

Second, this expansion of liability, far beyond that envisaged by section 36 of the *Competition Act*, represents an expansive approach to a tort that the Supreme Court held in *Canada Cement LaFarge* ought to be narrowed, rather than expanded. Indeed, the continued existence of this tort is hard to explain, for it makes lawful conduct unlawful, merely because more than one person is a party to it.

Constructive trust unavailable

Pro-Sys also claimed unjust enrichment against Microsoft and sought a constructive trust over an amount equal to the overcharge from Microsoft's sales as a remedy.

Microsoft objected to the claim in unjust enrichment, arguing that any enrichment it received from indirect purchasers was indirect, and thus not recoverable under the rule in *Peel (Regional Municipality) v. Canada*.⁶³ Rothstein J. noted Pro-Sys's argument that *Alberta v. Elder Advocates of Alberta Society*,⁶⁴ stands for the proposition that unjust enrichment is possible where the benefit was indirect. He held that it was not plain and obvious that the claim in unjust enrichment must fail.⁶⁵

But Pro-Sys' desired remedy, constructive trust, was not available, Rothstein J. held, because there is no referential property, that is, a link or causal connection between the plaintiff's contribution and the acquisition of specific property. Pro-Sys' claim is purely monetary, Rothstein J. noted, and constructive trusts are only available where a monetary award is inappropriate or insufficient.⁶⁶

Waiver of tort's status remains uncertain

Microsoft invited the Supreme Court to rule on the issue of whether waiver of tort is an election of remedy or an independent cause of action. Traditionally, waiver of tort was seen as an election of remedy made after the tort is proven. The plaintiff would “waive the tort” and seek recovery on an unjust enrichment instead of damages. More recently, commentators and some courts have argued that it should not be necessary to prove the underlying tort. In other words, it is argued that plaintiffs should not have to prove that they suffered damages; it would be sufficient to prove wrongdoing on the part of the defendant for the plaintiff to be able to force the defendant to disgorge its profits.

To date, courts in Canada have routinely held that given the uncertainty in the law surrounding the status of waiver of tort, they should not strike the claim at the pleadings stage. Although nearly ten years has passed since the leading case of *Serhan* in 2006⁶⁷ without a resolution to this issue, Rothstein J. followed the now time honoured formula, stating:

In my view, this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.⁶⁸

The notion that a full factual record is required to deal with waiver of tort once and for all was questioned by Lax J. in *Andersen v. St. Jude Medical, Inc.*⁶⁹ Lax J. found that the 138 days of evidence she had heard did not help illuminate the policy issues that waiver of tort involves, and suggested that courts should be willing to decide whether waiver of tort is a stand-alone cause of action on a pleadings motion. She noted that courts have made important decisions about the law on pleadings motions, citing *Donoghue v. Stevenson*⁷⁰ and *Cooper v. Hobart*.⁷¹ Despite this, the question remains undecided in Canada.

V. Conclusion

The Supreme Court's decisions in the indirect purchaser trilogy resolve longstanding issues relating to indirect purchasers in the sense

that they largely confirm the current practice of including all indirect and direct purchasers in the class and proposing a top-down methodology of proving that class members suffered a loss. These decisions will allow Canada's price fixing class action industry to continue generating large settlements and fees for plaintiff counsel. As I have argued, however, the court's resolution of these issues is superficial, hiding internal contradictions on the central points.

Endnotes

ⁱ *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*]; *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*]; *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 [*Infineon*].

ⁱⁱ Michael Osborne, "The Loss Stops Here: Should Indirect Purchasers Be Able To Sue For Price Fixing Losses?," 25 Can Comp L Rev 50 [Osborne 2012].

ⁱⁱⁱ Jean-Marc Leclerc and David Sterns, "The case for permitting indirect purchaser claims in Canada: a critical analysis of Pro-Sys Consultants and Sun-Rype," 25 Can Comp L Rev 96 [Leclerc and Sterns].

¹ Michael Osborne is a partner of Affleck Greene McMurtry LLP.

² *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*]; *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*]; *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 [*Infineon*].

³ Michael Osborne, "The Loss Stops Here: Should Indirect Purchasers Be Able To Sue For Price Fixing Losses?," 25 Can Comp L Rev 50 [Osborne 2012].

⁴ Jean-Marc Leclerc and David Sterns, "The case for permitting indirect purchaser claims in Canada: a critical analysis of Pro-Sys Consultants and Sun-Rype," 25 Can Comp L Rev 96 [Leclerc and Sterns].

⁵ *Competition Act*, RSC 1984 c C-34, s 36.

⁶ *British Columbia v Canadian Forest Products Ltd.*, [2004] 2 SCR 74.

⁷ *Kingstreet Investments v New Brunswick (Department of Finance)*, 2007 SCC 1 [Kingstreet].

⁸ *Attorney General of Nova Scotia v Christian* (1974), 49 DLR (3d) 742 at 752, [1974] NSJ No 221 (CA) at para 37; *Oshawa Group Ltd. v Great American Insurance Co.* (1982), 36 OR (2d) 424 at 431-432 (CA); *Alberta Housing Corporation v Orysiuk* (1981), 17 Alta LR (2d) 60, [1981] AJ No 1032 (CA); *Mississauga Hydro Electric Commission v Ontario Hydro* (1979), 26 OR (2d) 155 (HCJ).

⁹ *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 392 US 481 (1968) [*Hanover Shoe*].

¹⁰ *Illinois Brick Co. v Illinois*, 431 US 720 (1977) [*Illinois Brick*]

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

¹² See for example: *Irving Paper Ltd. v Atofina Chemicals Inc.*, [2009] OJ No 4021 (for a discussion of this case, see K. Thomson *et al.*, "One Hand Taketh Away: Recent Developments in Indirect Purchaser Competition Class Actions in Canada," 38 *Advocates' Q* 286 at 291ff); *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2009 BCCA 503 at para 78 (for a discussion of this case,

see M. Osborne, “Aggregate Assessment of Damages Allows Certification of Conspiracy Class Actions, Courts Hold,” (2010) 24:1 Can Comp Rec 82; Thomson, at 295ff; M. Eizenga *et al.*, “Antitrust Class Actions: A Tale of Two Countries,” 25:1 Antitrust 83); *Fanshawe College of Applied Arts and Technology v LG Philips LCD Co.*, 2011 ONSC 2484

¹³Osborne 2012, *supra* note 3.

¹⁴*Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2006 BCSC 1047.

¹⁵*Civil Code of Quebec*, art 1457 provides for a cause of action for damages caused by breach of rules of conduct that are imposed by law or usage.

¹⁶*Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2011 BCCA 187.

¹⁷*Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2011 BCCA 186.

¹⁸*Ibid* at para 30.

¹⁹*Options Consommateurs v Infineon Technologies AG*, 2011 QCCA 2115.

²⁰Osborne 2012, *supra* note 3.

²¹*Pro-Sys*, *supra* note 2, at para 29.

²²*Ibid* at para 38, citing Brennan J., dissenting in *Illinois Brick*, *supra* note 10 at 764.

²³*Ibid* at para 40.

²⁴*Sun-Rype*, *supra* note 2, at para 21.

²⁵*Pro-Sys*, *supra* note 2, at para 45.

²⁶*Ibid* at para 22, citing *Kingstreet*, *supra* note 7 at para 47.

²⁷*Ibid* at para 50.

²⁸*Ibid* at para 51-59.

²⁹The right to opt out has been recognized as an important procedural right: *Currie v McDonald's Restaurants of Canada Ltd.* (2005), 74 OR (3d) 321 at para 28.

³⁰In *Vitapharm Canada Ltd. v F. Hoffmann-La Roche Ltd.*, [2000] OJ No 4594 (SCJ) at para 36-46 Cumming J. recognized that “It seems probable that due to varying economic factors persons at different levels in the overall distribution process suffered different losses. There may well be differing interests and perspectives as between different users. Claimants at any given level of user in the distribution chain, such as retail purchasers, may well require separate counsel at that point in time to properly represent their interests. Separate subclasses can be formed if appropriate: see ss. 8(2), (3), 11(1)(b), 12, 25 and 26 of the CPA.”

³¹*Pro-Sys*, *supra* note 2, at para 50.

³²*Ibid* at para 84.

³³P.D. Maddaugh & J.D. McCamus, *The Law of Restitution* (looseleaf edition) Carswell, 2004-, at p. 1-1, 3-3: “The fundamental and animating principle of the law of restitution is the principle against unjust enrichment” [Maddaugh and McCamus].

³⁴[1992] 3 SCR 762.

³⁵*Ibid* at para 58.

³⁶*Pro-Sys*, *supra* note 2, at para 87.

³⁷*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, at para 9-14.

³⁸ *Ibid* at para 82, citing *Garland v Consumers' Gas Co.*, 2004 SCC 25 at 31, citing *Peel*, *supra* note 34 at p. 790.

³⁹ This is because the overcharge may reduce demand, reducing the profitability of the price increase made possible by price fixing. If the direct purchasers absorb the overcharge, the conspirators do not suffer this reduced demand.

⁴⁰ *Illinois Brick* recognized cost plus contracts as an exception to the rule against recovery by indirect purchasers, *supra* note 10 at 494.

⁴¹ P.B.H. Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1989) at p. 25, cited by Maddaugh & McCamus, *supra* note 33, at p. 3-7.

⁴² Maddaugh & McCamus, *supra* note 33, at p. 3-23 - 3-24.

⁴³ *Ibid* at p. 23-35ff.

⁴⁴ See, generally, *ibid* at p. 2-1ff.

⁴⁵ *Hollick v Toronto (City)*, 2001 SCC 68.

⁴⁶ *Pro-Sys*, *supra* note 2, at para 103-104.

⁴⁷ *Ibid* at para 110.

⁴⁸ *Ibid* at para 118.

⁴⁹ See for example the Ontario *Class Proceedings Act*, s. 24(1)(b).

⁵⁰ *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2010 BCSC 285; see also *Irving Paper Ltd. v Atofina Chemicals Inc.*, [2009] OJ No. 4021 (SCJ), leave to appeal refused, but criticized on this point 2010 ONSC 2705 (Div Ct); *Steele v Toyota Canada Inc.*, 2011 BCCA 98; *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2009 BCCA 503 (For a discussion of this case, see M. Osborne, "Aggregate Assessment of Damages Allows Certification of Conspiracy Class Actions, Courts Hold," (2010) 24:1 Can Comp Rec 82; K. Thomson *et al.*, "One Hand Taketh Away: Recent Developments in Indirect Purchaser Competition Class Actions in Canada," 38 *Advocates' Q* 286 at 295ff; M. Eizenga *et al.*, "Antitrust Class Actions: A Tale of Two Countries," 25:1 *Antitrust* 83.).

⁵¹ *Competition Act*, *supra* note 5, s 36(1).

⁵² *Pro-Sys*, *supra* note 2, at para 115, citing *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir 2002) at 155.

⁵³ *Ibid* at para 118.

⁵⁴ *Bogosian v Gulf Oil Corp.*, 561 F.2d 434, 448 (3d Cir. 1977) at 455.

⁵⁵ *Pro-Sys*, *supra* note 2, at para 121-123.

⁵⁶ [1983] 1 SCR 452.

⁵⁷ *Pro-Sys*, *supra* note 2, at para 78.

⁵⁸ (2006), 80 OR (3d) 81 (CA).

⁵⁹ *Pro-Sys*, *supra* note 2, at para 79.

⁶⁰ See for example, s. 45(6) which exempts conspiracies between affiliates from the s. 45 conspiracy offence, and s. 47(3), which does the same for the bid rigging offence.

⁶¹ 467 US 752.

⁶² *Ibid* at 771.

⁶³ [1992] 3 SCR 762.

⁶⁴ 2011 SCC 24.

⁶⁵ *Pro-Sys*, *supra* note 2, at para 87.

⁶⁶ *Ibid* at para 92.

⁶⁷ *Serhan (Trustee of) v Johnson & Johnson* (2006), 85 OR (3d) 665 (Div Ct). In that case, the Divisional Court certified a class action on behalf of plaintiffs who had not suffered any harm, seeking to force Johnson & Johnson to disgorge profits it made from selling a defective blood monitoring device.

⁶⁸ *Pro-Sys, supra* note 2, at para 97.

⁶⁹ 2012 ONSC 3660.

⁷⁰ [1932] AC 562 (HL).

⁷¹ 2001 SCC 79.