A HISTORICAL PERSPECTIVE OF A MADE-IN-CANADA REMEDY FOR ANTICOMPETITIVE BEHAVIOUR

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This paper is better described as a colloquy rather than an in-depth legal treatise. It is a perspective of living through and litigating the formative years of anticompetitive class action cases in Canada. In particular, it describes the "legal quagmire" created by the US Supreme Court in antitrust cases whereby indirect purchasers (consumers) were disenfranchised at the federal court level in the US and how this legal quagmire could be avoided in Canada. The paper tracks several of the early consumer anticompetitive class action cases in Canada and in particular the Microsoft case which was successful at the certification level, lost at the British Columbia Court of Appeal level and restored by the Supreme Court of Canada. The outcome of the Microsoft case determined that contrary to the US Supreme Court, consumers can pursue damages claims for anticompetitive conduct in Canada. Hence, the US legal quagmire was avoided.

Cet article se veut davantage une discussion qu'une analyse juridique en profondeur. Mon point de vue est façonné par mon vécu et ma pratique durant les années formatives que furent les recours collectifs contre des agissements anticoncurrentiels au Canada. Plus précisément, je décris le bourbier juridique qu'a créé la Cour suprême des États-Unis dans des affaires antitrust concernant des acheteurs indirects (consommateurs) brimés dans leurs droits à la cour fédérale. Dans mon article, j'explique comment le Canada peut éviter de s'empêtrer de la sorte. Je fais un retour sur certains des premiers recours collectifs contre des agissements anticoncurrentiels au Canada, notamment le recours contre Microsoft, pour lequel les auteurs ont eu gain de cause en première instance, ont été déboutés par la Cour d'appel de la Colombie-Britannique, mais à qui la Cour suprême du Canada a définitivement donné raison. L'arrêt contre Microsoft a établi, contrairement au jugement de la Cour suprême des États-Unis, que les consommateurs canadiens peuvent réclamer des dommages-intérêts pour agissements anticoncurrentiels. C'est ainsi qu'on a pu éviter ce bourbier juridique américain.

Introduction

The *Competition Act* and its antecedents makes certain anticompetitive behavior illegal, generally speaking.[1] Horizontal price fixing, in particular, is condemned as akin to

fraud or theft and criminalized.[2] The plaintiffs' bar in Canada was not very active in pursuing anticompetitive cases until the advent of class actions and, more particularly, until the advent of pan-Canadian class actions. Prior to the emergence of Canadian class actions, there were very few anticompetitive cases brought and the only significant modern anticompetitive case about civil damages was *Cement LaFarge v. B.C. Lightweight Aggregate*, which reached the Supreme Court of Canada in 1983.[3] This case is notable because it determined the parameters of the tort of conspiracy. The respondent was left out of the price-fixing cement conspiracy and was driven out of business. The appellants, who pleaded guilty to a charge of conspiring to prevent or unduly lessen competition in the production of cement, had made it impossible for the respondent to continue operating in the field. The Supreme Court of Canada overturned the lower courts and found that the conspirators were not liable. A number of commentators were surprised by the decision of the Court and the factual and legal reasoning.

The Supreme Court of Canada did lay down the law that the tort of conspiracy exists: (1) if the predominant purpose of defendants' conduct is to cause plaintiff injury, whether or not defendants' means were lawful; or (2) where defendants' conduct is unlawful and directed towards the plaintiff (alone or with others) and in circumstances that the defendants should know that injury to the plaintiff is likely to, and does, result.

Class Action Legislation and the First Pan-Canadian Class Actions

In 1978, Québec was the first province in Canada to legislate class proceedings.[4] In 1992 Ontario followed suit,[5] and although there was no express provision enabling national class actions, it did not take Ontario judges very long to find that Ontario class proceedings cases could be asserted on a pan-Canadian basis.[6] In 1996 British Columbia passed class proceedings legislation.[7] Because these three jurisdiction covered more than 75% of the Canadian population and because the Ontario courts ruled that Ontario class proceedings could be asserted on a pan-Canadian basis, the formative Canadian plaintiffs' class action bar started to form a consortium of counsel to bring class actions for anticompetitive conduct on a pan-Canadian basis. This was accomplished by these counsel and law firms commencing parallel actions in each of these three jurisdictions, with the Ontario class action covering the rest of Canada. Most Canadian jurisdictions now have class action legislation

and several of these jurisdictions have provisions in their legislation allowing pan-Canadian class actions.[8] British Columbia has recently passed amending legislation to allow for pan-Canadian class actions.

Why Class Actions?

Class actions can provide an effective and efficient means of litigating mass claims. They also improve access to justice for individuals who would otherwise be unlikely or unable to assert their claims. Furthermore, effective class actions can lead to behavior modification of actual or potential wrongdoers who might be tempted to ignore their obligations to the public. While anti-competitive conduct often results in modest damages per class member, the number of class members can be very large and, on occasion, can comprise the majority of both the Canadian population and Canadian businesses. For example, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG ("DRAM")* was a case based on a price-fixing conspiracy of the DRAM memory chips in desktop computers, laptop computers, servers and a whole host of other electronic equipment.[9] Approximately 10 years after the case was started, it was settled by a consortium of class counsel and firms for more than $80 million. Certain large purchasers had very significant individual claims. In addition, because DRAM was so ubiquitous, the administration of the settlement provided for each household in Canada to claim $20 compensation by way of an electronic declaration alone. An excess of 880,000 Canadian households came forward and received funds.

The Difficulties and Dilemmas Facing Class Counsel at the Outset

To understand the difficulties and dilemmas facing Canadian class action counsel at the time we embarked on this journey, it is necessary to understand the differences between both the statutory class proceedings regimes that exist in the United States and the differences in the law that developed. These differences are not only very considerable but include a very radical United States Supreme Court ruling that, in my respectful opinion, undermined consumer recovery in antitrust class actions in the United States. The pioneer class action counsel in Canada felt very strongly that we needed to develop a "made in Canada" approach to the private prosecution of antitrust class actions. We enjoyed a substantial head start because of the very hard and good work performed by the Ontario Law Commission in their seminal study.[10] Their recommendations were largely accepted by

the Ontario legislature and the Ontario *Class Proceedings Act* has been used as a template for all other Canadian jurisdictions except Québec.

There are appreciable differences between class action law in Canada and the United States, especially in regards to class certification. Canadian jurisdictions have a lower threshold for certification, which is intended to function as mechanism for screening claims. The Supreme Court of Canada has said that the certification stage is not to be a battle front of opposing experts and only "some basis in fact" is needed to support the constructs of a class action.[11] This level of scrutiny is consistent with the fact that there is no pre-certification discovery as a matter of right in Canadian jurisdictions. While Canadian courts have largely avoided weighing evidence and trying the merits of an action at the certification stage, U.S. courts engage heavily with expert evidence at this step.[12] The U.S. Supreme Court has said that class certification should only be granted if the trial court is satisfied after a "rigorous analysis" that the statutory requirements for certification have been met, and that "such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim."[13] This inevitably increases the costs associated with pursuing class certification. As one class action lawyer writes, the potential results of the U.S. approach to certification "weigh heavily against access to justice and effectively turn certification into a mini-trial".[14]

The higher U.S. standard for certification is also attributable to specific class certification requirements under the U.S. Federal Rules of Civil Procedure. Most antitrust class actions are brought under Rule 23(b)(3), because plaintiffs can recover treble damages.[15] One requirement for certification under this rule is that the common issues "predominate" over individual issues. By contrast, Canadian class action legislation has not adopted this same predominance requirement.[16] A second requirement for certification under Rule 23(b)(3) is that a class action be "superior" to other available methods of adjudicating the controversy. In Canadian common law jurisdictions, the corresponding requirement is the "preferability" of a class action, which lowers the threshold for certification compared to the United States.

In spite of the substantial statutory and common law differences between Canada and the United States on the class action front, it was essential for the pioneers pursuing private enforcement of Canadian anticompetitive class actions to have close regard to U.S. antitrust and class action law. The first and foremost reason for this was that in the

beginning of anticompetitive class actions in Canada, the U.S. plaintiffs' class action bar had almost invariably started cases in the U.S. litigating the same facts and circumstances that underlay parallel anticompetitive conduct in Canada. Indeed, those of us who were at the forefront of pursuing Canadian anticompetitive class actions liaised with law firms in the U.S. who were prosecuting parallel class actions. Second, U.S. class action law had a very long historical record compared to the very immature Canadian class action jurisprudence. Although this could said to be a truism, it does not mean that the U.S. got it right with respect to one of the most important pillars of class action law.

Indirect Purchasers: The U.S. "Legal Quagmire"

The United States got into a legal quagmire on the core issue of who was entitled to sue price-fixing conspirators. Reaching back into the 1960s, U.S. price-fixing conspirators were enjoying a considerable level of success in defending claims on the basis that the plaintiffs who were suing them could not prove where the harm fell as between direct purchasers, intermediaries and consumers. This issue was a significant roadblock for consumers to take advantage of the governing U.S. federal legislation that permitted a court to triple the amount of actual/compensatory damages.[17] This overarching issue occupied the attention of the U.S. Supreme Court in the *Hanover Shoe* decision in 1968,[18] and again in the *Illinois Brick* decision in 1977.[19]

In *Hanover Shoe* the plaintiff was a shoe manufacturer and a customer of the defendant and alleged that the defendant had monopolized the shoe machinery industry in violation of U.S. antitrust law, which resulted in an overcharge. The defendant argued that the plaintiff class had passed on some or all of the overcharge and, therefore, was not entitled to recover damages. The court rejected this defence, holding that the passing on defence was not available. In making its decision, the court determined that if the passing on defence was permitted, treble damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.[20]

In *Illinois Brick*, the state of Illinois brought a class action on behalf of consumers against the manufacturers and distributors of concrete block in the greater Chicago area. The state alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers causing them to suffer a loss. The majority

of justices on the U.S. Supreme Court held that the passing on theory must be applied uniformly for plaintiffs and defendants alike. The Court referred to *Hanover Shoe*, where the Court found that the defendants could not resort to a passing on defence and equity required a quid pro quo, finding that only indirect purchasers had standing to pursue a class action claim of this nature. Thus, the Court in *Illinois Brick* held that only the direct purchasers, and not distributors or others in the manufacturing chain, could be considered injured and assert recovery rights. The majority relied on two key arguments in support of their decision. The first argument was that determining exactly where the harm was suffered was difficult, time-consuming and an uncertain process. The second argument was that deterrence was better served by letting only the direct purchasers sue for the full amount of damages even if this meant they were being overcompensated.

Although *Illinois Brick* is still applied at the federal level, many states have passed legislation repealing its effect at the state level. Approximately 3 dozen jurisdictions have "*Illinois Brick* repealer laws" restoring the rights of citizens in those states who are indirect purchasers to pursue actions to recover antitrust damages under state antitrust laws.[21] These repealer states contain approximately 50% of the population of the United States.

Since *Illinois Brick*, there has been profound criticism from many quarters with respect to this facet of antitrust law in the United States.[22] Most critics prefer the dissent in *Illinois Brick* which said that the majority decision "... severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers."[23] Another criticism levelled by the defendants in U.S. antitrust litigation is that they face the unsavoury possibility of paying triple damages to the direct purchasers in federal court and then single compensatory/actual damages to indirect purchasers in the state courts.

The legal artifice of *Illinois Brick* still exists today in spite of fairly intense criticism by legal and economic scholars. In 2007, the U.S. Antitrust Modernization Commission weighed the arguments for and against allowing indirect purchaser actions in antitrust litigation and recommended that the U.S. Congress should enact a statute that would overrule *Illinois Brick* and allow both direct and indirect purchasers to sue for recovery of damages.[24]

Indirect Purchaser Claims in Canada

Several senior Canadian counsel, notably, Harvey Strosberg, Q.C., Scott Ritchie Q.C. and J.J. Camp Q.C., who were becoming engaged in similar and often parallel antitrust cases in Canada wanted to ensure that the Canadian courts avoided this U.S. legal quagmire. This issue came to a head in the vitamins case.

The Vitamins Case

Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. was predicated upon an international price-fixing conspiracy by the large international manufacturers of vitamins and related products from the beginning of 1988 until the end of 1999.[25] A compendium of price-fixing cases in Canada and the United States collectively alleged damages of several billion dollars against those manufacturers. Over time, many of the defendants pled guilty in the United States, Canada and the European Union to price-fixing the prices of various vitamin products.

A host of vitamins class actions were commenced across Canada and a carriage motion was litigated in Ontario to determine which class actions would proceed and which would be stayed.[26] The senior counsel group noted above and their respective firms were awarded carriage. In preparing for this carriage motion, we conferred on several occasions and eventually agreed upon a legal strategy to avoid the U.S. legal quagmire. Our solution was to act for a class of all Canadian persons and entities in the supply chain who may have suffered damages, including direct purchasers, intermediaries, and consumers. We retained expert economists who opined on two important matters. First, expert economists proposed a workable methodology for assessing the global vitamins priced-fixed damages for the Canadian economy as a whole. Second, they proposed a workable methodology for assessing the vitamins priced-fixed damages at each level in the distribution chain. If we could convince Canadian courts that these econometric models were viable,

we would overcome one of the principal arguments that the majority judges in the United States Supreme Court adopted in *Illinois Brick*. In our view, we were supported by the flexible damage assessment tools and processes outlined in the extant Canadian class action legislation.

Our legal strategy was based on two central pillars. First, all Canadian class members, wherever they were in the distribution chain, should band together to ensure that a global Canadian damage figure could be awarded. This way, none of the damages would fall through the cracks by omitting any level in the distribution chain. Second, we had to satisfy the courts that there were workable methodologies and available processes to allocate the global damage figure amongst the class members at each level in the distribution chain. To this end, we proposed to seek directions from the courts after an assessment of pan-Canadian global damages to determine the appropriate allocation amongst the various levels in the distribution chain.

Opposing counsel groups asserted that our legal strategy would create an interminable conflict of interest between the various layers in the distribution chain. This issue was litigated in a preliminary fashion in the carriage motion. Mr. Justice Cumming found that there is no divergence of interests between class members until the point when common issues are determined, including the assessment of global damages. In fact, he found that the quantification of global damages would achieve the ultimate, shared goal of a fair resolution of the claims of all class members. He also found that further economic analysis would be needed to determine the varying losses suffered by each level in the overall distribution process after global damages have been assessed. At that juncture, it may be that one given level in the distribution chain might require separate counsel, or that subclasses could be formed if appropriate.

As it turned out, our class counsel group achieved settlements on a global basis for all Canadian class members and then mediated the issue of the allocation of global damages between the various layers of class members in front of another Ontario judge. That resolution of the allocation of damages was accepted by Mr. Justice Cumming, who said in his reasons approving the settlements, "All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses."[27]

Our counsel group subsequently litigated, either collectively or on a firm-by-firm basis, several national price-fixing class actions using this same approach: act for all class members in the distribution chain, assess global damages on a Canada wide basis, and then agree on a mechanism to fairly allocate the damages among the various levels of class members. We thought, wrongly as it turned out, that we had successfully avoided the U.S. legal quagmire.

The Dog Days

This historical perspective would be very misleading if the reader believed that we had the wind at our back throughout. There were periods of time where anticompetitive class actions were tenuous at best. During the dog days, one defence firm opined that class action claims by indirect purchasers were probably dead.[28]

In two early decisions, *Price v. Panasonic Canada Ltd.*[29] and *Chadha v. Bayer Inc.*,[30] were both successfully defended on the basis that the plaintiffs had not provided a workable method for determining liability or damages on a class-wide basis. These cases hearkened back to the concerns registered by the majority judgement in *Illinois Brick*, namely, the difficulty and complexity of proving where any price-fixed damages would come to rest in the chain of distribution.

The B.C. Supreme Court denied certification in *DRAM* based largely on successful defence arguments raised in *Chadha*. The pan-Canadian *DRAM* case was brought against the manufacturers of memory chips that were integral to the operation of computers, servers, printers and the like. When it was commenced, several of the defendant conspirators had pleaded guilty to conspiring to fix prices. This decision not to certify the British Columbia class action created a great deal of uncertainty in British Columbia, and elsewhere, as to whether anticompetitive conduct could be certified in a class action.

The British Columbia Court of Appeal reversed and certified the action. The unanimous decision recognized that there may be difficulty proving liability and damages but did not accept the argument's that it was unmanageable based on the earlier Canadian decisions. It is important to note that the *DRAM* class was composed of all distribution levels including consumers. Leave to appeal to the Supreme Court of Canada was refused.[31]

Along Comes Microsoft

In 2004 class-actions were commenced against Microsoft on a pan-Canadian basis. The actions were commenced in three jurisdictions, Ontario, Québec and British Columbia, with the British Columbia class action taking the lead. The action was brought only on behalf of final consumers of Microsoft products as opposed to aggregating all persons and entities in the chain of distribution. Class counsel had concluded that virtually all of the recoverable damages were passed on through the distribution chain to the final consumers. The Microsoft case did however give rise to the neat legal issue of whether Canadian courts would buy into the Illinois Brick doctrine, discussed above, that only direct purchasers were entitled to bring price-fixing actions.

It was alleged that beginning in 1988 Microsoft engaged in unlawful conduct which enabled Microsoft to overcharge for its operating systems and some of its applications software. It was further alleged that as a direct consequence of Microsoft's unlawful conduct, the class members paid higher prices for the Microsoft operating systems and applications software in issue, then they would have paid absent the unlawful conduct.

As noted, the class is made up of consumers who acquired the Microsoft products from resellers and these consumers therefore fall into the category of indirect purchasers. Preliminary legal skirmishes resulted in the Court ruling that the class action could proceed for claims for conspiracy, international interference with economic interests, restitution for waiver of tort, unjust enrichment and constructive trust. The certified cause of action for constructive trust was struck by the Supreme Court of Canada.[32] Mr. Justice Myers took over case management and presided over the trial. He found that the remaining certification requirements set out in the British Columbia Class Proceedings Act were met and certified the common issues for trial.[33]

Microsoft appealed certification and a majority of the British Columbia Court of Appeal allowed the appeal, set aside the certification order and dismissed the action on the basis that indirect purchaser actions were not available as a matter of law in Canada. A strong dissent was filed by Mr. Justice Donald.[34]

The majority reasons were a thunderbolt. The majority followed the logic of the U.S. Supreme Court in *Hanover Shoe* and *Illinois Brick* concluding that indirect purchasers of a price fixed product had no valid

cause of action and stated: "Any passing on of the charge did not give rise to a cause of action for its recovery by those whom the charge was in whole or in part said to have been passed on."[35] This outcome could be fairly described as a death knell for recovery rights by consumers or any other indirect purchasers of price fixed goods or services. As one defence firm published in a newsletter, "[a]s a result, future class sizes and claims will decrease as indirect purchasers are left with the losses and no cause of action."[36]

Again, for the period of time from when the British Columbia Court of Appeal handed down its reasons in Microsoft until this decision was reversed by the Supreme Court of Canada, a great deal of uncertainty prevailed across Canada. For example, several price-fixing certification applications were adjourned in various Canadian jurisdictions pending the Supreme Court of Canada decision in Microsoft.

Unanimous reasons written by Mr. Justice Rothstein overturning the British Columbia Court of Appeal were handed down by the Supreme Court of Canada in October, 2013, nine years after the actions were commenced.[37] The central question was whether indirect purchasers have the right to bring an action to recover losses that were passed on to them as a result of a price-fixing conspiracy. Put another way, the central issue was whether indirect purchasers had a cause of action against the party who caused the overcharge at the top of the distribution chain that allegedly injured them indirectly as a result of the overcharge being "passed on" down the distribution chain to them. Microsoft argued the rationale set forth in the *Hanover Shoe* and *Illinois Brick* cases noted above. The Supreme Court of Canada was not persuaded.

The Supreme Court of Canada dealt with the arguments that prevailed in the *Hanover Shoe* and *Illinois Brick* cases. The Court first dealt with the argument that allowing indirect purchasers to recover creates the potential for double or even multiple recovery. It held that practically speaking the risk of duplicate or multiple recoveries can be managed by the courts. It would be open to the defendants to bring evidence of this risk before the trial judge to modify any award of damages accordingly. The Supreme Court of Canada agreed with the dissenting opinion of Mr. Justice Donald of the British Columbia Court of Appeal in *Sun-Rype*, that "the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided".[38] Microsoft did

not produce any evidence to show a serious risk of double or multiple recovery.

Next, the Supreme Court of Canada dealt with the arguments of remoteness and complexity that also animated the U.S. Supreme Court cases. Microsoft argued that complexities with tracing the loss down the distribution chain and the remoteness of proof associated with passing on give rise to confusion and uncertainty which militate in favour of the U.S. approach. The Court preferred the dissent in *Illinois Brick* and said that the same concerns can be raised in most antitrust cases and should not stand in the way of allowing indirect purchasers an opportunity to make their case. The Court held that the indirect purchasers carry the burden of establishing their loss, which may well require expert testimony and complex economic evidence, but indirect purchaser actions should not be barred solely because of the complexity of proving damages.

The Supreme Court of Canada also dealt with the deterrence argument relied upon in the U.S. cases and found that allowing indirect purchaser actions would not frustrate the deterrence objectives of Canadian competition laws. The Court again followed the dissenting reasons in the U.S. *Illinois Brick* case and held that there is just as much to be said for indirect purchaser actions reinforcing these deterrence objectives.

The Court went on to note that allowing indirect purchaser actions is consistent with the remediation objective of restitution law. 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. The Court also noted that approximately three dozen states have passed repealer statutes or otherwise allowed for indirect purchasers to recover by way of judicial decisions. The Court also recognized the significant body of academic authority in favour of repealing the decision in *Illinois Brick* in order to best serve the objectives of the antitrust laws.[39]

Conclusion

The pioneers in anticompetitive class actions in Canada needed to figure out a "made-in-Canada" legal strategy to overcome the U.S. legal quagmire that precluded consumers bringing anticompetitive class actions in federal court. We did devise such a strategy that had the imprimatur of the Ontario courts and a few other courts, until the British Columbia Court of Appeal in Microsoft reversed. The Supreme Court

of Canada in turn reversed the British Columbia Court of Appeal and it can now be safely concluded that in Canada, antitrust class actions can be prosecuted by anyone in the distribution chain including consumers. This journey took approximately two decades and at various times the pioneers in anticompetitive class actions in Canada were either enjoying the heights of exultation or the depths of despair along the way. From our perspective, it had a happy ending.[40]

Endnotes

[*] Associate Counsel, Camp Fiorante Matthews Mogerman, Vancouver. I wish to express my appreciation for the assistance and helpful comments made by Scott Ritchie Q.C. and the constructive comments of Reidar Mogerman. In particular, I wish to thank our summer student, Kelly Firth, who worked long and hard in both helping me shape the paper and doing the legal research and footnoting.

[1] RSC, 1985, c C-34.

[2] *Canada v Maxzone Auto Parts (Canada) Corp*, (2012) FC 1117 at para 54.

[3] *Cement Lafarge v BC Lightweight Aggregate*, [1983] 1 SCR 452, 145 DLR (3d) 385.

[4] *Code of Civil Procedure*, CQLR c C-25.

[5] *Class Proceedings Act*, 1992, SO 1992, c 6.

[6] See e.g. *Nantais v Telectronics Proprietary (Canada) Ltd.* (1995), 127 DLR (4th) 522, 25 OR (3d) 331; *Carom v Bre-X Minerals Ltd,* (1999) 43 OR (3d) 441, 30 CPC (4th) 133; *Menegon v Philip Services Corp*, (1999) 11 CBR (4th) 262, CPC (4th) 287; *Webb v K-Mart Canada Ltd*, (1999) 45 OR (3d) 389, 45 CCEL (2d) 165.

[7] *Class Proceedings Act*, RSBC 1996, c 50 ["BC Act"].

[8] Saskatchewan *Class Actions Act*, SS 2001, c 12.01; Newfoundland *Class Actions Act*, SNL 2001, c C-18.1; Manitoba *Class Proceedings Act*, CCSM c C130; Alberta *Class Proceedings Act*, SA 2003, c C-16.5; New Brunswick *Class Proceedings Act*, SNB 2006, c C-5.15; Nova Scotia *Class Proceedings Act*, SNS 2007, c 28; *Federal Court Rules*, 1998, SOR/98-106, as amended by *Rules Amending the Federal Court Rules*, 1998, SOR/2002-417, s 17, as amended by *Rules Amending Certain Rules Governing Practice and Procedure Applicable to the Federal Court (Representative Pleadings, Class Proceedings and Other Amendments)*, SOR/2007-301 [collectively the "Acts"].

[9] 2008 BCSC 575 (certification denied), rev'd 2009 BCCA 503; 2012 BCSC 1136; 2013 BCSC 316, (partial settlement and fee approval); 2014 BCSC 1936 (settlement and fee approval); 2015 BCSC 1846 (distribution) ["*DRAM*"].

[10] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982).

[11] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [*Microsoft*];

Sun-Rype Products Ltd v Archer Daniels Midland Company, 2013 SCC 58 ["*Sun-Rype*"].

[12] For more detailed comparison of Canadian and U.S. class actions, see Charles Wright, "The Canadian Perspective on Competition Law Class Actions" (23 August 2010), *Siskinds* (blog), online: <https://www.siskinds.com/the-canadian-perspective-on-competition-law-class-actions/>.

[13] *Comcast Corp v Behrend*, 133 S Ct 1429 at para 1432 (2013).

[14] *Supra* note 12.

[15] Plaintiffs can recover damages under Rule 23(b)(3). The *Sherman Act* and *Clayton Act, supra* note 16 permit recovery of treble damages.

[16] While not a prerequisite for certification, factors relating to predominance may be relevant to determining whether a class action is the preferable procedure. See e.g. BC Act, s 4; Alberta Act, s 5; Newfoundland Act, s 5.

[17] *Sherman Act*, 15 USC § 1 (1890); *Clayton Act*, 15 USC § 15.

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

[19] *Illinois Brick Co v Illinois*, 431 US 720 (1997) ["*Illinois Brick*"].

[20] *Hanover Shoe*, *supra* note 18 at para 494.

[21] *Ibid* at 268-269. Starting with California in 1978, many states have passed statutes that specifically authorize indirect purchasers to recover damages under state antitrust laws. In some states, courts have interpreted state laws to allow recoveries by indirect purchasers.

[22] See e.g. Donald I. Baker, "Hitting the Potholes on the *Illinois Brick* Road" (Fall 2002) Antitrust 14.

[23] *Illinois Brick*, *supra* note 19 at para 749.

[24] US, Antitrust Modernization Commission, *Report and Recommendations* (April 2007) at 18, online: <https://govinfo.library.unt.edu/amc/>.

[25] *Vitapharm v F Hoffmann-La Roche* (2000), [2000] OJ No 4594, 101 ACWS (3d) 472 ["*Vitapharm* Carriage Motion"]; (*sub nom Ford v F Hoffman-La Roche*) [2005] OJ No 1118, 74 OR (3d) 758 ["*Vitapharm* Certification Settlement Approval"].

[26] *Vitapharm* Carriage Motion, *supra* note 25.

[27] *Vitapharm* Certification Settlement Approval, *supra* note 25 at para 23.

[28] Steven Rosenhek, "The Death of Indirect Purchaser Claims in Canada?" (18 October 2011), *Fasken* (blog), online: <https://www.lexology.com/library/detail.aspx?g=12a98597-1a70-4249-98d3-f18e53c22b63>.

[29] [2002] OJ No 2362, 22 CPC (5th) 379 (SC) ["*Chadha*"].

[30] [2003] OJ No 27, 223, DLR (4th) 158 (CA).

[31] *Infineon Technologies AG v Pro-Sys Consultants Ltd*, 2010 CanLII 32435 (SCC).

[32] *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57.

[33] *Pro-Sys Consultants Ltd v Microsoft Corp*, 2010 BCSC 285.

[34] *Pro-Sys Consultants Ltd v Microsoft Corp*, 2011 BCCA 186.

[35] *Ibid* at para 75.

[36] *Supra* note 28.

[37] *Supra* note 32.

[38] *Supra* note 32 at para 41, citing *Sun-Rype*, *supra* note 11 at para 30.

[39] *Supra* note 32 at para 51.

[40] Of final note, the Microsoft case has been resolved and, depending on the participation of class members, the total package of benefits may exceed $500 million.