THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

2012 VOL. 25 NO. 1

Canadian Competition Law Review

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THE LOSS STOPS HERE: *SHOULD INDIRECT PURCHASERS BE ABLE TO SUE FOR PRICE FIXING LOSSES?*

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Les acheteurs indirects d'un produit qui a fait l'objet d'un complot de fixation de prix ne disposent pas d'une cause d'action pour recouvrer les pertes leur ayant été repassées par des acheteurs directs, selon deux récents arrêts de la Cour d'appel de la Colombie Britannique. Ces décisions font présentement l'objet d'un appel à la Cour suprême du Canada.

La Cour suprême américaine a rejeté les concepts conjoints de défense de « passing-on » ainsi que le « passing-on » comme conférant une cause d'action aux acheteurs indirects dans deux arrêts de principe, *Hanover Shoe* (1968) et *Illinois Brick* (1977). La question de savoir si les acheteurs indirects peuvent réclamer des dommages au Canada a été traitée dans l'arrêt *Chadha c. Bayer*. Dans cette affaire, la Cour d'appel de l'Ontario a refusé d'autoriser un recours collectif parce qu'aucune méthode pour prouver les pertes au niveau du groupe avait été proposée, mais a également refusé d'adopter une règle interdisant les réclamations d'acheteurs indirects. Dans des affaires subséquentes, des plaignants ont développé trois techniques pour éviter l'application de *Chada* : (a) inclure des acheteurs directs et indirects dans le même groupe; (b) invoquer des causes d'action qui n'exigent pas de preuves de pertes afin de pouvoir invoquer l'évaluation globale des dommages; et (c) soumettre des faits probants économiques concernant le « pass-on ». Bien que ces tactiques aient fonctionné, elles ne faisaient que remettre à plus tard l'examen de la question de la preuve des dommages subis par des acheteurs indirects.

Dans deux affaires, *Canfor* et *Kingstreet*, la Cour suprême du Canada a rejeté définitivement la défense du « passing-on ». Ceci a mené la Cour d'appel de Colombie Britannique à statuer en 2011 qu'étant donné que la défense du « passing-on » ne pouvait être utilisée pour réduire les dommages octroyés à des acheteurs directs, les acheteurs directs

étaient en droit d'obtenir la totalité de la surcharge, ne laissant rien pour les acheteurs indirects. En conséquence, toute perte subie par des acheteurs indirects n'est pas reconnue par la loi.

Selon l'auteur, la Cour d'appel de la Colombie Britannique a raison : le rejet de la défense du « passing-on » implique le rejet de l'utilisation du « passing-on »comme cause d'action. Permettre aux acheteurs indirects d'intenter des recours exige que la défense du « passing-on » soit admise, ou tolérer la double indemnisation. Cependant, même s'ils disposaient d'une cause d'action, les acheteurs indirects auraient peu à gagner, étant donné que les consommateurs n'ont jamais été directement indemnisés au Canada : les sommes ont toujours été distribuées suivant la doctrine du cy-près à des organisations sans but lucratif. Par contre, permettre les recours d'acheteurs indirects rendrait les recours collectifs en matière de fixation de prix plus coûteux et complexes. Également, permettre la défense du « passing-on » aurait des répercussions négatives sur d'autres affaires.

Finalement, l'auteur est d'avis que les réclamations d'acheteurs indirects peuvent être considérées comme une espèce de perte économique relationelle et que les conditions pour faire droit à de telles réclamations en tant que nouvelle catégorie de perte économique relationelle recouvrable ne sont pas rencontrées.

Indirect purchasers of a product that was the subject of a price fixing conspiracy cannot sue to recover losses passed on to them by direct purchasers, the British Columbia Court of Appeal ruled in two landmark decisions issued recently.[2] These decisions are currently being appealed to the Supreme Court of Canada.

This paper traces the history of indirect purchaser litigation in Canada, together with the conjoined concepts of passing-on as a defence and passing-on as giving rise to a cause of action and concludes that Canadian common law should not recognize passing-on in either circumstance.

I. Direct and indirect purchasers and the passing-on problem

When suppliers of a product conspire to fix prices, allocate markets, or fix production of product "A", the result will typically be that the price for product A will be higher than it would be but for the conspiracy. The customers who buy directly from the conspirators are termed "direct purchasers". It is fairly obvious that the direct purchasers will have suffered a loss, as the price they pay is too high.

But is it so obvious after all? The direct purchasers are typically intermediaries in a chain of distribution. In the simplest possible case, where the direct purchasers resell product A without alteration, and simply add their usual percentage margin to their cost, the direct purchasers may be able to pass on the entire overcharge to their customers. If sales do not decline, the direct purchasers will not have suffered any loss, and may even be very slightly better off as a result of the conspiracy. It is the direct purchasers' customers, who are known as indirect purchasers, who suffer the loss.

However, if the direct purchasers face competition from firms not affected by the overcharge, or customers with countervailing market power, they may not be able to pass on the entire overcharge. Similarly, where the direct purchasers transform product A into some other product, the direct purchasers may not be able to pass on the entire overcharge in the price of the new product because of competition in the market for that other product, or countervailing market power of purchasers of that product.

In a complex distribution chain, there may be many levels between the conspirators and the ultimate consumers of a product. At each of these levels, product A may be transformed into another product or not, bundled with another product, or not, and the overcharge may be passed on to the next level, or not.

In the result, it is very difficult to know how much of the overcharge was borne by direct purchasers, and how much was borne by indirect purchasers.

II. From shoes to bricks: the US rejection of passing-on

In 1977, in *Illinois Brick Co. v. Illinois*, the US Supreme Court adopted a rule that indirect purchasers cannot sue for damages caused by a price fixing conspiracy.[3] This result followed from the court's earlier rejection of the passing-on[4] defence in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[5]

1. Defensive passing-on rejected: Hanover Shoe

Hanover Shoe was a monopolization case.[6] United would only lease, not sell, its more complicated and important shoe machinery. Hanover sued United under section 4 of the *Clayton Act* claiming that United had monopolized the shoe machinery industry through its policy of leasing, and refusing to sell, machinery. Section 4 of the *Clayton Act* provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" can sue and recover treble damages.[7] The District Court held that Hanover would have bought the equipment rather than lease it, had it been able to do so, and had it done so, it would have paid less than it paid in lease payments. The court awarded the difference in cost, trebled. The Court of Appeals affirmed the liability finding but disagreed with the District Court on certain damages issues. Both parties sought, and were granted, *certiorari* to appeal to the US Supreme Court.

Before the Supreme Court, United argued that Hanover had suffered no legally cognizable injury because it had passed on the overcharge to its customers in the price it charged for shoes. Had Hanover's costs been lower, United said, it would have charged less for its shoes and made no more profit.

The Supreme Court rejected this contention. Justice White, writing for the court, discussed two clear cases where passing-on could not apply: a buyer could clearly recover if it left its price unchanged and absorbed the loss, or if it decreased other costs so as to maintain its price. Equally, White J. held, even a buyer that increases its price can recover, because by charging an illegal price, the seller took from the buyer more than the law allows.[8]

White J. relied on a number of old antitrust cases in support of this principle, including the following statement of Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*:

> The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. . . . The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . . Probably in the end the public pays the damages in most cases of compensated torts.[9]

This passage is noteworthy for linking the issue with the concepts of proximity and remoteness.

White J. then turned to the practical difficulties with United's proposed passing-on defence. He noted that proving the passing-on defence would require proof of a number of "virtually unascertainable figures" because of the wide range of factors that influence a company's pricing policies.[10] Moreover, if the passing-on defence were allowed, defendants would raise it routinely, making private antitrust actions longer and more costly, thus reducing their effectiveness as an enforcement tool.[11]

White J. did recognize the possibility of exceptions to this rule where it is easy to show that the direct purchaser passed on the loss. He gave as an example where the direct purchaser has a pre-existing cost-plus contract with an indirect purchaser.[12]

2. Offensive passing-on rejected: Illinois Brick

The other shoe dropped in *Illinois Brick*. The State of Illinois and a number

of local government entities sued manufacturers of concrete blocks, claiming that they had conspired to fix prices for the concrete blocks. The plaintiffs were, however, indirect purchasers: the manufacturers sold to masonry contractors, who submitted bids to general contractors, who in turn submitted bids to customers, including the plaintiffs. The manufacturers sought summary judgment, arguing that only direct purchasers could sue. They won before the motion judge, but lost in the Court of Appeals. They then appealed to the US Supreme Court.

In a six to three decision,[13] the Supreme Court held that its rejection of the passing-on defence in *Hanover Shoe* meant that indirect purchasers could not recover overcharges passed on to them by direct purchasers.

a) White J. for the majority

Justice White wrote for the majority. He reached his conclusion in two steps. First, the same rule must be applied to passing-on both as a defence (defensive use) and as a ground of a cause of action (offensive use). Second, he declined to overturn the decision in *Hanover Shoe* that only the direct purchaser, and not the indirect purchaser, is "injured in his business or property" and thus entitled to sue under section 4 of the *Clayton Act*.

Turning to the first point, White J. gave two reasons for rejecting the contention that the rule against defensive use of passing-on need not bar its offensive use by a plaintiff. First, allowing offensive, but not defensive use of passing-on will give rise to multiple liability by defendants. Based on *Hanover Shoe*, defendants could not use passing-on to limit what they pay to direct purchasers, who will be entitled to recover the full overcharge. Allowing offensive use of passing-on by indirect purchaser plaintiffs means that they can recover again losses already paid to the direct purchasers.[14]

In a lengthy footnote, White J. added that courts that allowed offensive passing-on used various procedural devices to bring indirect and direct purchasers into the same action and allowed defensive use of passing-on in order to apportion liability. He cautioned that "[t]hese procedural devices cannot protect against multiple liability where the direct purchasers have already recovered by obtaining a judgment or by settling, as is more likely".[15] He observed that proponents of offensive passing-on acknowledge that this inevitably increases the risk of multiple recoveries, that they "ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated".[16]

White J.'s second reason for insisting that the same rule be applied both to defensive and offensive passing-on was that "the reasoning of Hanover Shoe cannot justify unequal treatment of plaintiffs and defendants with respect to

the permissibility of pass-on arguments".[17] He recalled the two reasons for the decision in *Hanover Shoe*, that is, first, the extreme difficulty of tracing passing-on of the overcharge through the various layers of the distribution chain, and second, the impact of this on the cost and complexity of antitrust proceedings.

White J. also rejected the argument that the policy underlying *Hanover Shoe* is that antitrust violators must be deprived of their unlawful gains and that this policy would be further by allowing offensive, but not defensive, use of passing-on. White J. countered that concentrating full recovery in the direct purchasers will lead to more effective enforcement of antitrust laws.[18]

It may be noteworthy that missing from White J.'s analysis in *Illinois Brick* of his previous decision in *Hanover Shoe* is what appeared to be his first reason for denying the passing-on defence: the principle that by charging an unlawfully high price, the seller takes from the buyer more than the law allows.[19] This principle might be taken to authorize recovery of the whole overcharge by the direct purchaser as a matter of principle, regardless of passing-on. However, White J. did not push the reasoning in this direction.

Having concluded that defensive and offensive use of passing-on were inseparable, White J. held that the court should not overrule *Hanover Shoe*. Allowing passing-on would force plaintiffs in antitrust actions to use compulsory joinder and class action procedures to include all direct and indirect purchasers, including ultimate consumers, in the action as plaintiffs. He wrote:

> Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge - from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.[20]

He also cautioned:

> There is thus a strong possibility that indirect purchasers remote from the defendant would be parties to virtually every treble-damages action (apart from those brought against defendants at the retail level).[21]

White J. acknowledged that economists use "an array of simplifying assumptions" to calculate to what extent the overcharge is passed on to various levels in the distribution chain. In the real world, however, these "drastic simplifications generally must be abandoned".[22]

In response to Justice Brennan's claim that all that is necessary is to estimate what the price would have been at each level absent the violation, White J. noted that except for the ultimate consumer, each indirect purchaser could also claim for any reduction in sales caused by its price increase.[23]

White J. also addressed the problem that the rule against passing-on leaves indirect purchasers without compensation. He argued that direct purchasers absorb some and often most of the overcharge. The cost and complexity of allocating damages among the different levels in the distribution chain would deplete the recovery and leave victims under-compensated. Finally, he noted, the claims of many indirect purchasers are so small that many would not even trouble to collect their damages.[24]

b) Brennan J.'s dissent

Brennan J. penned a dissent for himself and two other judges. He began from the proposition that section 4 of the *Clayton Act* was intended to compensate all victims of antitrust violations, citing a 1948 decision of the Supreme Court:

> [§ 4] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers... [but] is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.[25]

Thus, he held, the majority's decision flouted Congress' purpose in enacting section 4, since while consumers often bear the brunt of price fixing, the majority decision denied them compensation.[26]

Brennan J.'s reasoning proceeded in four steps. First, he considered that the court's decision to bar the defensive use of passing-on in *Hanover Shoe* did not require ruling out its offensive use. He characterized *Hanover Shoe* as being motivated by a concern of preventing an antitrust violator from escaping liability. This was not the issue in the offensive use of passing-on, as there is no danger of the defendant escaping liability. Moreover, he reasoned, the same policy of preventing wrongdoers from retaining the spoils of their misdeeds that motivated *Hanover Shoe* also militate in favour of allowing indirect purchasers to prove that they too suffered a loss.[27]

Second, the majority's decision frustrated Congress' objective in creating the statutory cause of action for antitrust violations, which included recovery of damages by consumers.[28]

Third, the difficulties inherent in tracing the overcharge through the various levels of chain of distribution are no reason to deny recovery to indirect purchasers. Antitrust cases generally are difficult, since they require proof of what would likely have happened but for the breach. Tracing the overcharge

through the chain of distribution requires but-for analysis at each level.[29] Nor is the impossibility of obtaining a precise measure of the overcharge a reason to deny recovery to indirect purchasers, since "reasoned estimation is all that is required in antitrust cases".[30]

Fourth, procedural mechanisms can eliminate the danger of multiple liability for defendants in most cases. The remaining hypothetical risk of double recovery would not justify denying recovery to indirect purchasers.[31] The risk of double recovery exists where there are several suits by direct and indirect purchasers at the same time in different courts, and where additional suits are filed after an award of damages in an earlier suit. The first situation can be dealt with through procedural mechanisms to transfer and consolidate cases. The second situation is not likely, because the limitation period would likely have expired before the case is commenced.[32]

3. Reaction to Illinois Brick

Illinois Brick was far from universally accepted in the United States. Chicago School economists tended to approve of the rule, but many others disagreed. Several attempts to overturn the rule in Congress have so far failed. At the federal level, *Illinois Brick* remains in force.[33]

The case is different at the state level. States typically have antitrust statutes that mirror the federal Sherman Act and provide for private actions. A number of states have enacted *Illinois Brick* repealer statutes, and the courts of other states have refused to follow *Illinois Brick*. The US Supreme Court upheld the right of states to pass *Illinois Brick* repealer statutes in *California v. ARC America*.[34] In the result, in over two-thirds of US states, indirect purchaser class actions are possible.[35] However, because of the very issues raised in Illinois Brick, the success rate of plaintiffs is uneven. Moreover, the ban on indirect purchaser actions at the federal level, coupled with permissive regimes in many, but not all, states, results in a "divided system [that] is expensive, cumbersome, and complex",[36] or "a jerry-rigged legal structure with one ad hoc legal solution balanced precariously on the next".[37] Worse still, the multiplicity of direct and indirect purchaser actions, all relating to the same cartel, proceeding in a variety of federal and state courts, can make global settlements difficult to achieve, and lead to duplicative trials ending in inconsistent results, or double recovery.[38] However, Andrew Gavil, writing in 2009, took the view that "the current divided remedial system has led to the odd combination of over-deterrence and undercompensation",[39] and while he also recognized the risk of double recovery,[40] he described it as a "theoretical problem" for which there was no evidence.[41] That being said, mechanisms do exist in the US to coordinate multiple antitrust suits brought in different states.[42] As well, Kevin O'Connor argues, settlements in price fixing class actions do not support fears of double recovery.[43]

Numerous proposals to reform the US system have been advanced.[44] For instance, the Antitrust Modernization Commission proposed in 2007 that *Illinois Brick* and *Hanover Shoe* should be overruled to the extent necessary to allow both direct and indirect purchasers to recover, and that direct and indirect purchaser claims should be consolidated in a single federal forum for both pre-trial and trial proceedings.[45] This recommendation was an attempt to make the best of a bad situation, however; the report notes that half of the Commissioners took the view that the best policy would be to allow only direct purchaser claims.[46] Gavil advocated in his 2009 article basing recovery on the amount of the overcharge and establishing by statute presumptive allocations the overcharge between direct and indirect purchasers based on the number of distribution levels. In all cases, he would allocate 50% to direct purchasers.[47] Gavil would retain the rule in *Hanover Shoe*.[48] Implicit in his presumptive allocation scheme, however, is that in a putative suit by, say, a direct purchaser, the direct purchaser would only be allowed to recover 50% of the overcharge. This amounts to an application of the passing-on defence.

III. Indirect purchasers in Canada

1. Causes of action for price fixing conspiracies

Section 36 of the *Competition Act* provides a statutory cause of action that permits anyone who has suffered damages as a result of price fixing (among other things) to recover damages.[49] Interestingly, section 36 was added to the *Combines Investigation Act* in 1976, just before the US Supreme Court's decision in *Illinois Brick*. At this time, however, class proceedings legislation had yet to be adopted in Canada.[50]

There are two elements to the section 36 cause of action: (i) a breach of Part VI (that is, the criminal offences created by the Act, such as conspiracy contrary to section 45), and (ii) damages. Of course, proof of the first element involves proof of all of the elements of the criminal offence.

Because recovery under section 36 is limited to the amount of the loss and costs, with no possibility of punitive damages, plaintiffs typically also plead the economic torts of conspiracy and unlawful interference with economic relations. Both of these torts also require proof of damages as an essential element of the cause of action.

The requirement of proving damages to establish liability has an important consequence in class actions seeking recovery of damages caused by conspiracies: liability cannot be a common issue unless a way of proving damages on a class-wide basis can be shown.

2. Chadha v. Bayer Inc.

The question of whether or not indirect purchasers should be barred from

claiming for damages in an action under section 36 of the *Competition Act* was raised for the first time in Canada in the Ontario case of *Chadha v. Bayer Inc.*[51] In that case, the Ontario Court of Appeal refused to certify a class action because the indirect purchaser plaintiffs had not proposed a methodology for proving damages on a class-wide basis. But the court expressly left open the possibility of a future plaintiff proposing such a methodology and achieving certification.

The plaintiffs in *Chadha* alleged 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 from 1985 to 1991. They proposed a class consisting of "all homeowners or other end users in Canada who have suffered loss or damage as a result of" the alleged conspiracy.

On a motion for certification, Sharpe J. certified three common issues: first, whether the defendants had fixed prices; second, whether they were liable to class members for the conspiracy; and third, what was the appropriate measure of damages.[52]

The defendants appealed to the Divisional Court, which allowed the appeal and denied certification.[53] The Court of Appeal dismissed the plaintiffs' appeal, and the Supreme Court refused leave to appeal.

At issue before the Court of Appeal was the second common issue, that is, liability. The problem was that loss to the plaintiffs was a necessary element in establishing liability. Feldman J.A., writing for the Court of Appeal, held that the plaintiffs' evidence did not show how they would prove at trial that all end purchasers of buildings containing the pigments overpaid for the buildings as a result. The plaintiffs' expert assumed full pass on of any price increase, and had failed to lead evidence to prove it. Yet this was the very issue that had to be provable on a class-wide basis before it could be certified as a common issue.[54]

Feldman J.A. also addressed the indirect purchaser rule in *Illinois Brick*. She discussed the problems of proving passing-on in a case with a multi-level chain of distribution, including the possibility that at any level, the loss might not be passed on at all. She declined, however, to adopt an absolute bar to claims by indirect purchasers. Rather, she left it as an open question in Ontario whether it would be possible to marshal an evidentiary record sufficient to satisfy the court that liability to indirect purchasers can be proved as a common issue in price fixing cases.

Feldman J.A. then concluded that a class proceeding was not the preferable procedure for resolution of the remaining common issues. The individual trials that would be needed to establish loss, and thus liability, for each of the estimated 1.1 million class members would make the action unmanageable.

The only one of the three goals of class proceedings (judicial economy, access

to justice, and behaviour modification) that would be served by certification would be behaviour modification. Here, she noted, criminal sanctions provided by the *Competition Act* achieve the goal of behaviour modification.[55]

3. Avoiding Chadha

Class action plaintiff lawyers were not long in coming up with ways to avoid the difficulties raised in *Chadha*. They adopted three main ways of avoiding or overcoming the difficulties 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) economic evidence regarding pass on.

These tactics generally worked. Cases generally settled, although the trend after *Chadha* was for less of the settlement funds to be allocated to the indirect purchasers.[56] More recently, these avoidance tactics have led to the certification of a number of class proceedings. Yet these tactics do not resolve the difficulties associated with proving that indirect purchasers suffered losses; they only put them off until trial. Their ultimate success hinges upon the fact that class actions nearly always settle.

a) Combining direct and indirect purchasers into one plaintiff class

One way to postpone the difficulties involved in proving passing-on is to combine all direct and indirect purchasers into one plaintiff class. This in theory allows the total overcharge to be determined for the entire class as a whole. The extent to which the overcharge was passed on, or not, then becomes an issue of apportionment between direct and indirect purchasers within the class.

The eventual necessity of apportioning damages between direct and indirect purchasers creates a potential conflict within the class. This issue was raised in the context of a carriage battle in the *Vitamins*[57] case between one group of firms that proposed to represent both direct and indirect purchasers, and a rival group that proposed representing retail purchasers only. The latter group argued that there was a conflict between direct and indirect purchasers within the putative class.

Justice Cumming rejected this contention. He held that damages should be assessed globally, based on a but-for analysis of pricing, and that the question of distribution among class members would only arise after the global assessment. At that point, purchasers at different levels in the distribution chain may have different interests, and require division into subclasses and separate representation. Consequently, there was no conflict among class members with respect to the common issues (which included global assessment of damages, but not apportionment). Indeed, Cumming J. added, class members were likely to maximize their recovery through joint pursuit.[58]

In approving the *Vitamins* settlement, Cumming J. returned to this theme, commenting that "[a]ll groups of class members must be present…to protect the rights of the class members to make a claim against a common fund to address their losses".[59] He repeated that direct and indirect purchasers have a common interest in maximizing recovery. [60]

More recently, however, in *Irving Paper Ltd. v. Atofina Chemicals Inc.*, Justice Rady accepted that there may be a conflict between direct and indirect purchasers, but considered, that this conflict could be resolved in settling the action.[61] She did not consider how this conflict would be resolved if the action were not settled.

In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,[62] British Columbia Supreme Court Justice Masuhara refused to certify a class action claiming damages suffered by direct and indirect purchasers as a result of an alleged conspiracy to fix the price for DRAM, a kind of computer memory chip. Among his reasons was the irreconcilable conflict between direct and indirect purchasers within the proposed class. He held that *Vitapharm* was of limited assistance because it dealt with a settlement.[63] The British Columbia Court of Appeal, in over-ruling Masuhara J., flatly rejected this contention, characterizing the potential conflict between direct and indirect purchasers as a "minor issue that may never be reached".[64]

It is an inescapable fact of a plaintiff class that includes both direct and indirect purchasers that at some point the purchasers at various levels in the distribution chain will be fighting over the allocation of the same pot of money. Given the uncertainties and difficulties involved in determining pass through rates at various stages of the distribution chain, this issue *must* arise in the course of any trial of a price fixing class action. The job of courts when determining whether to certify a class proceeding is to consider how the action will be tried; it is wrong in my view to allow the likelihood that an action will be settled to factor into whether it should be certified. Thus consideration should be given to the likelihood that purchasers at each level of the distribution chain may need their own subclass, counsel, and expert witnesses, and the effect that this will have on the ability to conduct an efficient trial of the action as a class proceeding.

b) Reliance on causes of action that do not require proof of loss and aggregate damages

Class proceedings statutes in Canada typically allow damages to be determined in the aggregate provided, but only after the defendant's liability has been proven.[65] Aggregate assessment of damages is a tool for determining the quantum of damages, but not the fact of damages as an element in a cause of action.

Thus in *Chadha*, the Court of Appeal held that the aggregate damages provisions are "applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage".[66]

Later decisions chipped away at this restriction, beginning with Cullity J.'s determination in 2005 that the availability of the aggregate damages provisions could not be determined on a motion for certification. It was enough, he held, that there was a "reasonable likelihood" that the preconditions for resort to aggregate assessment of damages would be met.[67] Then in 2006, the Divisional Court accepted that the notion of an aggregate assessment of damages could be a common issue where the cause of action may not require proof of loss as an element. In that case the plaintiffs sought disgorgement based on waiver of tort as an independent cause of action, because they had suffered no damages. Their claim was based on the (as yet untested) assertion that wrongdoing by the defendant, plus profits, should entitle them to disgorgement of those profits, without the need to prove the loss element of the tort of negligence.[68]

Then in *Markson* and *Cassano*, both decided in 2007, the Ontario Court of Appeal then decided clarified, and, arguably, expanded the availability of aggregate damages. Ironically, both were bank cases involving fees that were alleged to agreements between the banks and their customers.[69] Since breach of contract is actionable without proof of loss, the aggregate damages provisions are clearly available.[70] However, in *Markson*, the court went further, suggesting that an aggregate assessment of damages was available if liability to some class members were established.

In 2009, courts in Ontario and British Columbia held that an aggregate assessment of damages was possible in price fixing class actions. They also effectively held that an aggregate assessment of damages can be used to determine the fact of damages as a component of liability. In *Irving Paper*,[71] Ontario Superior Court Justice Rady held that *Markson* and *Cassano* had "overtaken" *Chadha*, emphasizing that *Markson* stands for the proposition that not every class member must have suffered a loss.[72] This, it should be noted, is tantamount to a judicial amendment to section 36 to remove the element of damages from the cause of action, which is impermissible. In denying leave to appeal, Leitch J. expressly disagreed with Rady J.'s interpretation of *Markson*, holding that loss must be provable on a class-wide basis.[73]

Next, in the British Columbia case of *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,[74] the Court of Appeal focussed on the plaintiff's restitutionary claims in unjust enrichment, waiver of tort, and constructive trust, which may require only proof of wrongful conduct and resulting gain, but not proof of damages.[75] The resulting gain might be proven from fines in criminal proceedings in the US, which were based on the gain to the defendants. This would

establish liability and permit an aggregate assessment of damages.[76]

Justice Smith, writing for the court, also held that because the defendants' gain will be the mirror image of the plaintiffs' loss, aggregate assessment of damages was also available for the statutory and common law causes of action for conspiracy. He does not appear to have considered the difficulty that these causes of action require proof of loss in order to establish liability.[77]

The British Columbia Court of Appeal recently confirmed this reasoning in S*teele v. Toyota Canada Inc.*,[78] holding that individual proof of loss may no longer be required, because of the availability of a "benefit based claim" allowing the plaintiff to recover upon showing wrongful conduct and a benefit to the defendant, even if the plaintiff suffered no loss.[79]

Finally, a 2010 decision by the Ontario Court of Appeal is noteworthy for its endorsement of a "top down" approach to damages that focussed in that case on common franchise agreements and pricing between the parties, in preference to a "bottom up" approach that would revolve around individual inquiries.[80]

c) Economic evidence of loss on a class-wide basis

In *Chadha*, the Ontario Court of Appeal expressly left open the possibility that plaintiffs might lead economic evidence to show that loss as a component of liability could be proved on a class-wide basis.[81] In *Hollick v. City of Toronto*, the Supreme Court established a low standard of proof on certification: the plaintiffs need merely show "some basis in fact for each of the certification requirements".[82]

In both *Irving Paper* and *Infineon*, the plaintiffs led economic evidence setting out how they intended to prove damages on a class-wide basis. In both cases, the defendants countered with their own expert evidence. Both courts were thus faced with conflicting and complicated expert evidence. Both decisions applied the "some basis in fact" standard and held that the court should not attempt to determine which expert was right on a motion.

In applying "some basis in fact" standard to the economic evidence about proving passing-on, Rady J. held that the plaintiffs needed to show only that a "methodology may exist for the calculation of damages".[83] Similarly, in *Infineon*, Smith J.A. said that the plaintiffs only needed to show a "credible or plausible methodology" for estimating damages.[84] Most recently, in *Fanshawe College of Applied Arts and Technology v. LG Philips LCD Co.*, Tausendfreund J. accepted that the proposed method for determining damages was "not so insubstantial as to amount to no method at all".[85]

These decisions are understandable. A judge on a certification motion cannot be expected to decide between conflicting expert evidence on whether and

how losses can be proven on a class-wide basis. The result, however, is to postpone the difficulties until trial.

4. Passing-on defence rejected

The decisions discussed above deal—or postpone—the practical question raised by *Chadha*, that is, whether and how to prove that an overcharge was passed on through a multi-layered distribution chain. They do not confront the question as to whether passing-on is available either as a defence or as a foundation for a cause of action by indirect purchasers.

When *Chadha* was decided, the availability of a passing-on defence was, arguably, still an open question. Subsequently, in two decisions, issued in 2004[86] and 2007,[87] the Supreme Court of Canada definitively rejected the passing on defence. This in turn led to the recent decisions of the British Columbia Court of Appeal that indirect purchasers have no cause of action.

a) Early passing-on cases

The passing on defence appears to have first been raised in Canada in the 1970s. The Nova Scotia Court of Appeal,[88] the Ontario Court of Appeal,[89] and Alberta Court of Queen's Bench[90] rejected the argument that bribes were passed on through higher prices or markups, and thus no loss was suffered. Whether or not the victim passed on the loss is irrelevant; the victim paid too much because of the bribe, and had a right to recover that payment. This reasoning reflects the reasoning of White J. in *Hanover Shoe* that because the seller took from the buyer more than the law allows, the buyer is entitled to recover the overcharge, regardless of whether the buyer passed it on or not.[91]

The defence was also rejected on slightly different grounds, and in *obiter dicta*, in the context of allegedly unlawful electricity charges levied by Ontario Hydro.[92]

Thus by the early 1980s, passing-on as a defence had been definitively rejected by trial and appellate courts in Canada. It was La Forest J. who revived it in *Air Canada v. British Columbia*[93] in 1989. The question was whether British Columbia must repay unconstitutional indirect taxes it had collected from airlines.[94] The court held that because BC had passed a constitutionally valid retroactive tax that effectively taxed back the money it had previously collected unconstitutionally, it did not have to.

La Forest J. went further, holding that governments should not be forced to repay unlawfully collected taxes. He argued that to the extent that the burden of the tax was passed on, the government was not unjustly enriched at the airlines' expense. In other words, the government's unjust enrichment lacked a corresponding deprivation on the part of the airlines.

Underlying La Forest J.'s position was the very nature of an indirect tax: an indirect tax is one that is related to a unit of a commodity or its price; it is likely to be incorporated by the original taxpayer into the price of goods or services, and thus passed to someone else. The "incidence" or economic burden of an indirect tax is not borne by the taxpayer, but by the taxpayer's customers. In this sense, it is precisely analogous to an overcharge by price fixers that it passed on through the distribution chain to customers. Indeed, as discussed below, pass through rates are estimated using tax incidence theory.

Although La Forest J. was joined in this view by only two of his colleagues, it was enough to open the door to the passing-on defence. Thus in another airlines case, *Air Canada v. Liquor Control Board of Ontario*, this time involving liquor fees, the Ontario Court of Appeal appeared to accept that the defence may be available, but did not disturb the trial judge's finding that the fee had not in fact been passed on, since the airlines were not profitable at the time.[95] The Supreme Court did not deal with this issue when that case came before it.[96] Similarly, in 1998, the Nova Scotia Court of Appeal upheld the application of the passing-on defence by a trial judge in a case involving cigarette taxes unlawfully collected from Status Indians.[97]

In *The Law Society of Upper Canada v. Ernst & Young*, Ground J. allowed a pleading of the passing-on defence to stand, holding that the law was not clear. Nevertheless, he expressed a preference for the rule established in *Hanover Shoe*, and would have confined the defence to unconstitutional tax cases.[98] The Court of Appeal, however, preferred not to express an opinion on the matter.[99] The earlier, categorical, rejection of the passing-on defence by that court appeared to have been forgotten.

b) Canfor

The first case in the Supreme Court's two-step rejection of the passing on defence was *British Columbia v. Canadian Forest Products Ltd.*[100] The Supreme Court held that British Columbia could not recover damages for timber destroyed by a fire caused by Canfor because the province used a formula to determine stumpage fees that automatically re-allocated the loss by raising the stumpage fees on timber not consumed by fire. Consequently the province had no loss to recover.

Binnie J., writing for a six judge majority, held that the passing on defence did not arise because there was no loss to pass on. He expressed the view, however, that the defence is not generally available:

> 111 Almost any business will have to "pass on" the impact of a business loss to its clients or customers. It is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been "passed on" by the plaintiff. Such an argument would

> require the court to engage in "the endlessness and futility of the effort to follow every transaction to its ultimate result"[101]

In his dissenting reasons, LeBel J. attacked the passing-on defence. He wrote:

> My overall conclusion is that the passing-on defence, on the facts of this case and generally, must not be allowed to take hold in Canadian jurisprudence. Although the plaintiff does indeed bear the burden of proving that he or she has suffered an actual loss, the plaintiff need only establish loss in the proximate sense. The courts need not go on to consider whether the plaintiff was able to recoup his or her losses by accessing other sources of revenue or exercising contractual or statutory rights.[102]

LeBel J. expressed the concern that allowing the defence might require plaintiffs not just to prove losses, but also to show that they did not engage in any other transactions that might have offset the loss.[103] He agreed with Ground J.'s observation in *Ernst & Young* that any defendant could argue that any commercial entity has passed on its damages to its customers through higher prices and thus suffered no losses. On this argument, damages might never be recoverable in commercial cases, except in the case of unprofitable plaintiffs.[104]

Citing the passage by Holmes J. in *Southern Pacific* that White J. relied on in *Hanover Shoe*, LeBel J. added that allowing the defence would involve an endless and futile effort of examining to what extent losses had in fact been passed on.[105] Le Bel J. also quoted with approval White J.'s discussion in *Hanover Shoe* of the difficulties involved in proving passing-on:

> Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. [Emphasis added by LeBel J.][106]

c) Kingstreet Investments

In the 2007 *Kingstreet Investments* case, the Supreme Court revisited the issue of whether the passing on defence would relieve governments of the obligation to refund unconstitutional taxes, in this case, an indirect tax imposed on night club owners. This time, the court rejected the passing on defence.[107]

Bastarache J. articulated three major criticisms of the passing-on defence. First, it is inconsistent with the basic principles of the law of restitution. Whether the taxpayer has been able to recoup its loss from some other source is irrelevant, he held.[108] This is because the purpose of restitution is to restore to the plaintiff what has been taken without justification.[109] Thus restitution law is not concerned about the possibility of a windfall to the plaintiff.

The second criticism is that the defence of passing-on is economically misconceived and the third is that it raises insurmountable difficulties of proof. Here, Bastarache J. mirrored LeBel J.'s comments in *Canfor*:

> LeBel J. noted that every commercial entity could be accused of passing on all or part of any damages suffered by it, by its own rates or charges to its customer. This is because it is difficult to determine what effect a change in a company's prices will have on its total sales. Unless the elasticity of demand is very low, the plaintiff is bound to suffer a loss, either because of reduced sales or because of reduced profit per sale. Where elasticity is low, and it can be demonstrated that the tax was passed on through higher prices that did not affect profits per sale or the volume of sales, it would be impossible to demonstrate that the plaintiff could not or would not have raised its prices had the tax not been imposed, thereby increasing its profits even further. LeBel J. referred to these various figures as "virtually unascertainable" (para. 205, citing White J. in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), at p. 493). LeBel J. ultimately concluded that "[t]he passing on defence would, in effect, result in an argument that no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages but was still solvent had obviously found a way to pass the loss on" [citation omitted]. [Emphasis added][110]

In the passage above, Bastarache J. recasts the problem stated by White J. in even starker terms, as a dilemma: either elasticity is high, in which case the direct purchaser suffers a loss; or it is low, in which case the direct purchaser could have raised prices anyway, which means that the direct purchaser suffered a loss as compared with the profits it could have made.

It might be argued that the Supreme Court only rejected the passing-on defence in indirect tax cases in *Kingstreet*. In my view the correct reading of this case is that it stands for a definitive rejection of the availability of the defence. First, while Bastarache J. began his discussion by announcing his rejection of the passing-on defence in the context of unconstitutional taxes, he concluded it by rejecting the defence "in its entirety" after citing Le Bel J.'s rejection of

the defence in a commercial context in *Canfor*.[111] Second, the defence had only ever succeeded in indirect tax cases; in every other case, it was rejected.[112] In particular, the court was unanimous in *Canfor* that passing-on should not be a defence. The rejection of the defence in the indirect tax context is thus the last nail in the coffin for this defence.

5. The ultimate question: do indirect purchasers have a cause of action?

Finally, in *Sun-Rype*[113] and *Microsoft*[114] in British Columbia, and *Infineon* in Quebec, courts came to grips with the implications of the Supreme Court's definitive rejection of defensive passing on for indirect purchasers in price fixing class actions. The British Columbia Court of Appeal held that the corollary of the rejection of defensive passing on was that indirect purchasers have no cause of action. The Quebec Court of Appeal disagreed.

(i) *The Sun-Rype and Microsoft cases*

The *Sun-Rype* and *Microsoft* cases were both proposed class actions to recover damages on behalf of direct and indirect purchasers for an alleged overcharge caused by price fixing conspiracies.

In *Sun-Rype*, juice company Sun-Rype Products Ltd. and an individual sued a group of producers of high-fructose corn syrup (HFCS), alleging that a price fixing conspiracy among the producers raised the price of HFCS. The proposed class consisted of both direct purchasers, represented by Sun-Rype, and indirect purchasers, represented by the individual plaintiff.

On the certification motion, the defendants objected that indirect purchasers have no cause of action because Canadian law does not recognize the passing-on defence. The motion judge rejected this contention. He distinguished between using passing-on as a defence, which is not allowed, and passing-on as a factual occurrence (giving rise to a loss). He also reasoned that because the proposed class included both direct and indirect purchasers, all of those who potentially suffered a loss were included in the class, and the question was liability to the class as a whole. The motion judge certified the case,[115] and the defendants appealed.

In *Microsoft*, the plaintiff sought to certify a class of indirect purchasers to sue Microsoft for various kinds of anticompetitive behaviour. The claim originally was based primarily on alleged abuse of dominance by Microsoft. After losing a motion in 2006,[116] the plaintiffs then restructured their pleading to base it on conspiracy contrary to section 45 of the *Competition Act*. Microsoft argued, among other things, that the claim continued to be primarily about abuse of dominance and that, as indirect purchasers, the plaintiffs could not found a claim based on passing-on of the losses to them. The motion judge certified the case,[117] and Microsoft appealed.

Sun-Rype and *Microsoft* were heard back to back by the same panel and the Court of Appeal issued reasons in the two cases on the same day. By a two-to-one decision, the court allowed both appeals, holding that indirect purchasers cannot sue for losses caused by a conspiracy. The majority's reasons for this finding are found in its decision in *Sun-Rype*.

The majority's reasoning proceeded in two steps. First, it follows from the Supreme Court's rejection of passing-on as a defence that the direct purchasers are entitled in law to recover the whole amount of the overcharge, the majority reasoned:

> However, the DPs are in law entitled to recover the whole of the amount of the overcharge for which they may establish the defendants are liable to them, regardless of how much of it had been passed on. In responding to a claim made by the DPs alone, it would be no answer for the defendants to say the DPs suffered less than they were overcharged because they passed some of the overcharge on to the IPs. Their loss was complete at the time the overcharge (or each overcharge payment) was paid. This appears to me to have been made clear beyond question by the Supreme Court of Canada: passing on is not a defence that the defendants could raise…[118]

Second, if the direct purchasers are entitled to recover the whole overcharge without deduction on account of passing on, it follows that there is nothing left for the indirect purchasers to recover. The law refuses to recognize passing-on to reduce the amount recoverable by direct purchasers; equally it must refuse to recognize passing-on to grant recovery to indirect purchasers:

> If then it is right to say there is no defence of passing on, it must, in my view, follow that even though an overcharge may in fact have been passed on (as the invalid tax was said to have been passed on in Kingstreet), the law does not recognize it: as a matter of law, the overcharge or the loss for which the wrongdoer is liable is sustained when the overcharge is paid at first instance. It is no defence to contend there was no loss (or it was something less) because the overcharge was passed on. If that is so, then those who would seek to recover an overcharge that has been passed on are effectively claiming a loss that in law is not recognized. For that, there can be no cause of action.[119]

If this were not the case, the majority reasoned, the defendants would have to pay twice: they would have to pay the direct purchasers the whole of the overcharge, and then they would have to pay the indirect purchasers for whatever was passed on to them. The law does not sanction such double recovery.[120]

In his dissenting reasons, Donald J.A. adopted the motion judge's distinction 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".[121] 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. He contended that "the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided". Thus, he concluded:

> To summarize: although the pass-through defence is dead, the corollary proposition barring a pass-through claim is by no means a logical or legal necessity. The plaintiffs offer evidence to overcome the assumed impossibility of proof and they will not seek over-recovery. Other adequate safeguards will be available.

The majority, however, refused to accept the distinction between passing-on as a defence and passing-on as a fact. The court stated:

> But the distinction is not considered as a matter of law. The passing-on defence appears to have been seen as something a court will not "allow" a defendant to raise. But, in my respectful view, it is not a question of what a court may allow; rather it is a matter of what the law recognizes. The defence cannot be raised, not because it is for some reason not allowed, but because the law does not recognize it – it has been authoritatively rejected. Once that is accepted, the fact that some of the overcharge may have been passed on cannot be relevant to establishing a cause of action.

The majority of the BC Court of Appeal also disagreed that putting direct and indirect purchasers together in the same class would solve the problem. The direct purchasers would still, as a matter of law, be entitled to recover the whole of the overcharge, the majority reasoned. Putting them in a class with indirect purchasers cannot take away this right, since the *Class Proceedings Act* is a procedural statute that cannot create or modify a cause of action.[122] Even the concession by the representative direct purchaser plaintiff that it would not seek to recover any part of the overcharge it passed on was not enough, in the majority's view, since this plaintiff could not bind the other members of the plaintiff class.[123]

(ii) *Infineon*

In November 2011, the Quebec Court of Appeal certified a class action against makers of DRAM memory chips on behalf of all Quebecers who bought DRAM

chips of products containing DRAM chips between April 1999 and June 2002.[124] The plaintiff class likely consists mainly of indirect purchasers.

The Court of Appeal's discussion largely follows, and adds little to, Donald JA's dissenting reasons in *Sun-Rype*. The court did suggest that if the direct purchasers were to capture the whole of the overcharge in opt-out litigation against the price-fixers, the indirect purchasers would have an action in unjust enrichment against the direct purchasers. However, it is unlikely that this putative unjust enrichment action would satisfy the required elements for an unjust enrichment action. In particular, indirect purchasers would not have a deprivation corresponding to the recovery by the direct purchasers. Their losses would have occurred at the time the overcharge was passed on by the direct purchasers, and not as a result of the later recovery of the overcharge. As well, this passing-on by the direct purchasers is neither unlawful nor actionable. Moreover, it would be impossible to show an absence of a juristic reason for recovery by the direct purchasers pursuant to a judgment of the court.

IV. The other shoe

The result in *Sun-Rype* and *Microsoft* is really the other shoe dropping. The Supreme Court has definitively ruled out passing-on as a defence. The question now is whether that conclusion also rules out claims by plaintiffs to whom one set of plaintiffs passed on a loss.

1. Rejection of defensive passing-on entails rejection of offensive passing-on

In my view, the Supreme Court's rejection of the passing-on defence necessarily entails a rejection of the offensive use of passing-on to found indirect purchaser claims. Put another way, if indirect purchaser claims are to be permitted, then the passing-on defence must be allowed, at least to the extent necessary to permit the allocation of damages between direct and indirect purchasers. The alternative is to countenance double recovery.

A simple example shows why this must be so. Suppose manufacturers of widgets conspire to fix prices. Direct and indirect purchasers (the latter comprising intermediate purchasers and consumers) claim damages in a class action. After a trial, the court assesses total damages at $100 million. Now the court must allocate the damages between the direct and indirect purchasers. In order to do so, it must award the direct purchasers *less* than the actual overcharge they experienced. This is tantamount to recognizing a defence of passing-on.

This can be made even more obvious by changing the example: suppose one of the direct purchasers, "A", not wishing to share the recovery with the indirect purchasers, opts out and sues the conspirators in a separate action.[125]

The conspirators plead that A passed on its loss to indirect purchasers, and that these same indirect purchasers are claiming those damages in class proceedings. A moves to strike this defence on the basis that the Supreme Court rejected the passing-on defence in its entirety in *Kingstreet* and wins. After a trial, A recovers 100% of the overcharge it suffered. Meanwhile, in the class proceedings, the court is faced with a range of unappealing choices: it could rule that the indirect purchasers that purchased from A can no longer recover and must exit the class, with the result that they get nothing. This would be difficult, if not impossible, to accomplish. Recognizing this, the court could leave A's indirect purchasers in the indirect purchaser class, but spread the amount allocated to indirect purchasers across all indirect purchasers, with the result that all indirect purchasers under-recover. This would be unfair. To obviate this, the court could ignore A's recovery and award A's indirect purchasers their share of the overcharge, with the result that the conspirators pay double with respect to those indirect purchasers.

This is not a theoretical problem. Direct purchasers do not wait until certification to commence litigation.[126] As a result, settlement agreements typically include provisions for deductions from the settlement amount on account of opt-out settlements with direct purchasers. For example, in *Vitamins*, the defendants settled with a number of direct purchasers and received "settlement credits" of about $42 million in total, or over 30% of the total settlement of about $132 million.[127] More recently, in *Rubber Chemicals*, Bayer Inc. (and related companies) reached settlements with eight direct purchasers. These credits were deducted from the direct purchaser fund.

Consequently, Donald JA's distinction between passing-on "in fact" and passing-on as a defence is mere wordplay. Giving legal effect to passing-on "in fact" entails recognizing passing-on as a defence. The same goes for any attempted distinction between defensive and offensive passing-on. They are two sides of the same coin.

American commentators generally acknowledge that if indirect purchaser claims are to be allowed, the choice is between allowing passing-on as a defence or tolerating double recovery.[128] Most of the various proposals for reform in the United States involve overruling both *Illinois Brick* and *Hanover Shoe*.[129] Proposals that would overrule *Illinois Brick* but leave *Hanover Shoe* intact accept that double recovery is the inevitable result.[130]

2. Can passing-on be limited to price fixing cases?

If allowing indirect purchasers to claim for damages that were passed on to them necessarily entails allowing passing-on as a defence to direct purchaser claims, the question arises: can the scope of this defence be limited to price fixing cases?

The concern expressed by Ground J. in *Ernst & Young* that in virtually every commercial case the defendant could raise passing-on likely is not justified. In order for the defence to apply, the defendant would need to show that the plaintiff passed on the actual loss it suffered, and not simply that the plaintiff's business was profitable.

It is unlikely, however, that the passing-on defence could be limited to price fixing cases. There is no analytical difference between passing-on in price-fixing, bribery or indirect tax cases: in each case, the wrongful conduct results in overcharges. More broadly, any wrong that results in a loss or overcharge attributable to a product or service that is either resold or used as an input in another product would be fair game for the passing-on defence. Thus allowing indirect purchaser claims would be inconsistent with and entail overruling *Kingstreet* itself. It would also lead to considerable uncertainty in the law of damages.

Allowing the passing-on defence in bribery and indirect tax cases could have serious negative effects. In both cases it may wipe out the incentive for the victim to sue, since the victim's ability to recover would be doubtful at best. This would in turn reduce deterrence of corruption and leave provincial governments free in practice to ignore the constitutional prohibition on imposing indirect taxes. Alternatively, it may lead to the emergence of class actions that include direct and indirect purchaser classes in bribery and *ultra vires* tax cases. This in turn would increase the strain on the court system.

3. Is denying recovery to indirect purchasers a problem?

Perhaps the single most compelling argument in favour of creating an exception to the rule against the passing-on defence in order to allow indirect purchasers to recover is that the rule against passing on means that consumers, who ultimately pay more for things because of price fixing, are not compensated, while direct purchasers, who do not in fact bear the loss, are. This would seem contrary to section 36, which provides that "any person who has suffered loss or damage" as a result of a price fixing conspiracy can sue to recover "an amount equal to the loss or damage proved to have been suffered by him".

The situation is more complex, however. First, even if indirect purchasers are permitted to recover damages, there remains the problem of proving damages they suffer. Any argument based on section 36 cuts both ways, since section 36 expressly requires proof of damages as a component of liability. While overcharges arising from price fixing are frequently passed on, determining the extent of the overcharge suffered at each level of the distribution chain is a highly complex exercise. Even if pass through rates can be determined, there is still the problem of the individualized exercise of determining whether or not particular individuals suffered damages. Second, an analysis of price fixing class

actions settled to date in Canada shows that consumers do not, in fact, recover damages due to price fixing.

a) *The challenges of proving indirect purchaser damages*

There are two major challenges in proving damages suffered by indirect purchasers. The first is to show that the overcharge was passed on to indirect purchasers in general. The second is to prove that particular indirect purchasers in fact suffered from the overcharge.

(i) *Proving passing-on*

Common sense suggests that all costs are ultimately passed on to the end user, typically the consumer: "in the long run, the final consumers are the victims of price fixers".[131]

The academic literature and caselaw on the question of how much of the overcharge is passed on to consumers and how this can be proven is extensive. The first task, determining the amount of the overcharge, is far from simple.[132] Once the overcharge is calculated, the pass through rate[133] is generally assessed using "incidence theory", an economic theory designed to show the incidence of taxes.[134] Depending on the competitive dynamics, direct purchasers may pass on all or part of the overcharge or absorb it all. If they apply a standard percentage markup to their input costs, they will pass on more than the overcharge.[135] However, the amount of the overcharge that direct purchasers pass on may not represent damages they have avoided, since they may lose sales as a result of having increased prices, without a compensatory increase in profit. As well, direct purchasers may not pass the overcharge on immediately. While some businesses adjust prices day to day (for example, gas stations), for many others, pricing decisions are important events that occur annually. Inevitably there will be more factors at play than the increase in price caused by the price fixing. The costs of other inputs may have gone up or down.

The competitive dynamics of the upstream market for the product whose price has been fixed as well as the downstream market that the direct purchaser is selling into will largely determine whether the direct purchaser is able to pass the overcharge on. Economists explain that the pass through rate depends on relative elasticities of supply and demand.[136] If elasticities of supply are high relative to demand, more of the overcharge will be passed on. Put another way, if the direct purchaser is highly sensitive to changes in price for the input in setting prices it charges to the indirect purchasers, and indirect purchasers are less sensitive, than the more of the overcharge will be passed on.[137] This will occur, for example, if the direct purchasers are already pricing close to marginal cost because of competition. However, calculating elasticities is difficult in practice, and "[t]rying to identify *both* demand and supply curves is often a statistical nightmare".[138]

In the long run, in perfectly competitive markets, the overcharge will be fully passed through to the end user.[139] If, however, the markets under analysis are not perfectly competitive, the pass through rate will be different, and require a more complicated analysis.[140] The pass through rate is also affected by the extent to which the product is altered, by, for instance, being incorporated into another product.[141]

This analysis must be repeated at each level of the distribution chain. At each level of the distribution chain, the relative elastiticities of supply and demand may be different. At each level, the timing of pricing decisions may be different. At each level, the product may be resold as is, or used to make another product. Thus at each level of the distribution chain, all, part, or none of the overcharge may be passed through to the next level.

The recent *DRAM* case provides a good illustration of these difficulties. DRAM chips were incorporated into a variety of end products, and made their way to consumers, through a distribution chain involving as many as ten levels of intermediaries. A pass through analysis must therefore be conducted for each of these ten levels. The cost of the DRAM as a percentage of the price of the end product varied from a low of 0.2 percent in the case of automotive products, to a high of between 1.1 and 8.6 percent of desktop computers. This suggests that the dollar value of any overcharge borne by individual consumers will be minute, although collectively their loss may be quite large. Of course, where the price-fixed product assumes a greater importance in the price of the final product, the loss suffered by individual consumers may be larger. This may prove to be the case in the current *LCD* class action.

(ii) *Proof of loss as a component of liability*

Section 36 requires proof of loss as an element of establishing liability. This means that loss must be established *before* damages can be assessed in the aggregate; aggregate assessment of damages *cannot* be used to establish loss as a component of liability.

Quite apart from the difficulties inherent in proving passing-on, consumers face particular obstacles in proving that they have suffered a loss as a result of a price fixing conspiracy. Consumer classes involve large numbers of people who will individually have suffered very small losses. Consumers frequently will not maintain records of purchases and may not even recall what brand of the product in question they purchased.[142] Inevitably, the cost of proving that each and every consumer in the class suffered a loss will be greater than the loss.

It is fairly obvious that these concerns apply to conspiracies that affect the price of everyday products, such as the *Vitamins* case. They may also apply to conspiracies that affect relatively large purchases. For example, the proposed *CRT* class action alleges that manufacturers of cathode ray tubes fixed prices

from 1995 to 2007.[143] Anyone who bought a television or a computer during this period will presumably be a class member. Yet many televisions and computers purchased during this period will already have been disposed of and the receipts long ago recycled.

Courts have so far not had to deal with these hard issues, since no price fixing class action has ever gone to trial in Canada. Yet even the devices employed by some courts to certify price fixing class actions raise concerns.

First, the suggestion that it is not necessary to prove that each class member suffered damages in order to establish liability under section 36 is simply wrong. In *Bisaillon v. Concordia University*,[144] the Supreme Court confirmed that class proceedings legislation is procedural only and does not create – or take away – causes of action, nor modify the rules of evidence:

> 17 The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights [citations omitted]. It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so: [citations omitted].
>
> 18 For example, in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, this Court confirmed that the provisions of the *Code of Civil Procedure* pertaining to class actions did not change the substantive rules of evidence (paras. 31-36). Thus, unless otherwise provided, the substantive law continues to apply as it would in a traditional individual proceeding. L'Heureux-Dubé J. stated the following in this regard: "Those provisions certainly do not create new rules of evidence; rather, they adapt to class actions the methods by which a right, which previously could be claimed only by each person entitled to it, may be exercised" (para. 32).

It follows that class proceedings legislation cannot remove the necessity of proving an element of a cause of action.

Second, the reliance on restitutionary concepts and waiver of tort is problematic. Section 36 creates a cause of action that includes loss as a component of liability and limits recovery to "an amount equal to the loss or damage proved to have been suffered by" the plaintiff. Using waiver of tort not only to remove the requirement of proving loss, but also to award damages based on disgorgement of profits, effectively removes both of these express statutory requirements from the legislative scheme. It is no answer to say that the waiver of tort concept is based on a common law wrongdoing, that is, common law conspiracy or unlawful interference with economic relations. This is because

both of those torts must be grounded in an unlawful act, which here is a breach of section 45. Thus the unlawful act relied on to justify restitution remains a breach of section 45, no matter how it is dressed up, and a waiver of tort claim to obtain disgorgement in this circumstance is an attempt to do indirectly what Parliament does not allow to be done directly.

Third, while requiring plaintiffs to demonstrate no more than a credible methodology for proving loss on a class-wide basis may be correct given the low threshold for certification, this test effectively ducks the issue. At trial, plaintiffs will have to prove that each and every class member suffered a loss. This does not mean that loss must necessarily be proven for each consumer individually. If the plaintiffs can establish that *every* purchaser of a given product suffered an overcharge, then, logically, proof that a person purchased the product will complete the proof.[145] Proof of the major premise, that *all* (not just most, but *all*) purchasers of a product suffered an overcharge, presents the problem, although it must be remembered that the standard of proof is balance of probabilities, not one of absolute certainty. Nevertheless, the fact that a proceeding is a class proceeding does not allow us to relax the standard of proof.[146] As well, class proceedings legislation explicitly restricts the availability of statistical evidence and aggregate assessment of damages to determining the quantum of damages *after* liability has been determined.[147] The top down analysis risks becoming an indirect way of using statistical evidence or an aggregate assessment of damages to prove liability, which is impermissible.

b) *Do indirect purchasers recover their losses through indirect purchaser class actions?*

The evidence from price fixing class action settlements in Canada to date shows that indirect purchasers, in particular consumers, generally do not recover damages through class actions. While a number of settlements permit intermediate purchasers (that is, indirect purchasers who themselves resell the product to another purchaser) to make claims against the settlement fund, Canadian consumers have *never* directly been compensated for price fixing losses through a class action settlement. Rather, in every case to date, the portion allocated to consumers has been distributed *cy-pres* to various charities, consumer groups, and educational institutions.

(i) *Allocations to indirect purchasers in class action settlements*

In 2006, I published a study of all price-fixing class action settlements that were then available.[148] I have updated this data to include settlements since that article was published.[149] The data shows that in every case, the majority of the settlement funds were allocated to direct purchasers. The trends in allocation have varied over time. In the three settlements before *Chadha* (2003), the

split was 70-30 in favour of direct purchasers in one settlement, and 80-20 in the other two. After *Chadha*, the allocations to indirect purchasers tended to be lower than 20 percent. A number of settlements allocate almost nothing to indirect purchasers. For instance, *Polychloroproprene*[150] and *EPDM*[151] allocate up to 100 percent to direct purchaser claims, with the unclaimed remainder going *cy-près* to non-profit organizations. Three others allocate between five and ten percent to indirect purchasers.[152] Three settlements allocated between 15 and 20 percent to indirect purchasers.[153] The one outlier is *Carbonless Paper*, which allocates 55 percent to direct purchasers, ten percent to intermediate purchasers, and 35 percent to indirect purchasers. It must be noted, however, that "direct purchasers" in settlement agreements is sometimes defined to include those who purchased from distributors, thus, it would seem, the first level of indirect purchasers.[154] The *Copper* settlement provided that only those whose purchases of copper totalled $2 million or more could submit claims. This presumably was designed to segregate direct from indirect purchasers.[155]

The allocations to indirect purchasers in settlements to date are not consistent with the contention that most losses ultimately are passed on to consumers. If the allocations reflect the available evidence as to pass through rates in each case, then the only possible conclusion is that the rate at which losses are ultimately passed on to consumers in Canada is relatively low. It is, of course, possible that the allocations to indirect purchasers reflect a discount due to the difficulties of proving passing-on and the impropriety of allocating a large portion of the settlement to non-compensatory *cy-pres* distributions.

(ii) *Cy-près distribution of indirect purchaser allocations*

Amounts allocated to consumers have, to date, invariably been distributed *cy-près* to various consumer groups, educational institutions, and charities. Amounts allocated to intermediate purchasers are usually distributed *cy-près*.

Class proceedings legislation in Canada provides for distribution of parts of the award *cy-près*, but only after an opportunity has been given for class members to make claims against the fund.[156] Price fixing settlements[157] are not structured this way, however. Only certain class members – direct purchasers and sometimes also distributors – are entitled to make claims against the fund. Indirect purchasers further down the distribution claim, including consumers, are not permitted to make claims. The rationale for this is simple: it is too hard to identify possible claimants.

The settlement in *Vitamins* provides a good example. Because of the extent of that conspiracy and the ubiquity of added vitamins in food products, likely every single resident of Canada was a class member. But who among us keeps receipts for everyday purchasers such as bread, milk, breakfast cereal, or multi-vitamin pills? The difficulties inherent in determining how much any individual

was entitled to would have been insurmountable, and the costs of distributing the settlement to 30 million Canadians may have exceeded the recovery.[158] The court approved of a cy-près distribution:

> ¶15 There are significant problems in identifying possible claimants below the manufacturer level. Hence, the monies allocated to intermediaries such as wholesalers and consumers are to be paid by a cy pres distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The CPA provides the flexibility for this approach: see ss 24 and 26.
>
> ¶16 Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.[159]

The passage above reveals three reasons for the *cy-près* distribution: first, the difficulties in identifying claimants below the manufacturer level; second, that payments to non-profit entities would indirectly benefit consumers; and third, deterrence of price fixing.

The first reason cited by the court is fairly obvious: it is difficult to identify claimants below the manufacturer level, and it would be cost-prohibitive to attempt to identify and compensate them individually. The second and third reasons cited by the court are discussed further below.

(iii) *Indirect benefits*

It is difficult to evaluate whether the cy-près distribution to non-profit entities indirectly benefit consumers, as the court held in *Vitamins*. Any benefit to consumers would be highly indirect and diffused (but then, so were the damages).

Professor Jasminka Kalajdzic puts the matter more strongly, arguing that the practice of fixing a quantum to be distributed *cy-près* at the time of settlement means that consumers receive no compensation for their losses: "consumers give up their litigation rights in exchange for nothing".[160]

This raises the question of whether consumers' interests are best protected by including them in class actions at all. In a 1999 article, in a passage quoted with approval by the Ontario Court of Appeal in *Chadha*, Professor William H. Page concluded:

> Thus, in many cases, a price-fixing overcharge will simply dissolve into the currents of the channels of distribution. Eighty

> years ago, Justice Holmes noted the "endlessness and futility of the effort to follow every transaction to its ultimate result," even though "in the end the public pays the damages in most cases of compensated torts." Now, as then, it may well be that an overcharge is passed on but the legal system cannot identify its incidence. Common proof is impossible, and individualized proof would be more costly than the amount of the harm. The emerging reality of the indirect purchaser class action offers no realistic mechanism for accomplishing compensation for remote purchasers of price-fixed goods. If the indirect purchaser class action is only available to a small subset of indirect purchaser injuries, even among price-fixing conspiracies that are actually detected, it is not fulfilling its stated purpose.[161] [Emphasis added]

In 2005, Page returned to this theme, pointing out:

> But the absence of a remedy for consumers is not necessarily inconsistent with the goal of protecting the consumer interest. Whether a statute protects a class is a separate question from whether it would [be] efficient for that class to have a private right of action. Many federal statutes, such as the Federal Trade Commission Act, are designed to protect consumers, but do not accord them a private right to sue, presumably because to do so would not be the most efficient mechanism for securing compliance with substantive standards.[162] [Emphasis added.]

The same could be said of the *Competition Act*, which protects consumers from a variety of economic harms by providing criminal and civil enforcement mechanisms that are mostly under the control of the Competition Bureau (and the Crown, in criminal cases).

In the US, there has been a vigorous scholarly debate about whether allowing indirect purchaser claims benefits indirect purchasers. Landes and Posner argue that limiting recovery to direct purchasers is more efficient, provides better deterrence, and will benefit indirect purchasers, since the direct purchasers will pass on the recovery.[163] Not surprisingly, this view is far from being universally accepted. Professors Harris and Sullivan argued that direct purchasers would not pass on the recovery. Courts could order direct purchasers to pass on the recovery, but this they criticized as being an "an awkward, *cy près* method of obtaining the goal of compensatory justice—a goal more easily and precisely obtained by reversing *Illinois Brick*".[164] Harris and Sullivan's apparent disapproval of *cy-près* recovery is interesting, given that allocations to Canadian consumers are always distributed *cy-près*.

Indeed, the situation in Canada is far different from that envisioned by American economists writing about indirect purchaser claims there. In Canada, indirect purchasers receive nothing at all directly from settlements, and very little *cy près*. On the one hand, because direct purchasers collectively receive the bulk of the settlement, including indirect purchasers does not reduce their incentive to sue.[165] On the other, the very costly process of working out pass through rates through a complex distribution chain is not worth it if the end result is relatively small bequests to non-profit entities and no direct compensation to consumers.

(iv) *The competing poles of deterrence and compensation*

The third rationale cited by the court in approving of a *cy près* distribution, deterrence, bears further analysis, since it was a key factor in the decision of the US Supreme Court in *Illinois Brick*. As well, much of the US literature revolves around the competing poles of deterrence (the pro-*Illinois Brick* camp) and consumer compensation (the anti-*Illinois Brick* camp). The ABA Task Force Report put it succinctly:

> But the rule of Hanover Shoe and Illinois Brick may sacrifice compensating some economic victims of antitrust violations for other goals, such as deterrence and manageability of litigation. State indirect purchaser statutes, in contrast, emphasize compensating the actual victims of the antitrust violation at the expense of manageable litigation. If Congress attempts to resolve the issues raised by ARC America, it must decide which goals it chooses to promote and whether the goals of deterrence, compensation, and efficient judicial administration can be harmonized.[166]

That Canadian class proceedings incorporate a deterrence rationale is well established: in 1995, in *Abdool v. Anaheim Management Ltd.*, the Divisional Court held that "modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations" was one of the three main objects of class proceedings legislation.[167] That case, however, involved a civil wrong, not a criminal one. By contrast, in *Chadha*, the Ontario Court of Appeal held that criminal sanctions in the *Competition Act* achieve the goal of behaviour modification.[168]

Private actions in Canada have never achieved the same importance as a parallel system of enforcement of competition policy as they have in the United States. The fact that section 36 permits only single damages, and does not provide for punitive damages, limits both the attractiveness and the deterrent effect of private actions in Canada. The earliest price fixing class actions in Canada generally followed on enforcement action by the Competition Bureau.

Today, class actions are often commenced in Canada following private actions or enforcement in the United States. In both cases, the Canadian class action likely provides little additional deterrent effect.

Thus in Canada, both of the policy concerns that drive the debate in the United States assume less importance: the deterrence aspect of price fixing class proceedings is less important here, but so is the concern about compensation, since indirect purchasers are not directly compensated in any event.

4. Proximity and policy

The rejection of passing-on as a defence is rooted in considerations of proximity and the difficulty of tracing damages as the effects of a conspiracy ripple through the economy. In Holmes J.'s classic statement, adopted by the US Supreme Court in *Hanover Shoe*, and by Le Bel J. in *Canfor*, "The general tendency of the law, in regard to damages at least, is not to go beyond the first step".[169]

This suggests that the question of whether indirect purchasers should be able to claim should also be considered in light of the law on proximity. The loss suffered by indirect purchasers is the nature of a pure economic loss, and in particular, it is a form of relational economic loss.[170] It is a relational economic loss because it arises from the buyer-seller relationship between the indirect purchaser and the direct purchaser who was the victim of the price fixing (or another indirect purchaser to whom the loss was passed on).

The parallel between the relational economic loss suffered by an indirect purchaser and that suffered by (for example) the user of a railway bridge,[171] or charterers of an oil rig,[172] is not perfect. There are two main differences: first, the loss suffered by the direct purchaser is not caused by negligence, but by a breach of the *Competition Act*—effectively an intentional statutory tort. Second, the loss suffered by the direct purchaser is itself pure economic loss.[173] By contrast, relational economic loss is conventionally defined as loss suffered by a party as a result of a relationship with a party that suffers personal injury or property damage caused by the defendant's negligence.[174] Nevertheless, considered in itself, the loss suffered by indirect purchasers is a form of relational economic loss.

The general rule is that relational economic losses are not recoverable, except in special circumstances. McLachlin J. (as she then was) stated the rule in three short propositions in *Bow Valley*:

> (1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed.[175]

In *Bow Valley*, the Supreme Court accepted three categories of recoverable relational economic loss:

> (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.[176]

So far as the recognition of new categories is concerned, McLachlin J. adopted a conservative approach, stating:

> It thus appears that new categories of recoverable contractual relational economic loss may be recognized where justified by policy considerations and required by justice. At the same time, courts should not assiduously seek new categories; what is required is a clear rule predicting when recovery is available.[177]

The test to be used is the familiar *Anns v. Merton London Borough Council*[178] test, as modified by the Supreme Court in a series of recent decisions.[179]

As noted above, indirect purchaser claims are founded neither on negligence nor on personal injury or property damage. Thus they are not a perfect fit with the negligence-based analysis mandated by *Bow Valley*. In *Fraser v. Westminer Canada Ltd.*,[180] however, the Nova Scotia Court of Appeal considered a relational economic loss claim that was predicated on an intentional tort that itself generated a pure economic loss. The reasoning in this decision is of some assistance in analysing indirect purchaser claims.

Westminer had purchased a company, Seabright, that turned out to be a dud. Westminer and its affiliates took a number of actions against the former directors of Seabright, including a lawsuit alleging fraud, whose predominant purpose was to injure the former directors. The Westminer group of companies were thus liable under the predominant purpose branch of the tort of conspiracy. But the Westminer group's actions also ruined a planned initial public offering for a new venture, Cavalier, promoted by one of the ex-Seabright directors. Investors in Cavalier lost money. They sued, alleging negligence based on a relational economic loss theory. The trial judge dismissed the action and the investors appealed.

The Nova Scotia Court of Appeal upheld the trial judge's decision. Cromwell J.A. (as he then was), writing for the court, held that there was no proximity because there was no relationship at all between Westminer and the investors. The investors' loss was "distant" and arose from "collateral relationships".[181] Nor did the fact that the predicate tort was an intentional tort instead of negligence establish proximity. What matters is the relationship between the parties, not the conduct, Cromwell J.A. held.[182] Turning to the second stage of the *Anns* analysis, Cromwell J.A. held that the primary policy consideration is

whether the proposed new duty of care potentially gives rise to indeterminate liability.[183] Here, it did.[184]

With this background, the question can be asked, although perhaps not conclusively answered: would indirect purchaser claims be recoverable pursuant to the analysis mandated by *Bow Valley* for new categories of relational economic loss?

First, it should be noted that indirect purchaser claims may belong to a category of cases known as "transferred loss". Transferred loss occurs where the owner of the damaged property allocates the loss to another by contract either through some indemnity provision or a requirement that the third party bear the loss directly. This is similar to insurance, where the insurer undertakes the liability through a contract of insurance, and has a corresponding right of subrogation.[185] La Forest J. considered transferred loss in *Norsk*, but found that it did not apply in that case because the loss caused by the property damage was not passed on to CN. CN's loss was loss of use, not the cost of property damage passed on by CN.[186] This suggests that passing-on may be a form of transferred loss.[187] However, passing-on is different from express contractual allocation of loss that seems to be typical of transferred loss cases.[188] To the extent that they are passed on, price fixing overcharges are passed on as part of the price and are not expressly allocated to the indirect purchaser.

In any event, La Forest J. stopped short of approving it as a category of recoverable relational economic loss in *Norsk*. In subsequent economic loss cases, the Supreme Court has not enumerated it among the recognized categories of recoverable relational economic loss. Arguably therefore, the Supreme Court has rejected it. At best, its status is uncertain.[189]

The first stage of the *Anns* test requires both foreseeability and proximity. It is certainly foreseeable that an overcharge generated by price fixing may be passed on to by direct purchasers to indirect purchasers. Proximity is another matter, however. The conspirators will have a relationship with the direct purchasers, but they may not have any relationship at all with indirect purchasers. By the time the end of the distribution chain is reached, Cromwell J.A.'s characterization of the loss as "distant" and arising from "collateral relationships" may be apposite.

That being said, the conspirators will know the various uses to which their products are put, and have some sense of the purchasers of the product at the various levels of the distribution chain. They may engage with indirect purchasers through websites, trade shows, and other marketing activities, or through after-purchase support. Thus, given the fact-dependent nature of the proximity analysis, it is impossible to posit or exclude a prima facie duty of care owed to indirect purchasers in the abstract.

The second stage of the *Anns* test involves a policy analysis. In connection with this, it is worth examining the reasons for the general exclusionary rule. Interestingly, the policy reasons cited in support of the exclusionary rule are similar in some respects to the reasons underlying the rule against defensive passing-on. Four policy reasons are conventionally cited.

First, the law views economic interests as being less worthy of protection than bodily security and property.[190] This is because an economic loss represents a wealth transfer from one person to another, whereas personal injury and damage to property involves the destruction of something of value, and thus constitutes social loss.[191] However starkly one paints the picture of losses caused by price fixing, those losses remain economic: wealth is transferred, but no property is destroyed (although some things may not be built because of reduced output), nor is anyone physically hurt.

The second, and likely most important, reason is the spectre of "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[192] The concern here is that the effects of negligence can ripple outwards to a wide circle of individuals. La Forest J. explained in *Norsk*:

> 38 A third distinction is that perfect compensation of all contractual relational economic loss is almost always impossible because of the ripple effects which are of the very essence of contractual relational economic loss. This aspect has been recognized as critical from the very beginning. It is in this sense that the solution to cases of this type is necessarily pragmatic and involves drawing a line that will exclude at least some people who have been undeniably injured owing to the tortfeasor's admitted failure to meet the requisite standard of care.[193]

The concern over the impossibility of tracing the ripple effects of price fixing is precisely what motivated the US Supreme Court to reject passing-on in *Hanover Shoe* and *Illinois Brick*.

Allowing indirect purchaser claims does create the potential for indeterminate liability to an indeterminate class. Clearly the class of potential plaintiffs is indeterminate; it is also outside the control and or ken of the price fixers. For example, every Canadian was likely a member of the plaintiff class in the *Vitamins* case (including, ironically, the defendants' counsel); the same is likely true of plaintiff classes for the current DRAM, CRT, and LCD class proceedings. The potential for indeterminate liability is not as acute as it was in other cases, however. The defendants' total liability will be some combination of the initial overcharge, plus any markups applied to the overcharge, plus any lost profits arising from reduced sales. There is not the same potential for limitless liability as there was in *Hercules*.[194] The problem is not

so much that the liability is indeterminate, but that it may be virtually unascertainable at worst, or extremely difficult and costly to ascertain at best.

The third reason is that it may be more efficient to place the burden of the economic loss on the victim, since the victim can deal with this through, for example, insurance or contractual allocation.[195] This reason has no application in the case of an overcharge passed on to indirect purchasers, since the indirect purchasers' loss consists of an increase in price. This is not something that can be insured against. While the effects of price increases can be delayed through long term fixed price contracts, such contracts bring their own risks, and may not be available to all purchasers.

The fourth reason is that allowing claims for relational economic loss would lead to a multiplicity of lawsuits, since there would be a great many more plaintiffs.[196] Allowing indirect purchaser claims clearly adds a great many more plaintiffs. While incorporating all plaintiffs into class proceedings does attenuate the concern about a multiplicity of lawsuits somewhat, it is not a complete answer, since there remains a real danger that a price fixing class action will degenerate into a series of individual trials to determine, for each member of a class comprising potentially millions of consumers, whether each consumer suffered a loss. Even if this does not occur, it is clear that the economic analysis required to trace pass through rates through a multi-layered distribution chain will increase costs and lengthen trials.

In *Norsk*, La Forest J. also pointed out that allowing claims for relational economic loss does not increase deterrence, since the suit by the person who suffers personal injury or damage to property has a deterrent effect that puts pressure on the defendant to act with care.[197] This is equally the case with indirect purchaser claims, if not more so. The ability of direct purchasers to sue has a deterrent effect on price fixing; adding indirect purchasers to the plaintiff class does not increase deterrence. If anything, it reduces deterrence because indirect purchaser recovery may reduce direct purchasers' incentives to sue, and the additional complexity and costs must factor into the economic analysis conducted by the plaintiff class action lawyers before commencing the action.[198]

In sum, therefore, the policy considerations do not militate as strongly against recognizing an exception to the rule for overcharges that are passed on to indirect purchasers as they do in the case of, for example, auditors' liability (*Hercules*). That being said, opening the door to such claims leads to increased complexity and cost of litigation, with little countervailing benefit to indirect purchasers by way of recovery, or to society, by way of increased deterrence.

5. Conclusion

The Supreme Court's rejection of the passing-on defence necessarily entails

rejecting passing-on as a theory of liability to indirect purchasers as well. The question therefore is whether passing-on should be recognized both as a defence and as a foundation of liability in price fixing class actions. There is little to be gained by creating an exception to *Kingstreet* to allow indirect purchaser claims, since indirect purchasers in Canada typically do not receive any direct benefit from actions commenced in their name. By contrast, allowing indirect purchaser class actions has significant costs: the difficulties inherent in determining pass through rates and proving that class members at every stage of the distribution chain suffered a loss are enormous. This complexity carries with it a large increase in the cost of litigating class actions.

Considering indirect purchaser claims as a species of relational economic loss leads to the same conclusion: there is insufficient justification to depart from the normal exclusionary rule that applies to relational economic loss outside of established categories. Indeed, there are sound policy reasons to stop the recovery, and thus the litigation, at the direct purchaser level.

In short, the loss, as recognized by the courts, and its recovery, should stop with direct purchasers.

Endnotes

[1] Michael Osborne is a partner of Affleck Greene McMurtry LLP, where he practises competition law and commercial litigation.

[2] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187 [*Sun-Rype*]; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186 [*Microsoft*].

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

[4] The terminology for this theory is unfortunately not consistent. The Supreme Court of Canada refers to it using the term "passing-on". The US Supreme Court has used both this term and the term "pass-on". Others have also used "pass-through". Economists refer to the "pass through rate", which is the rate at which firms at one level of the distribution chain pass an overcharge onto those at the level below. This article uses the term "passing-on" to refer to the concept of passing-on of an overcharge and its use as a defence or a ground of a cause of action.

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

[6] *Sherman Act* §2, 15 USC § 2, provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…"

[7] 15 USC § 15.

[8] *Supra* note 5 at 489.

[9] 245 US 531 at 533-534 (1918) as cited in *Hanover Shoe*, *supra* note 5 at 490.

[10] *Supra* note 5 at 492-493.

[11] *Ibid*. at 493-494.

[12] *Ibid.* at 494.

[13] An analysis of the Supreme Court justices' meeting notes and memoranda by Andrew Gavil and William Kovacic shows that the justices initially voted six to two to

three to *affirm* the Court of Appeals' decision. However White J. took a very strong position and convinced three of his colleagues to switch sides. See Andrew Gavil and William Kovacic, *Presentation at the ABA Antitrust Section Spring Meeting Annual Luncheon* (April 2, 2003), summarized in ABA Section of Antitrust Law, *Indirect Purchaser Litigation Handbook* (2007).

[14] *Supra* note 3 at 730-731.

[15] *Ibid.* at 731.

[16] *Ibid.* at 731.

[17] *Ibid.* at 731.

[18] *Ibid.* at 734-735.

[19] *Supra* note 5 at 489.

[20] *Supra* note 3 at 737.

[21] *Ibid.* at 741.

[22] *Ibid.* at 742.

[23] *Ibid.* at 743, note 27.

[24] *Ibid.* at 746-747.

[25] *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 US 219, 236 (1948), (Refiners of sugar beets in California agreed amongst themselves to pay uniform prices to sugar beet growers. The growers sued. This case was thus not an indirect purchaser case).

[26] *Supra* note 3 at 749.

[27] *Ibid.* at 753.

[28] *Ibid.* at 754-758.

[29] *Ibid.* at 758-759.

[30] *Ibid.* at 759.

[31] *Ibid.* at 761.

[32] *Ibid.* at 762-764.

[33] William H. Page, "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of *Illinois Brick*", (1999) 67 Antitrust LJ 1 at 1-3 [Page, 1999]; Antitrust Modernization Commission, *Report and Recommendations* (2007) at 268*ff* [AMC Report].

[34] 490 US 93 (1989).

[35] Kevin O'Connor, "Is the *Illinois Brick* Wall Crumbling?", 15 Antitrust 34; "AMC Report", *supra* note 3 at 2-3; William H. Page, "Class Certification in the Microsoft Indirect Purchaser Litigation", 1(2) J Comp Law & Econ 303-308 at 303-304; Ronald W. Davis, "Indirect Purchaser Litigation: *ARC America's* Chickens Come Home to Roost on the *Illinois Brick* Wall", 55 Antitrust LJ 375 at 391*ff*.

[36] Andrew I. Gavil, "Thinking Outside the *Illinois Brick* Box: A Proposal for Reform", (2009) 76 Antitrust LJ 167.

[37] Davis, *supra* note 35, at 396.

[38] AMC Report, *supra* note 33 at 271; O'Connor, *supra* note 35 at 34; Donald I. Baker, "Hitting the Potholes on the Illinois Brick Road", *Antitrust* (Fall 2002) 14 at 16; ABA Section of Antitrust Law, "Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC America Corp.", 59 Antitrust LJ 273 at 281*ff* [ABA Task Force Report].

[39] *Supra* note 36 at 169.

[40] *Ibid*. at 188.
[41] *Ibid*. at 192.
[42] For a discussion of issues surrounding indirect purchaser litigation in the US, see ABA Section of Antitrust Law, *Indirect Purchaser Litigation Handbook* (American Bar Association, 2007).
[43] O'Connor, *supra* note 35 at 37. He cites two cases: *Mylan Labs.*, where the FTC obtained a disgorgement of somewhat less than single damages. And although the *Vitamins* class actions "represent a defendant's 'worst case'", the direct and indirect actions settled for a combined amount of about two-and-a-half times single damages.
[44] For a comprehensive discussion of the advantages and disadvantages of various policy options, see ABA Task Force Report, *supra* note 38 at 288*ff*.
[45] AMC Report, *supra* note 33 at 267; Baker proposes much the same thing, *supra* note 38 at 17*ff*.
[46] AMC Report, *supra* note 33 at 266.
[47] *Supra* note 36 at 195*ff*.
[48] *Ibid.* at 201-202.
[49] *Competition Act*, RSC 1985, c. C-34, s. 36.
[50] Quebec adopted rules allowing class proceedings in 1978, but class proceedings were not available in common law provinces until Ontario's law was enacted in1992.
[51] (2003), 63 OR (3d) 22 (CA) [*Chadha*].
[52] (1999), 45 OR (3d) 29 (Gen Div).
[53] (2001), 54 OR (3d) 520 (Div Ct).
[54] *Supra* note 51 at ¶30.
[55] Interestingly, the Competition Bureau had earlier declined to launch a formal inquiry into the plaintiffs' allegations.
[56] See Michael Osborne, "And the Money Keeps Rolling (In and Out) – Conspiracy Class Action Settlements After *Chadha v. Bayer*", (2006) 22:3 Can Comp Rec 115 [Osborne 2006].
[57] "*Vitamins*" is the nickname given to class actions arising from the bulk vitamins conspiracy. In Ontario, the style of cause is *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*
[58] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] OJ No 4594 (SCJ) at ¶36-46.
[59] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] OJ No 1118 (SCJ) at ¶23 [*Vitapharm* 2005].
[60] *Ibid.* at ¶44.
[61] [2009] OJ No 4021 at ¶158. For a discussion of this case, see Kent Thomson *et al*, "One Hand Taketh Away: Recent Developments in Indirect Purchaser Competition Class Actions in Canada", 38 Advocates' Q 286 at 291*ff*.
[62] *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575 [*Infineon* BCSC]. For a discussion of this case, see M. Osborne, "Complex Distribution Chain Kills Dram Class Action – *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*", (2009) 23:2 Can Comp Rec 46.
[63] *Infineon* BCSC, *supra* note 62 at ¶202.
[64] *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2009 BCCA 503 at ¶78 [*Infi-*

neon BCCA]. 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, *supra* note 61 at 295*ff;* M. Eizenga *et al*., "Antitrust Class Actions: A Tale of Two Countries", 25:1 Antitrust 83.

[65] For example, see Ontario's *Class Proceedings Act, 1992*, SO 1992, c. 6, s. 24.

> *Aggregate assessment of monetary relief*
> 24.--(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
> (a) monetary relief is claimed on behalf of some or all class members;
> (b) 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; and
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[66] *Supra* note 51 at ¶49. See also: *Bywater v. Toronto Transit Commission,* [1998] OJ No 4913 (Ont Gen Div).

[67] *Vezina v. Loblaw Companies Ltd.*, [2005] OJ No 1974 (SCJ).

[68] *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 OR (3d) 665 at ¶67-68 (Div Ct) [*Serhan*]. This case was settled in 2011.

[69] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at ¶41 [*Markson*] and *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781 at ¶42 [*Cassano*] In *Markson* the fees were also alleged to violate the *Criminal Code's* criminal interest rate provisions.

[70] *Cassano, supra* note 69 at ¶42.

[71] *Irving Paper Ltd. v. Atofina Chemicals Inc.,* [2009] OJ No. 4021 (SCJ) [*Irving Paper*] (class proceeding alleging price fixing of hydrogen peroxide).

[72] *Ibid.* at ¶118.

[73] *Irving Paper Ltd. v. Atofina Chemicals Inc.*, 2010 ONSC 2705 (Div Ct) [*Irving Paper* Div Ct].

[74] *Infineon* BCCA, *supra* note 64 (class proceeding alleging price fixing of DRAM).

[75] *Ibid.* at ¶31. Smith J.A.'s suggestion that unjust enrichment may not require proof of loss represents a significant departure from the traditional conception of this cause of action. It is well established that one of the elements of unjust enrichment is both gain to the defendant for which there is no juristic reason and a corresponding deprivation to the plaintiff. This principle was applied in the context of a motion to certify a class proceeding in *Price v. Panasonic Canada Inc.*, [2002] OJ No. 2362 (SCJ). In that case, the plaintiffs sought damages caused by alleged price maintenance contrary to the *Competition Act* by Panasonic. Shaughnessy J. refused to certify the case since proof that each class member suffered a loss would be required. He held that the plaintiffs' claim in unjust enrichment also required proof of corresponding deprivation. See also *Steele v. Toyota Canada Inc.*, 2008 BCSC 1063 at ¶77 [*Steele* BCSC].

[76] *Infineon* BCCA, *supra* note 64 at ¶33, 44.

[77] *Ibid.* at ¶70.

[78] *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 [*Steele* BCCA].

[79] *Steele* BCSC, *supra* note 75 at ¶52, 59 (class action alleging criminal price maintenance).

[80] *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466, affirming (2009), 96 OR (3d) 252 (Div Ct) at ¶65. The majority in the Divisional Court drew support for this proposition from Cumming J.'s preference for a global assessment of damages in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] OJ No. 4594 (SCJ) at ¶35-39, 43-45, and 57.
[81] *Supra* note 51 at ¶65.
[82] *Hollick v. City of Toronto,* 2001 SCC 68 at ¶25.
[83] *Supra* note 73 at ¶143.
[84] *Infineon* BCCA, *supra* note 64 at ¶68.
[85] *Fanshawe College of Applied Arts and Technology v. LG Philips LCD Co.*, 2011 ONSC 2484 at ¶37 [*Fanshawe*]. This case was argued before, but decided after, the BC Court of Appeal's decisions in *Sun-Rype* and *Microsoft* were released. Despite this, Tausendfreund J. does not discuss the BC decisions in her reasons.
[86] *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 SCR 74 [*Canfor*].
[87] *Kingstreet Investments v. New Brunswick (Department of Finance)*, 2007 SCC 1 [*Kingstreet*].
[88] *Attorney General of Nova Scotia v. Christian* (1974), 49 DLR (3d) 742 at 752, [1974] NSJ No 221 (CA) at ¶37.
[89] *Oshawa Group Ltd. v. Great American Insurance Co.* (1982), 36 OR (2d) 424 at 431-432 (CA).
[90] *Alberta Housing Corporation v. Orysiuk* (1981), 17 Alta LR (2d) 60, [1981] AJ No 1032 (CA).
[91] *Supra* note 5 at 489.
[92] *Mississauga Hydro Electric Commission v. Ontario Hydro* (1979), 26 OR (2d) 155 (HCJ). The charges were in fact valid, the court ruled.
[93] [1989] 1 SCR 1161.
[94] Under Canada's constitution, provincial governments can only levy "direct" taxes. Not surprisingly, this restriction of provincial taxing power has spawned an enormous volume of litigation. Early on, courts adopted John Stuart Mills' distinction between direct and indirect taxes:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another....

See *Bank of Toronto v. Lambe* (1887), 12 AC 575 (PC). Flat rate licence fees and property taxes imposed on businesses have been considered direct taxes. Taxes that are "related or relateable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in the course of being manufactured or marketed" are indirect. See *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 SCR 371 at ¶39. Thus, for instance, a sales tax imposed on any distributor or retailer is indirect; a sales tax imposed on the consumer is a direct tax.
[95] *Air Canada v. Liquor Control Board of Ontario* (1995), 24 OR (3d) 403 (CA), reversed in part, [1997] 2 SCR 581 at 432. [*LCBO*].
[96] [1997] 2 SCR 581.
[97] *Johnson v. Nova Scotia (Attorney General)* (1998), 170 DLR (4th) 167, [1998] NSJ No 508 (CA).

[98] *The Law Society of Upper Canada v. Ernst & Young* (2002), 59 OR (3d) 214 at ¶47(SCJ) [*Ernst & Young*].
[99] *The Law Society of Upper Canada v. Ernst & Young* (2003), 65 OR (3d) 577 (CA).
[100] *Supra* note 86.
[101] *Ibid.* at ¶111.
[102] *Ibid.* at ¶197.
[103] *Ibid.* at ¶203.
[104] *Ibid.* at ¶206.
[105] *Ibid.* at ¶204-205.
[106] *Hanover Shoe* at 492-493, as quoted in *Canfor, supra* note 86 at ¶205.
[107] *Supra* note 87.
[108] Citing Maddaugh, Peter D. and John D. McCamus, *The Law of Restitution,* (Aurora: Canada Law Book, 2004) at 11-45.
[109] *Supra* note 87 at ¶47, citing *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 CLR 51 (Aust HC).
[110] *Supra* note 87 at ¶48.
[111] *Ibid.* at ¶42 and 51.
[112] It might be argued that *Ernst & Young* is an exception. But that case involved a motion to strike the defence. The reason the court did not strike the defence was the uncertainty created by the La Forest J. in *Air Canada*.
[113] *Sun-Rype, supra* note 2.
[114] *Microsoft, supra* note 2.
[115] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922.
[116] *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2006 BCSC 1047.
[117] *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2010 BCSC 285.
[118] *Sun-Rype, supra* note 2 at ¶76.
[119] *Ibid.* at ¶80.
[120] *Ibid.* at ¶82.
[121] *Ibid.* at ¶30.
[122] *Ibid.* at ¶86, citing *Bisaillon v. Concordia University,* 2006 SCC 19 at ¶17 [*Bisaillon*].
[123] *Ibid.* at ¶87.
[124] *Options Consommateurs v. Infineon Technologies AG*, 2011 QCCA 2115.
[125] The 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 ¶28.
[126] The two year limitation period provided for in section 36 will typically have passed by the time the class proceeding is certified. Class proceedings legislation typically expressly tolls the limitation period for class members, giving them time to decide whether to stay in the class or opt out. See for instance Ontario's *CPA*, s. 28. Whether such provisions would be effective in tolling a federal limitation period has yet to be decided. I incline to the view that it is unlikely that the *CPA*, which is provincial legislation, could toll a limitation period provided for in federal legislation.
[127] *Amended Canadian Vitamins Class Actions National Settlement Agreement*, 6 January 2005, available online at http://www.vitaminsclassaction.com/documents.html.
[128] William M. Landes and Richard M. Posner, "Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*", 46 U Chi L Rev 602 at 603. ABA Task Force Report, *supra* note 38 at 292.

[129] See discussion above.
[130] Edward D. Cavanagh, "Illinois Brick: A Look Back and A Look Ahead", 17 Loy Consumer L Rev 1 at 43*ff*.
[131] George J. Benston, "Indirect Purchasers' Standing to Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals to Change the *Illinois Brick* Rule" 55 Antitrust LJ 213 (1986) at 217.
[132] James A. Brander and Thomas W. Ross, "Estimating Damages from Price-Fixing", *Litigating Conspiracy: An Analysis of Competition Class Actions*, (Toronto: Irwin Law, 2006) at 337*ff*.
[133] This is the rate at which firm at one level of the distribution chain pass losses on to their customers at the next level.
[134] Robert G. Harris and Lawrence A. Sullivan, "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis", 128 U Pa L Rev 269 at 275-276; George Kosicki and Miles B. Cahill, "Economics of cost pass through and damages in indirect purchaser antitrust cases", 51 Antitrust Bul 599 at 606; Page 1999, *supra* note 33 at 13*ff*.
[135] ABA Task Force Report, *supra* note 38 at 285-286.
[136] Harris & Sullivan, *supra* note 134 at 287.
[137] *Ibid.* at 287; Kosicki & Cahill, *supra* note 134 at 607; Samid Hussain et al, "Economics of Class Certification in Indirect Purchaser Antitrust Cases", 10 Competition 18 at 21-23.
[138] Landes & Posner, *supra* note 128 at 619.
[139] Kosicki & Cahill, *supra* note 134 at 619-620.
[140] *Ibid.* at 620-625; Page 1999, *supra* note 33 at 16.
[141] Page 1999, *supra* note 33 at 30; *supra* note 131 at 225.
[142] Page 1999, *supra* note 33 at 32; John E. Lopatka and William H. Page, "Indirect purchaser suits and the consumer interest", 48 Antitrust Bull 531 at 548.
[143] *Fanshawe College v. Hitachi, Ltd*, Ontario Superior Court file no. 59044CP, Statement of Claim, available online: http://www.classaction.ca/CMSFiles/PDF/PriceFixing/CRT/CRT_-_Statement_of_claim.pdf.
[144] *Bisaillon, supra* note 122.
[145] This is a classic syllogism: (1) all purchasers of widgets suffered an overcharge; (2) Jane Consumer purchased a widget; (3) therefore Jane Consumer suffered an overcharge.
[146] *Bisaillon, supra* note 122 at ¶18.
[147] In Ontario, *CPA* s 23-24.
[148] *Supra* note 56.
[149] With help from Brigid Wilkinson, Student-at-Law, which is gratefully acknowledged.
[150] *Canadian Polychloroprene National Settlement Agreement*, September 2005, unpublished.
[151] *EPDM Distribution Protocol*, unpublished.
[152] *Construction Flat Glass* -10%; *Linerboard/Corrugated Metal* – 5%; *Copper* – 6%.
[153] *MSG* – 15%; *Vitamins* – 17%; *Polyester Staple* – 20%.
[154] See for example, *Amended Canadian Vitamins Class Actions National Settlement Agreement*, 6 January 2005, unpublished at 4; *Polychloroprene*, *supra* note 150 at 4; *EPDM, supra* note 151.

[155] *Notice of Certification and Settlement Approval in the Matter of the Copper and Copper Products Class Action Litigation*, unpublished.
[156] See for instance Ontario: *supra* note 65, s. 26(4)-(6); BC: *Class Proceedings Act*, RSBC 1996, c. 50, s. 34; Alberta: *Class Proceedings Act*, SA 2003, c. C-16.5, s. 34; Saskatchewan: *The Class Actions Act,* SS 2001, c. C-12.01, s. 37; Manitoba *The Class Proceedings Act*, CCSM c. C130, s. 34.
[157] Although courts cite this provision as authority for *cy-près* distribution when approving settlements, it is not clear that a settlement fund is deemed to be an "award" for purposes of this provision. In the result, courts may have greater flexibility in the distribution of settlements than they would for awards.
[158] Or perhaps not: in the US, a variety of devices have been employed to provide consumers with direct compensation for losses due to price fixing: see *supra* note 42 at 235*ff*.
[159] *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] OJ No 79 (SCJ).
[160] Jasminka Kalajdzic, "Consumer (In)justice: Reflections on Canadian Consumer Class Actions", 50 Can Bus LJ 356 at 369-370.
[161] Page "1999", *supra* note 33 at 36-37.
[162] William H. Page, "Class Certification in the Microsoft Indirect Purchaser Litigation" (2005) 1(2) J Comp Law & Econ 303, 304-305 [Page 2005].
[163] Landes and Posner, *supra* note 128 at 605-625. See also *supra* note 131 at 246-247.
[164] Harris and Sullivan, *supra* note 134 at 299.
[165] In fact they likely have an incentive to participate in the class and make a claim against the direct purchaser fund.
[166] ABA Task Force Report, *supra* note 38 at 285.
[167] *Abdool v. Anaheim Management Ltd.* (1995), 21 OR (3d) 453.
[168] *Supra* note 51 at ¶62.
[169] *Supra* note 100 at ¶204, quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 US 531 (1918) at 533-534. Of course, the tools available to economists today to estimate downstream effects are much better today than they were in 1918!
[170] The categories of pure economic loss are: 1. The Independent Liability of Statutory Public Authorities; 2. Negligent Misrepresentation; 3. Negligent Performance of a Service; 4. Negligent Supply of Shoddy Goods or Structures; 5. Relational Economic Loss. See *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021 at ¶31 [*Norsk*], citing Bruce Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1991), 17 Can Bus LJ 356, at pp. 357-58.
[171] *Norsk, supra* note 170.
[172] *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210 [*Bow Valley*].
[173] "Pure economic loss is loss suffered by an individual that is not accompanied by physical injury or property damage" *D'Amato v. Badger*, [1996] 2 SCR 1071 at 13 [*D'Amato*].
[174] Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law* (9th ed. 2011) at 484-485.
[175] *Supra* note 172 at ¶48; B. Feldthusen, *Economic Negligence: the Recovery of Pure Economic Loss* (5th ed., Carswell, 2008) at 207; *supra* note 166 at 487.
[176] *Supra* note 172 at ¶48.
[177] *Ibid.* at ¶50.

[178] [1978] AC 728 (HL).
[179] *Supra* note 172, at ¶51-56. In *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 SCR 165 [*Hercules*] (cited in *Bow Valley*), the court restated the two steps to the *Anns* test: first, does a prima facie duty of care exists because of a relationship of proximity between the plaintiff and defendant? Second is that duty is negated or limited by policy considerations? In *Cooper v Hobart*, [2001] 3 SCR 537 [*Cooper*], the court clarified the policy questions that arise at each stage of the analysis. In particular, "[a]t the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?" (at ¶30) The court also clarified that mere foreseeability is not enough to create a prima facie duty of care; the first stage of the *Anns* test requires both foreseeability and proximity. The proximity analysis begins with established categories, but once again, the categories are not closed (at ¶31).
[180] 2003 NSCA 76 [*Westminer*].
[181] *Ibid.* at ¶77-81.
[182] *Ibid.* at ¶85, citing *Stewart v. Pettie,* [1995] 1 SCR 131 at ¶32.
[183] *Ibid.* at ¶119.
[184] *Ibid.* at ¶115-116.
[185] Feldthusen, *supra* note 175 at 257-258.
[186] *Norsk, supra* note 170 at ¶105-107.
[187] *Canfor* might also be thought of as a transferred loss case, since in that case the province's pricing scheme transferred the loss by reallocating it to holders of rights to harvest timber. In *Canfor* it was the transferor of the loss, not the transferee, who sued and was denied recovery. It would be an interesting question as to whether the holders of timber rights would therefore have had a cause of action for relational economic loss against Canfor based on a transferred loss theory. Similarly, the pre-existing cost-plus contract exception recognized in *Hanover Shoe* and *Illinois Brick* might also be a form of transferred loss, since the cost plus nature of the contract automatically passes on the entire overcharge.
[188] See Feldthusen's discussion of the cases, Feldthusen, *supra* note 175 at 257-263.
[189] Feldthusen regards it as uncertain: *ibid.* at 263.
[190] *Supra* note 173 at ¶17.
[191] *Supra* note 174 at 450. See also *Martel Building Ltd. v. Canada,* 2000 SCC 60 at ¶63.
[192] *Supra* note 173 at 18, citing the great American jurist, Cardozo J., in *Ultramares Corp. v. Touche*, 174 NE 441 at 444 (NY 1931).
[193] *Norsk, supra* note 170 at ¶38.
[194] *Hercules, supra* note 179 at ¶33.
[195] *Supra* note 173 at ¶19; *Norsk*, *supra* note 170 at ¶37; *supra* note 174 at 450; Feldthusen, *supra* note 175 at 219-221.
[196] *Supra* note 173 at 20; Feldthusen, *supra* note 175 at 222.
[197] *Norsk, supra* note 170 at ¶35.
[198] A study by Jasminka Kalajdzic found that plaintiff class action lawyers are highly selective in deciding what cases to bring, and decline more than 60% of the cases considered: *supra* note 160.