File Number: 37810

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N :

TOSHIBA CORPORATION, TOSHIBA SAMSUNG STORAGE TECHNOLOGY CORP., TOSHIBA SAMSUNG STORAGE TECHNOLOGY CORP. KOREA, TOSHIBA OF CANADA LTD., TOSHIBA AMERICA INFORMATION SYSTEMS, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS CANADA INC., SAMSUNG ELECTRONICS AMERICA, INC., KONINKLIJKE PHILIPS ELECTRONICS N.V., LITE-ON IT CORPORATION OF TAIWAN, PHILIPS & LITE-ON DIGITAL SOLUTIONS CORPORATION, PHILIPS & LITE-ON DIGITAL SOLUTIONS USA, INC., PHILIPS ELECTRONICS LTD., PANASONIC CORPORATION, PANASONIC CORPORATION OF NORTH AMERICA, PANASONIC CANADA INC., BENQ CORPORATION, BENQ AMERICA CORPORATION and BENQ CANADA CORP.

APPELLANTS
(Appellants below)

- and -

NEIL GODFREY

RESPONDENT
(Respondent below)

FACTUM OF THE APPELLANTS, TOSHIBA CORPORATION, et al.
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I: OVERVIEW OF POSITION

1. This appeal is about maintaining the balance struck by Parliament and provincial legislatures in Canada's competition and class proceedings laws. The courts below have upset the balance by creating special rules for price-fixing cases that undermine key elements of the statutory schemes.

2. In this proceeding, the plaintiff seeks to represent a class of three groups: direct purchasers, indirect purchasers and so-called "umbrella purchasers" of optical disk drives ("ODDs") or electronic products containing them. (Umbrella purchasers are those who bought a product containing an ODD manufactured by an entity not alleged to have engaged in any price-fixing, but assert that general market forces increased its price as well.) Collectively, these groups include millions of businesses and consumers in British Columbia.

3. The courts below erred in their treatment of these groups in three respects, and in each case the error undermines the legislated balance between conflicting interests. In promoting efficiency the *Competition Act* balances the interests of businesses and consumers, while class proceedings legislation promotes access to justice, behaviour modification and judicial economy, but not at the expense of fairness. The respective balance does not change based on the plaintiff's allegations – which are not facts – or with the nature of the class he seeks to represent.

4. ***First***, the decisions below erred by ignoring the requirement of the statutory cause of action provided by s. 36 of the *Competition Act* (and of common law causes of action) to show that each claimant must have suffered a loss to have a claim.

5. Following a decision of Justice Perell of the Ontario Superior Court of Justice in *Shah v LG Chem, Ltd*, the courts below have permitted indirect and umbrella purchasers to proceed in an entirely different way from other claimants, which does not require proof of individual harm. Based solely on the use of the phrase "the indirect purchaser level" in the *Pro-Sys Consultants Ltd v Microsoft Corp* decision from this Court, Perell J. held that indirect purchasers are to be treated "as a whole; i.e., as a group" with respect to their cause of action. Furthermore, he held that the elements of indirect purchasers' cause of action are different than for other class members. Rather than being required to prove indirect purchasers were themselves harmed, they must prove that *others* were harmed (i.e. the direct purchasers), and that any increased price charged to direct

purchasers was passed on to at least one indirect purchaser.[1] The effect is to treat the purchaser groups as juridical entities that can assert claims the individual group members need not have.

6. However, the 2013 trilogy of indirect purchaser decisions from this Court (of which *Pro-Sys* was part) held that class proceedings legislation is procedural and does not alter the underlying claims. For example, *Pro-Sys* held that the purpose of class proceedings is "to allow individuals who have *provable individual claims* to band together to make it more feasible to pursue their claims."[2]

7. Treating the groups of indirect and umbrella purchasers as juridical entities eliminates the legislated distinction between proof of harm and aggregate damages. Based on the standard applied in this case, indirect purchaser claims may now be certified (and ultimately proven at a common issues trial) with a methodology that could only conceivably estimate some harm to some unidentifiable members of that group (whether within Canada or not). And umbrella purchasers can succeed without any proof that the non-defendant manufacturers of the products they purchased adjusted prices in response to a conspiracy, but rather based on harm to the "market as a whole".

8. That is what the plaintiff has proposed here. The plaintiff's expert did not propose a methodology to prove harm to the indirect purchasers or umbrella purchasers, as *Pro-Sys* requires for certification of their claims. Instead, he stated a belief based entirely on a general theory of supply and demand that all class members would have been harmed if a conspiracy took place. The only *methodology* he proposed for a common issues trial was to calculate aggregate damages, and he admitted that it only estimates an average level of harm. Moreover, that average is global, not just among class members in B.C. The plaintiff's claims were nevertheless certified.

9. The current state of the law results in "merely symbolic scrutiny" being applied to plaintiffs' evidence at the certification stage (which this Court has cautioned against),[3] undermines

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[1] *Shah v LG Chem, Ltd*, 2015 ONSC 6148 at ¶¶57, 63-64 and 69-70, 390 DLR (4th) 87 (Sup Ct).

[2] *Pro-Sys Consultants Ltd v Microsoft Corp*, 2013 SCC 57, [2013] 3 SCR 477 at ¶133 (emphasis added).

[3] *Pro-Sys*, *supra* note 2 at ¶103.

Parliamentary supremacy by ignoring the express requirements of s. 36, and subverts the fairness of trial contrary to class proceedings legislation.

10. ***Second***, the courts below erred by permitting umbrella purchaser claims under the statutory cause of action in s. 36 of the *Competition Act*. In doing so, they have opened up a Pandora's box of liability to anyone who can argue they were harmed by market effects downstream and even disconnected from any conduct prohibited in Part VI of the *Competition Act*.

11. This Court has recognized that liability for pure economic loss has far-reaching consequences, and it has circumscribed such claims in the negligence context. The same limiting principles apply to s. 36, which creates civil liability for both intentional and negligence-based offences. The Supreme Court of the United States has held that principles of remoteness limit statutory liability under American antitrust laws, and umbrella purchaser claims have been rejected in the majority of U.S. cases as a result. Lower courts in this country have also limited statutory liability by principles of remoteness in other contexts.

12. ***Third***, the courts below erred by allowing common law relief based on a breach of the *Competition Act*.

13. According to this Court's jurisprudence, when a statute prohibits conduct and provides remedies for a breach, the statutory remedies are the only remedies available. That principle has particular relevance to the statutory cause of action added to the *Combines Investigation Act* (the "*CIA*") in 1975 (now s. 36 of the *Competition Act*) as part of a comprehensive overhaul of Canada's competition regime. The amendment process required years of consultation and involved several legislative proposals. Parliament considered several alternative versions of the remedy provision and struck a careful balance when enacting s. 36.

14. Parliamentary supremacy requires courts to respect Parliament's decision about the appropriate structure of that policy regime. Decisions from lower courts to date have undermined Parliament's prerogative in this area because of a mistaken belief that a breach of the *CIA* was civilly actionable prior to Parliament taking the initiative by enacting s. 36, and a misreading of

this Court's ground-breaking conspiracy decision in *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd*.[4]

15. On all three of the foregoing issues, the lower courts appear to be concerned to facilitate claims where policy is thought to favour redress. Yet allegations are not facts, and if the summary dismissal in the U.S. class action alleging the same global conspiracy is any guide, the allegations in this case are unlikely to be proven at trial. Moreover, Parliament and the provinces have already spoken on these issues. Apart from further legislated intervention, defendants in cases alleging price-fixing are entitled to the same procedure and the same legal principles as everyone else.

A. The Nature of the Action

16. The plaintiff alleges a global price-fixing conspiracy involving ODDs, such as the disk reader in a gaming console, and products containing ODDs ("ODD Products"), such as the gaming console itself. The plaintiff seeks damages for all persons in B.C. who purchased any of several classes of ODDs or ODD Products during the six-year period from January 1, 2004 until January 1, 2010. The causes of action asserted include s. 36 of the *Competition Act*, and common law tort and restitutionary claims that rely on a breach of the *Competition Act*.

17. Thousands of different products are captured by the class definition. During the class period, ODDs differed in format (Blu-ray, HD-DVD, DVD, CD-ROM, and several others), customization, functionality, quality, and many physical and electronic attributes. For example, each of Sony, Pioneer and LG sold hundreds of different models of ODDs during the class period, and the significant differences were reflected in a wide range of prices.[5]

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[4] *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd*, [1983] 1 SCR 452.

[5] Affidavit of M. Kondo sworn September 30, 2014 ("Kondo Affidavit") at ¶¶17, 19: Joint Record of the Appellants ("JRA") Vol IV, Tab 19, pp. 9–10; Exhibit "A" to the affidavit of Dr. J. Levinsohn sworn on January 13, 2015 ("Levinsohn Report") at ¶¶45-52: JRA Vol IV, Tab 23A, pp. 122–26; Affidavit of T. Fukuro sworn October 2, 2014 ("Fukuro Affidavit") at ¶17: JRA Vol IV, Tab 21, pp. 70–71; Affidavit of C. Lee sworn September 30, 2014 ("Lee Affidavit") at ¶12: JRA Vol V, Tab 24, p. 5; Affidavit of S. Peterson sworn September 25, 2014 ("Peterson Affidavit") at ¶¶6-7: JRA Vol IV, Tab 18, p. 3.

18. ODDs were then incorporated into a variety of ODD Products: desktop computers, laptop computers, gaming consoles and other electronic devices.[6]

19. ODDs and ODD Products reached persons in B.C. through numerous intermediaries outside the province. Most of the 42 named defendants are located outside of Canada (in Japan, South Korea, Taiwan and the United States), and the bulk of their direct sales of ODDs were to foreign original equipment manufacturers ("OEMs"), distributors, re-sellers and integrators. To reach class members in B.C., many ODDs and ODD Products were resold several times.[7]

B. Evidence on Commonality of Harm

1. Significant Issues for Proof of Harm in Common

20. In addition to the variety of products and distribution channels, the evidence at certification identified several further characteristics of the ODD and ODD Product markets that would complicate a determination of harm in common. For example, the ***direct purchasers*** varied in their purchasing practices. Some defendants participated in requests for quotations issued by certain direct purchasers while others did not. Some OEMs imposed certain terms that applied to every bid whereas other OEMs negotiated terms individually. Some sales were made based on price lists while others were at prices negotiated with specific customers. As a result, prices for the same model of ODD varied significantly.[8]

21. The undisputed evidence at certification also included two clear examples in which the cost of components was not the driving factor in determining price, such that entire segments of the proposed class had bought products at prices well below the cost of manufacturing:

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[6] Levinsohn Report at ¶45: JRA Vol IV, Tab 23A, p. 122.

[7] Kondo Affidavit at ¶¶11, 12, 14, 15, 47(c), (e), (g) JRA Vol IV, Tab 19, pp. 8–9, 19–20; Fukuro Affidavit at ¶¶22, 24-25: JRA Vol IV, Tab 21, p. 72; Lee Affidavit at ¶10: JRA Vol V, Tab 24, p. 5; Peterson Affidavit at ¶¶2-3: JRA Vol IV, Tab 18, p. 2; Levinsohn Report at ¶¶73, 122-23: JRA Vol IV, Tab 23, pp. 137, 155-56.

[8] Kondo Affidavit at ¶¶40, 47-48 (in September 2005, Sony sold the same model of DVD-RW to three different customers at prices ranging from $40 to $56): JRA Vol IV, Tab 19, pp. 16, 18–20; Peterson Affidavit at ¶4: JRA Vol IV, Tab 18, p. 2.

Standards War

- Between 2006 and 2008, a consortium of electronics companies led by Sony fought a standards war against Toshiba and NEC. The Sony group sought to establish Blu-ray as the next generation HD video recording format over the HD-DVD format sponsored by Toshiba and NEC.[9]

- To encourage the widespread adoption of their own format, both groups employed aggressive and costly pricing strategies. For example, Toshiba sold its first HD-DVD player at US$175 less than it cost to make, and Sony sold each of its Playstation 3 units, which can read Blu-ray disks, at a loss of several hundred dollars.[10]

- In January 2008, Toshiba slashed its prices by 40 to 50 percent after the standards war appeared to have tipped in favour of Blu-ray.[11]

Competition between Playstation 3 and Nintendo Wii

- Notwithstanding the Playstation 3's role in winning the standards war for Blu-ray, it lagged behind the revolutionary Nintendo Wii in sales for every quarter of the alleged conspiracy. In summer 2009, Sony dropped the price of its console by US$100 in "hopes of increasing sales ahead of the important holiday season."[12]

22. Sony's console division was reported to have lost close to US$3 billion because of its marketing strategies for the Playstation 3.[13]

23. The complications at the direct purchaser level also undermine commonality for subsequent purchasers, since unharmed direct purchasers could not pass on any overcharge. In addition, the evidence at certification indicated further complications for ***indirect purchasers***

[9] Levinsohn Report at ¶¶65-69: JRA Vol IV, Tab 23A, pp. 133-35

[10] Levinsohn Report at ¶¶67-68: JRA Vol IV, Tab 23A, pp. 134-35.

[11] Levinsohn Report at ¶69: JRA Vol IV, Tab 23A, p. 135.

[12] Levinsohn Report at ¶59: JRA Vol IV, Tab 23A, p. 130.

[13] Levinsohn Report at ¶¶70-71: JRA Vol IV, Tab 23A, p. 136.

specifically: at each level of the distribution chain many significant individual decisions influence whether an alleged overcharge is absorbed or passed on. For example:

(a) The OEMs that sell ODD Products make pricing decisions based on factors much more varied than simply the cost of ODD components. Among other factors, "menu costs" associated with price changes, and product bundling strategies, will influence whether small price increases are passed on.[14]

(b) Many firms in the ODD Product industries set prices using target retail price points that can be "sticky". For example, Apple launched a new line of iMac computers in 2008 containing ODDs at price points of $1,199, $1,499, and $1,799. Two years later its updated line of iMacs was released at $1,199, $1,499, $1,699 and $1,999. Apple's pricing strategy likely would not have been different based on a small increase in the cost of components.[15]

24. For these and other reasons, the defendant's expert, Dr. James Levinsohn, observed that a global average could not prove that all (or nearly all) indirect purchasers had been harmed:

> Because the alleged conspiracy would not have resulted in overcharges on some direct sales, and because some overcharges would not have been passed through supply chains to proposed indirect purchaser class members, analyses flexible enough to identify the proposed class members who would have been injured *separately* from the proposed class members who would not have been injured would be required. Such flexibility would preclude analyses based on estimates of average overcharges and average pass-through rates[.][16]

[14] Levinsohn Report at ¶¶74-84: JRA Vol IV, Tab 23A, pp. 137-42; Affidavit of R. Howe sworn October 3, 2014 ("Howe Affidavit") at ¶¶25-28: JRA Vol IV, Tab 20, p. 37.

[15] Levinsohn Report at ¶¶79-81: JRA Vol IV, Tab 23A, pp. 140-41; Howe Affidavit at ¶¶27 and 31, and see also the sample advertisements at p. 9 and Ex. "B": JRA Vol IV, Tab 20, pp. 37–39, 59–61.

[16] Levinsohn Report at ¶87: JRA Vol IV, Tab 23A, p. 143.

2. Commonality Issues Addressed in U.S. Proceedings

25. The plaintiffs in U.S. proceedings alleging the same global conspiracy significantly narrowed the class definition to address several of the foregoing issues. For example, gaming consoles, and all ODD Products not used in conjunction with a computer (such as Blu-ray players and HD-DVD players) were excluded.[17]

26. Although the U.S. plaintiffs' expert evidence included statistical analyses, certification was not granted until the proposed methodology was sufficiently robust to provide confidence that unharmed claimants were not obscured by averages. In the first iteration, the court held that the proposed methodology, "which calculated a single overcharge percentage for all purchasers across all models of ODDs and throughout the entire class period, effectively assumed the proposition it was meant to prove – i.e. class-wide impact."[18]

27. The U.S. plaintiffs only succeeded in certifying a narrower class after their expert proposed a significantly more granular methodology that analyzed sales separately for each month, and by particular products and customers groups. For direct purchasers, the expert proposed a means of testing the data to confirm whether a causal relationship existed and whether all or nearly all would have been harmed. For indirect purchasers, the plaintiffs proposed market-specific evidence that they claimed "covers nearly all of the market in the United States, including companies responsible for approximately 80 percent of personal computer retail sales, and 45 percent of top distributor sales."[19]

3. Plaintiff's Expert Methodology Relates Only to Aggregate Damages

28. The plaintiff's expert evidence for certification submitted by Dr. Keith Reutter addressed none of the foregoing issues. Instead, Dr. Reutter delivered an opinion that all class members would be harmed by a conspiracy among defendant ODD manufacturers based entirely on textbook supply and demand theory. In response to the issues raised by the defendants, he stated that some could be addressed with his aggregate damages model, but provided no particulars.

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[17] *In re Optical Disk Drive Antitrust Litigation*, 2016 WL 467444 at *3 (ND Cal, 2016): Joint Book of Authorities of the Appellants ("JBA") at Tab 7.

[18] *Ibid.* at *5: JBA Tab 7.

[19] *Ibid.*, at *5-*6: JBA Tab 7.

29. Dr. Reutter's report is divided into three distinct parts. In the first, Dr. Reutter identifies four market factors that either promote the formation of cartels or facilitate their success. Nowhere does Dr. Reutter indicate that the four factors are part of his theory of class-wide harm. Instead, he characterized them as an assessment of "the realities of the market to determine whether the plaintiff's claims are reasonable."[20]

30. The relevance of these factors is to demonstrate whether an industry may be conducive to collusion. There is no suggestion that when these four factors are present, a conspiracy necessarily happens, or that every direct purchaser is thereby harmed.

31. The second part of Dr. Reutter's report is entitled "Market Conducive to Impacting All Members of the Proposed Class", and is the only aspect of Dr. Reutter's evidence directed at satisfying the *Pro-Sys* standard for a methodology that could plausibly prove harm to the indirect purchasers.[21] However, Dr. Reutter provides no such methodology. Instead, in a mere eight paragraphs, Dr. Reutter concluded that ***if*** there were an overcharge at the direct purchaser level, then all class members would have been harmed based entirely on the operation of supply and demand. There is not a single reference to any actual facts about the ODD or ODD Product markets in this part of the report, besides ODDs and ODD Products being what Dr. Reutter describes as "typical goods". According to Dr. Reutter, a typical good is anything that is reproducible and is not a life-or-death necessity.[22]

32. The remainder of Dr. Reutter's report, comprised almost entirely of the section entitled "Estimation of Overcharge and Aggregate Damages", deals only with aggregate damages.[23] It is not a methodology to prove harm. All of Dr. Reutter's discussion of mathematical models and statistical regression analyses is part of his aggregate damages model.

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[20] Exhibit "B" to the affidavit of Dr. Keith Reutter sworn on October 8, 2013 ("Reutter Report") at Parts III to V: JRA Vol III, Tab 17A, pp. 122-45; Transcript of the cross-examination of Dr. Keith Reutter conducted on November 13, 2014 ("Reutter Transcript") at QQ188-92: JRA Vol V, Tab 26, pp. 153-54.

[21] Reutter Report at ¶¶60-67 : JRA Vol III, Tab 17A, pp. 145-48.

[22] Reutter Report at ¶¶61 and 63: JRA Vol III, Tab 17A, pp. 145-47.

[23] Reutter Report at Part VIII: JRA Vol III, Tab 17A, pp. 150-67.

33. Dr. Reutter candidly admitted that the most his model could achieve was the calculation of an average.[24] Furthermore, that average is global. Dr. Reutter addressed the Canadian and B.C. markets for ODDs and ODD Products in a single paragraph, and cited no facts relevant to the B.C. market in particular other than an estimated quantity of ODDs and computers sold into the province.[25] As a result, he provided no basis to conclude that the B.C. market is representative of the global whole.

34. Dr. Reutter also admitted that whether his calculated average obscured unharmed claimants was an open "empirical question".[26] A further admitted empirical question was whether the standards war between Sony and Toshiba had affected the impact of the alleged conspiracy.[27] Yet Dr. Reutter provided no details on how he would answer those questions.

35. Dr. Reutter was even less forthcoming for umbrella purchasers. Nowhere in either of his two reports and not once on his cross-examination did Dr. Reutter address the different position of umbrella purchasers or the non-defendant manufacturers of the products they purchased. Yet even if the defendants had conspired to raise prices, harm to umbrella purchasers would not necessarily follow. One or more non-defendant manufacturers of ODDs might choose not to match the supra-competitive price in order to gain market share, in which case none of their customers would be harmed.

C. The Decisions Below

36. Although Dr. Reutter clearly distinguished in his evidence between his theory of harm and his aggregate damages model, the plaintiff conflated them in submissions to the courts below. As a result of the confusion, and the reluctance to engage in a "battle of experts", the certification judge referred to the former in a single paragraph, and then assessed Dr. Reutter's aggregate

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[24] Reutter Transcript at Q397: JRA Vol V, Tab 26, pp. 215-16.

[25] Reutter Report at ¶68: JRA Vol III, Tab 17A, p. 149.

[26] Reutter Transcript at Q 399 and generally QQ394-411, 422-424: JRA Vol V, Tab 26, pp. 214-19, 223-25.

[27] Exhibit "A" to the Affidavit of Dr. K. Reutter sworn October 31, 2014 ("Reutter Reply") at ¶22: JRA Vol IV, Tab 22A, p. 90.

damages model as though it were the methodology to prove that the indirect purchasers were harmed.[28]

37. The certification judge acknowledged Dr. Reutter's aggregate damages model could only produce an average, but did not consider this fatal to certification due to his interpretation of this Court's decision in *Pro-Sys* (based on the decision of Perell J. in *Shah*). His holding eliminated the distinction between proof of harm and aggregate damages:

> The plaintiff must show that the defendants took part in a conspiracy, that they sometimes or always overcharged direct purchasers, and that at least some direct purchasers passed on these overcharges. That is sufficient to establish the defendants' liability.
> …
>
> This interpretation of [*Pro-Sys*] is supported by the aggregate damages provisions in Division 2 of the *CPA*, which allow for an aggregate award even where some class members suffered no loss.[29]

38. On appeal, there was no further consideration of the distinction between proof of harm and aggregate damages in Dr. Reutter's evidence. Instead, the Court of Appeal held only that "The judge concluded that a reasonable methodology existed here, and there is no basis upon which to interfere with his decision."[30]

39. Regarding umbrella purchasers, both courts below held that allowing their claims would not result in indeterminate liability since the number of such claimants would be constrained by the practical requirements of proving a price-fixing case. However, neither court considered that liability to many more claimants than merely umbrella purchasers would result without a requirement for a proximate connection to a defendant.

40. On the issue of whether s. 36 precludes overlapping common law claims, both courts below held they were bound by the B.C. Court of Appeal's prior decision in *Watson v Bank of America*

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[28] Reasons for Judgment of Masuhara J. dated May 13, 2016 ("BCSC Reasons") at ¶155: JRA Vol I, Tab 1, p. 48.

[29] BCSC Reasons at ¶¶168-69: JRA Vol I, Tab 1, pp. 52-53.

[30] Reasons for Judgment of Savage, Newbury and Groberman JJ.A. dated August 18, 2017 ("BCCA Reasons") at ¶163: JRA Vol I, Tab 7, p. 233.

Corporation. Although the defendants identified the mistaken premises underlying that decision, the Court of Appeal refused to consider those arguments because it was sitting as a three-judge division (after a request for a five-judge division to hear the appeal had been refused).[31]

PART II: QUESTIONS IN ISSUE

41. The questions in issue on appeal are:

1. (a) What is the required standard to certify harm as a common issue based on an economic methodology? And (b) does the evidence of Dr. Reutter satisfy the standard?

2. Do principles of remoteness or indeterminate liability circumscribe s. 36(1)?

3. Is s. 36(1) the exclusive civil remedy for breaches of Part VI of the *Competition Act*?

42. As the Court of Appeal acknowledged, almost all of these are issues of law subject to a correctness standard of review.[32] Only issue 1(b) may be subject to any deference from an appellate court.

43. However, no deference should be applied to the assessment of Dr. Reutter's evidence here. Both courts below erred in principle by applying an improper legal standard, and by conflating a methodology to prove class-wide harm with an aggregate damages model.

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[31] BCCA Reasons at summary p. 5 ("Commonality of Harm") and ¶¶164, 185: JRA Vol 1, Tab 7, pp. 185, 233, 238-39; *Watson v Bank of America Corporation*, 2015 BCCA 362, 79 BCLR (5th) 1.

[32] BCCA Reasons at ¶¶124, 169 and 198: JRA Vol 1, Tab 7, pp. 221, 234, 241-42.

PART III: ARGUMENT

ISSUE 1: A Class is Not a Juridical Entity

A. The Issue of Harm Must Be Answerable Class-Wide

44. The treatment of the groups of indirect and umbrella purchasers by the courts below is contrary to the *Competition Act*, the B.C. *Class Proceedings Act* (the "*CPA*"), and well-established law from this Court.

1. Statutory Context for the Appeal

(a) Section 36 of the *Competition Act*

45. Section 36(1) of the *Competition Act*[33] expressly requires individualized proof of loss or damage:

36 (1) Any person who has suffered loss or damage as a result of	36 (1) Toute personne qui a subi une perte ou des dommages par suite :
(a) conduct that is contrary to any provision of Part VI, or	a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order ***an amount equal to the loss or damage proved to have been suffered by him***, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance ***une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis***, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à

[33] *Competition Act*, RSC 1985, c C-34, s. 36.

> l'affaire et des procédures engagées en vertu du présent article.

46. Section 36 was added to the *Competition Act* as part of a comprehensive modernization of Canada's competition regime accomplished by two stages of amendments to the predecessor *CIA* ultimately passed in 1975 and 1986. Both were part of a cohesive reform agenda, the overall policy objective of which was to have competition legislation conform with economic principles, having regard for both business and consumer interests.[34]

47. During the amendment process, the federal government proposed six different packages of amendments. To develop the various proposals and to get the two stages of amendments passed, the government engaged in extensive consultation with a wide variety of interest groups, and many changes were made during the Parliamentary committee phase.[35]

48. The *Competition Act* that resulted is a prime example of a complex and policy-intensive area of economic regulation where respect for Parliamentary supremacy is crucial.

49. Moreover, as the requirement for individualized proof of loss is created by a federal statute, it cannot be nullified by the provincial *CPA*.

(b) The *Class Proceedings Act*

50. The *CPA* is a procedural statute intended to allow individuals with provable claims to unite and pursue their claims together. It does not alter substantive rights.

51. Furthermore, the *CPA* does not purport to override the requirement to prove harm as a component of liability. Section 29(1)(b) provides that for an award of aggregate damages to be made, there must be "*no questions of fact or law other than those relating to the assessment of*

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[34] Ian D. Clark, "Legislative Reform and the Policy Process: The Case of the Competition Act", ch. 6 in R.S. Khemani and W.T. Stanbury, *Historical Perspectives on Canadian Competition Policy* (Halifax, The Institute for Research on Public Policy, 1991) at 228-30: JBA Tab 18.

[35] *Ibid.*, at 229-33: JBA Tab 18.

monetary relief [that] remain to be determined in order to establish the amount of the defendant's monetary liability."[36]

2. *Pro-Sys* and *Vivendi* Require that Harm be Answerable Class-Wide

52. Notwithstanding the statutory context above, and the essential element of harm in an unlawful means conspiracy action, the decisions below have relied on a misinterpretation of *Pro-Sys* to hold that indirect purchasers may proceed in an entirely different way from other claimants: they may establish liability based on harm suffered by the *group as a whole*, not harm to *all* or to any identifiable individual class members.

53. That is a radical change to class proceedings.[37] It contradicts a central tenet of the common law, going back all the way to the decision of Cardozo J. in *Palsgraf v Long Island Railroad Co*: "What the plaintiff must show is 'a wrong' to herself, *i.e.* a violation of her own right, and not merely a wrong to someone else."[38]

54. Moreover, this Court has consistently held that the *CPA* is procedural and does not alter existing causes of action. *Pro-Sys* held that the *CPA* "was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the CPA is to allow individuals who have ***provable individual claims*** to band together to make it more feasible to pursue their claims."[39] Similarly, *Sun-Rype Products Ltd v Archer Daniels Midland Company* held that the *CPA* "allows claimants ***with causes of action*** to unite and pursue their claims as a class."[40]

55. Contrary to Perell J.'s interpretation in *Shah*, which was accepted by the courts below, *Pro-Sys* signaled no intention to depart from the otherwise-applicable standard of class-wide harm. In the very paragraph that specified the requirement for certification of an indirect purchaser class,

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[36] *Class Proceedings Act*, RSBC 1996, c 50, s. 29(1)(b) (emphasis added): Part VII hereto, p. 59.

[37] BCSC Reasons at ¶167: JRA Vol I, Tab 1, p. 52; BCCA Reasons at ¶¶148-49: JRA Vol 1, Tab 7, pp. 228-29.

[38] *Palsgraf v Long Island Railroad Co*, 248 NY 339 at 343-44 (NY App Ct, 1928): JBA Tab 13.

[39] *Pro-Sys*, *supra* note 2 at ¶133.

[40] *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 SCR 545 at ¶75 (emphasis added).

the judgment cites two cases that confirm the point: *Chadha v Bayer Inc*, and *In re Linerboard Antitrust Litigation.* Justice Rothstein stated:

> The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; ***rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of In Re: Linerboard Antitrust Litigation***, 305 F.3d 145 (3rd Cir. 2002).That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to ***all the members of the class***"(*ibid.*, at p. 155).[41]

56. The central issue in *Chadha* was precisely the issue before this court:

- "whether this is a case where ***all end-purchasers*** paid a higher price for their homes and therefore the ***loss can be proved on a class-wide basis***"; or
- "whether ***each individual end-purchaser*** … ***may or may not have had the inflated price of the iron oxide pigment passed through*** as part of the purchase price of the home they bought."[42]

57. The Ontario Court of Appeal held repeatedly throughout its decision that harm to ***all*** was the required standard. For example, it held the motion judge had erred in relying on the plaintiff's expert evidence which did not "address the issue of what method could be used at a trial to prove that ***all*** end-purchasers … overpaid for the buildings as a result."[43]

58. Furthermore, in the very paragraph from *Chadha* that Rothstein J. cited in *Pro-Sys*, the Court of Appeal rejected the type of analysis conducted by the certification judge here. It held that demonstrating "a measurable price impact upon the ultimate consumer" was not sufficient because it did not demonstrate harm to ***all*** class members:

> The fact that any price impact may be "measurable" goes only to the issue of how the damages can be calculated and distributed, not

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[41] *Pro-Sys*, supra note 2 at ¶115; *Chadha v Bayer Inc* (2003), 63 OR (3d) 22 (CA); *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir, 2002): JBA Tab 5.

[42] *Chadha*, *ibid.* at ¶20 (emphasis added).

[43] *Ibid.*, at ¶30 (emphasis added) and see also ¶¶36, 40.

> whether the inflated price charged to the direct buyers of the product was passed through to ***all of the ultimate consumers***.[44]

59. *Linerboard* reached the same conclusion, although subsequent U.S. case law has recognized that the existence of an insignificant number of unaffected outliers should not defeat certification. For example, *In re Intel Corp Microprocessor Antitrust Litigation* held that "[t]he issue is whether Plaintiffs have offered a methodology that employs common proof to show that all or nearly all class members suffered antitrust injury".[45] Other cases have clarified that "all or nearly all" means class certification is also permissible "if the class includes a de minimis number of uninjured parties",[46] or where the number of uninjured parties "can legitimately be considered the exceptions that prove the rule."[47]

60. In the courts below, the plaintiff relied on this Court's subsequent decision in *Vivendi Canada Inc v Dell'Aniello* to suggest that a different standard now applies to the circumstances of indirect and umbrella purchasers.[48] However, *Vivendi* was not a competition law case, and it is not in conflict with *Pro-Sys*. *Vivendi* was about whether commonality existed despite the different circumstances of various subgroups of beneficiaries under a company health insurance plan. The Court held that their differences did not defeat commonality: "the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit them all to the same extent." But it also added that "[t]here is nothing new about this flexible approach to the commonality requirement."[49]

61. Nothing in *Vivendi* contradicts *Pro-Sys* or suggests that an essential element of a claim can be answered in common for a group as a whole despite relevant internal differences. To the

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[44] *Ibid.*, at ¶31 (emphasis added).

[45] *In re Intel Corp Microprocessor Antitrust Litigation*, 2014 WL 6601941 at *13 (Del, 2014): JBA Tab 4.

[46] *In re Nexium Antitrust Litigation*, 777 F.3d 9 at 25 (1st Cir, 2015): JBA Tab 6.

[47] *In re Air Cargo Shipping Services Antitrust Litigation*, Report and Recommendation of Pohorelsky M.J. dated October 15, 2014 (unreported) at 74-75: JBA Tab 3.

[48] *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1, [2014] 1 SCR 3.

[49] *Ibid.*, at ¶¶46-47.

contrary, the Court held that when it comes to trial the common issues judge must "answer the questions in light of the facts applicable to ***each member of the group***."[50]

62. As *Pro-Sys* indicated, the issue of harm to indirect purchasers can be very complex, and the requirement to demonstrate a plausible methodology at certification was established to provide reasonable assurance that the issue could be adjudicated at a common issues trial. Indeed, the Court in *Vivendi* cited the Quebec companion case to *Pro-Sys* for the proposition that the purpose of the authorization motion is to "ensure that defendants do not have to defend against untenable claims on the merits."[51]

63. Read together, s. 36, *Pro-Sys* and *Vivendi* require that the question of individual harm be ***answerable*** for each class member to raise a common issue (and the same conclusion applies to common law causes of action that require proof of harm). That question could be answered by a methodology that shows all class members were harmed, or one that could distinguish between those that were harmed and those that were not. But it cannot be answered by an approach that effectively sidesteps the question of individual harm, by treating all the individuals as a group, such as the plaintiff has proposed and the lower courts have accepted.

64. The line of Ontario cases addressing the availability of aggregate damages and culminating in the Court of Appeal's decision in *Fulawka v Bank of Nova Scotia*[52] – which was cited by the certification judge to support his interpretation of *Pro-Sys*[53] – does not change this analysis. Unlike the circumstances here, the alleged causes of action in *Fulawka* (and in *Markson v MBNA Canada Bank* and *Cassano v Toronto-Dominion Bank*, which preceded it) did not require proof of individual harm. Rather, in each case, class members alleged systemic conduct that breached *every* class member's contract, such that all elements of the breach of contract claims could be answered

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[50] *Ibid.*, at ¶77 (emphasis added).

[51] *Ibid.*, at ¶37; *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59, [2013] 3 SCR 600.

[52] *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443, 111 OR (3d) 346.

[53] BCSC Reasons at ¶169: JRA Vol I, Tab 1, pp. 52-53.

on a common basis without proof of harm. If answered favourably for the class, the only outstanding question would be the quantum the defendants should pay for the breaches.[54]

65. Unlike the result in the courts below, *Markson*, *Cassano* and *Fulawka* did not alter the elements of existing causes of action, or treat the class as a juridical entity.

3. *Sun-Rype* and *Infineon* Contradict Adoption of New Standard

66. This Court has already considered and rejected the notion that a class is a juridical entity that can prove causes of action differently than its members. Although *Sun-Rype* was decided in the context of the statutory requirement for an identifiable class of two or more persons, it addressed the same fundamental issue about whether "the class" can recover based on generalized harm to the group as a whole.

67. The majority in *Sun-Rype* rejected a theory of class actions that aligns with the decisions below. The dissenting judgment suggested that aggregate damages should be available "where *liability to the class* has been proven" even if individual membership in the class is difficult or impossible to determine.[55] However, the majority opinion followed the standard conception of a class proceeding as a procedural vehicle that aggregates individually provable claims. Justice Rothstein stated:

> My colleague's approach would suggest a class action claim could proceed under s. 36 of the *Competition Act* without any person establishing that they had suffered loss or damage. However, the *CPA* neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants ***with causes of action*** to unite and pursue their claims as a class.[56]

68. Furthermore, the majority affirmed that the purpose of class proceedings was to "provide a more efficient means of recovery for plaintiffs *who have suffered harm* but for whom it would

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[54] *Fulawka*, *supra* note 54 at ¶62; *Markson v MBNA Canada Bank*, 2007 ONCA 334 at ¶49, 85 OR (3d) 321; *Cassano v Toronto-Dominion Bank*, 2007 ONCA 781 at ¶47, 87 OR (3d) 401.

[55] *Sun-Rype*, *supra* note 40 at ¶102.

[56] *Ibid.*, at ¶75 (emphasis added).

be impractical or unaffordable to bring a claim individually" (emphasis in original).[57]

69. The *Infineon Technologies AG v Option consommateurs* decision also follows the standard conception of class proceedings. In *Infineon*, this Court did not refer to the "indirect purchaser level". Instead, it stated that "the representative of the class will need to be able to prove that losses were passed on to the indirect purchasers in order to succeed at trial." To do so requires proof of loss to each class member: "The arduous task of actually proving this loss for ***each member of the group*** is one that would be more appropriately undertaken at trial."[58] The purpose of the required methodology at certification is to demonstrate that such proof could plausibly be obtained at a common issues trial, rather than by individual adjudications.

4. Proof of Harm by Market Effects Has Been Rejected in Canada

70. The mischief created by the shift to harm suffered by the "class as a whole" has led to a further disconnect from accepted principles for umbrella purchasers. The plaintiff in this case has not pleaded, nor does he propose to prove, any link causing harm to those claimants. Instead, the plaintiff's theory of harm (which was accepted by the courts below) is that the individual decisions of non-defendant manufacturers over whether to match prices need not be inquired into because the defendants had enough economic power to "move the market".

71. However, the argument that generalized market effects can replace a causal link to harm has been consistently rejected in Canada – both at common law and under s. 36. It is the same argument previously made by plaintiffs in securities class actions that individual reliance for common law misrepresentation claims can be presumed based on a "fraud on the market".[59]

72. In the United States, courts have accepted that causation of harm by reliance on a misrepresentation can be presumed when there is proof that *an efficient market would have incorporated the effect of the pleaded misrepresentations*.[60] Replace "misrepresentations" with

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[57] *Ibid.*, at ¶67.

[58] *Infineon*, *supra* note 51 at ¶¶135 and 137.

[59] In relation to individual reliance as the necessary causal link, see *McKenna v Gammon Gold Inc*, 2010 ONSC 1591 at ¶¶132-33 (Sup Ct).

[60] *Carom v Bre-X Minerals Ltd* (1998), 41 OR (3d) 780 at ¶24 (Gen Div).

"price-fixing" in the foregoing and that is the plaintiff's theory of causation here.

73. However, that theory has been rejected in Canada – both in relation to common law causes of action and statutory claims under s. 36.[61] In *Green v Canadian Imperial Bank of Commerce*, the Ontario Superior Court of Justice held that "there is ***no authority*** to support the proposition that 'fraud on the market' or the 'efficient market' theory can supplant the need to prove individual reliance". That determination was affirmed on appeal to the Ontario Court of Appeal, and afterward by this Court (the decision of the Court of Appeal was reversed on a limitations issue, but the reasoning regarding certification of various causes of action was affirmed).[62]

74. Consistent with the holdings in this Court's 2013 trilogy of indirect purchaser decisions and *Vivendi*, these cases establish that if there is a necessary causal link required for an individual's claim for recovery, it is not permissible to simply plead and propose to prove a generalized effect on the market. A class proceeding is a procedural mechanism that allows "individuals who have provable individual claims to band together to make it more feasible to pursue their claims". But the elements of the claims do not change.[63]

75. If changes to the law in this area are thought necessary, then it is up to Parliament or provincial legislatures to make them. For example, to address the concern that proof of individual reliance would preclude effective securities class actions, various provincial legislatures have enacted carefully calibrated statutory causes of action.[64] Legislative intervention has also occurred in the indirect purchaser context in Europe. The Damages Directive of the European Parliament and the Council of the European Union creates certain presumptions of law and fact in connection with proof of harm to indirect purchasers.[65] Notably, the European Commission has also proposed

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[61] *Ibid.*, at ¶¶39-41.

[62] *Green v Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at ¶¶595-600 (emphasis added), aff'd 2014 ONCA 90 at ¶103, 118 OR (3d) 641, rev'd on other grounds 2015 SCC 60, [2015] 3 SCR 801 at ¶¶10 (Coté J., dissenting), 129 (Cromwell J.), 147 (Karakatsanis J., dissenting).

[63] *Pro-Sys*, *supra* note 2 at ¶133; *Sun-Rype*, *supra* note 40 at ¶75.

[64] See e.g. *Securities Act* (Ontario), RSO 1990, c S.5, Part XXIII.1 Civil Liability for Secondary Market Disclosure.

[65] Directive 2014/104/EU at articles 14(1), (2) and 17(2): JBA Tab 27.

draft guidelines to estimate overcharges passed on to indirect purchasers that contemplate much more in-depth and market-specific analyses than is proposed by the plaintiff here.[66]

B. Plaintiff's Evidence Does Not Meet the Required Standard

1. Dr. Reutter's Theory of Harm Does Not Satisfy *Pro-Sys*

76. This Court has established a standard for certification in indirect purchaser class actions that precludes a purely theoretical methodology: "[t]he methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question." There must also "be some evidence of the data to which the methodology is to be applied."[67]

77. Dr. Reutter's theory of harm cannot satisfy these requirements, regardless of whether a "class-wide" or a "class as a whole" standard is applied. It is not a methodology at all, and proposes no further testing at trial.

78. Dr. Reutter's theory of harm is also purely theoretical. It is not grounded in the facts of this case and does not indicate what data would be required to test the theory at a common issues trial. As Dr. Reutter makes clear, his theory of harm relies only on the product in question being a "typical good". The only things that are not typical goods are extreme cases such as Rembrandt paintings (which cannot be reproduced no matter what price is offered) and a serum for deadly snakebites (for which victims will pay almost any price).[68]

79. If that theory is accepted, then certification of harm is automatic for any product that could conceivably be the object of a class action. That would include the iron oxide pigment in *Chadha*. However, certification was denied by the Court of Appeal in that case, and this Court cited that decision with approval in *Pro-Sys*.

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[66] European Commission (2018), Draft guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, at Annex 1: JBA Tab 28.

[67] *Pro-Sys*, *supra* note 2 at ¶118.

[68] Reutter Report at ¶¶61 and 63: JRA Vol III, Tab 17A, pp. 145-47.

2. No Theory of Harm for Umbrella Purchasers

80. The deficiency of the plaintiff's evidence is even more marked in relation to umbrella purchasers. As submitted to the courts below, the plaintiff's position is that the four economic factors identified by Dr. Reutter permitted the defendants to "move the market".

81. Yet the article that the plaintiff himself cited to each court below, and which they quote in their reasons, demonstrates that things are not that simple:

> The magnitude of the umbrella effects might depend on whether the market is characterized by price (Bertrand) or quantity (Cournot) competition, whether the goods that are traded in the market are homogeneous or differentiated, or whether the non-cartelized firms behave strategically or (non-strategically) as price takers. Finally, umbrella effects might also depend on whether firms sell to final consumers or to firms that do not compete with each other and if there is downstream competition.[69]

82. Given that Dr. Reutter did not address the circumstances of umbrella purchasers at all, there was no basis in the record for the certification judge to find that the plaintiff had discharged the *Pro-Sys* requirement of providing a plausible methodology to address harm to umbrella purchasers at a common issues trial.

83. The situation parallels the recent B.C. decision of Myers J. not to certify claims against roll-on/roll-off shippers in *Ewert v Nippon Yusen Kabushiki Kaisha,* a case with similarly vague umbrella purchaser claims brought by the same counsel that represents the plaintiff here. As with the evidence of Dr. Reutter, the plaintiff's expert in *Ewert* did not identify how harm to umbrella purchasers could be proven. Justice Myers held that it would be "a bridge too far" to assume that theories proposed for indirect purchasers could simply be extended to umbrella purchasers as well.[70]

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[69] Roman Inderst, Frank P. Maier-Rigaud & Ulrich Schwalbe, "Umbrella Effects" (2014) 10:3 Journal of Competition Law and Economics 739 at 743: JBA Tab 20.

[70] *Ewert v Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357 at ¶59-60.

3. Aggregate Damages Model Does Not Address Individual Harm

84. Nor is Dr. Reutter's aggregate damages model a sufficient basis to certify harm as a common issue. Both the *CPA* and the 2013 trilogy dictate otherwise.

85. In the *Pro-Sys* case, the certification judge had initially held that "the aggregate damages section of the *Class Proceedings Act* allow[s] the harm to be shown in the aggregate to the class as a whole", and that "a method of showing harm to all class members" need not be demonstrated first.[71] But this Court disagreed with that reasoning. Instead, it held that:

> An antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*. This includes, where required by the cause of action such as a claim under s. 36 of the *Competition Act*, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be used to establish any aspect of liability.[72]

86. In any event, an aggregate damages methodology based on global averages cannot plausibly demonstrate class-wide harm in B.C. For example, if defendants' prices were to go up only to OEMs or distributors that sell into Japan, the average will still rise. Even if a separate average is calculated for non-defendant manufacturers, it could not distinguish between those that match prices and those that do not. In either case, an average cannot identify which if any B.C. class members were injured and which were not.

87. Dr. Reutter admitted the implications of this point on his cross-examination: "the average is an average and if you want to throw a zero in there, as Dr. Levinsohn does, and say that there could be zero damages, I can't deny that, you know, if you average zero with some other numbers you get something other than zero by the definition of the mathematics."[73]

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[71] *Pro-Sys*, *supra* note 2 at ¶129.

[72] *Ibid.*, at ¶¶131, and generally 132-34.

[73] Reutter Transcript at Q405: JRA Vol V, Tab 26, p. 217.

4. Acceptance of Dr. Reutter's Evidence Creates Unfairness

88. It is also unfair to accept expert evidence geared only toward proof of harm to the class as a whole as sufficient for certification.

89. First, permitting global average harm to be imputed to all members of the B.C. class, without a means to confirm that the average does not obscure unharmed class members, undermines the requirement in *Pro-Sys* that the methodology to prove harm must address the actual facts of the case. Instead, it permits plaintiffs to abstract away from those facts and to argue that any issues identified in the defendants' responding evidence (which is expressly required by s. 5(4) of the *CPA*)[74] raise only a "battle of the experts". However, this Court cautioned in *Rumley v British Columbia* that a superficial approach to commonality is not appropriate:

> It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.[75]

90. For example, the defendants' *uncontested* evidence here highlighted market circumstances such as the "standards war" that would make harm to purchasers of many ODDs or ODD Products unlikely, even if there were a conspiracy. Dr. Reutter responded to that evidence only to say it was something that must be considered, but provided no details.[76] Yet how the methodology is to be accomplished given the actual facts of the market is crucial. For example, spelling out the methodology will identify what data is required, which the plaintiff must also demonstrate is available. If the plaintiff cannot do so, then there is no reasonable assurance that the issue is capable of resolution on a common basis.

91. Second, if the standard for certification accepted by the courts below is applied at the common issues trial to establish liability to the entire class, then defendants would be prejudiced

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[74] *Class Proceedings Act*, RSBC 1996, c 50, s. 5(4): Part VII hereto, p. 58.

[75] *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184 at ¶29.

[76] Reutter Reply at ¶¶18, 22, 24, 29-31: JRA Vol IV, Tab 22A, pp. 88, 90-91, 93-94.

because it forces them to disprove the assumption that harm flowed through the chains of commerce to all class members.

92. In this proceeding and in many other Canadian competition law class actions, whether or not any effect from alleged price-fixing flowed into Canada depends on the pricing decisions of the foreign intermediate purchasers of those goods. It is the plaintiff that bears the onus of proving that any overcharge was passed on to indirect purchasers in Canada, thereby causing them harm. One of the rationales provided by this Court in *Pro-Sys* for permitting indirect purchaser actions was that although indirect purchaser actions "will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task", plaintiffs nevertheless "willingly assume the burden of establishing that they have suffered loss."[77] But if the methodology for use at the common issues trial need only be a plausible means of tracing the overcharge to *one* indirect purchaser, or to indirect purchasers *on average*, then the plaintiff's "unenviable" onus disappears.

93. The practical consequence is that the plaintiff's obligation would be replaced by a requirement for defendants to lead granular evidence to show that individual class members did ***not*** suffer any losses.[78]

5. Price-Fixing Class Actions Will Not Be Made Impracticable

94. Finally, an affirmation of the appropriate "class-wide" standard for certification of harm to indirect purchasers and umbrella purchasers will not make competition law class actions impracticable. As noted above, plaintiffs in the U.S. ODD proceedings obtained certification by narrowing down the proposed class, and by proffering expert evidence that was much more sophisticated than simply a global average.

95. The evidence accepted in *Pro-Sys* was also more robust. Among other differences, one of the three expert methodologies in *Pro-Sys* proposed to directly calculate harm at the level of the consumer by comparing actual retail prices charged to customers against benchmark prices in the

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[77] *Pro-Sys*, *supra* note 2 at ¶¶44-45.

[78] See e.g. *Class Proceedings Act*, RSBC 1996, c 50, s. 29(2): Part VII hereto, p. 59.

absence of price fixing. As contemplated in *Vivendi*, it was therefore possible to determine which customers had been affected: anyone who paid more than the benchmark price.[79]

96. The plaintiff's failure to deliver sufficient evidence cannot be excused on the grounds of an alleged price-fixing conspiracy. Rather, to accept Dr. Reutter's evidence would be to license "such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny", which this Court has cautioned against.[80]

ISSUE 2: Liability Under Section 36 Not Without Limit

97. By allowing umbrella purchasers to advance claims under s. 36, the courts below have opened up a potentially limitless scope of liability that could not have been contemplated by Parliament and is contrary to the scheme of the *Competition Act*.

98. When the predecessor to s. 36 was enacted in 1975, Parliament was legislating in the context of legal principles that included limitations based on indeterminate liability and remoteness.[81] Such background values or norms "are likely to be taken into account by the government in drafting legislation and by the legislature in enacting it."[82]

99. Those limitations persist to this day, especially when dealing with liability for pure economic loss. For example, in the tort context, this Court has acknowledged that liability for pure economic loss necessitates principles to limit recovery for practical and policy reasons. Furthermore, "the limits should be relatively clear … such that commercial enterprises have some appreciation of what risk is to be borne by whom." [83]

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[79] *Pro-Sys* *supra* note 2 at ¶¶121-23.

[80] *Ibid.*, at ¶103.

[81] *Rivtow Marine Ltd v Washington Iron Works* (1973), [1974] SCR 1189 at ¶65 (Laskin J., dissenting in part); *Canadian National Railway v Norsk Pacific Steamship Co,* [1992] 1 SCR 1021 at ¶¶9, 15-16.

[82] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014) at §9.34 and see also §3.7: JBA Tab 21; *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140 at para. 48.

[83] *Norsk*, *supra* note 81 at 1139.

100. The common law principles limiting negligent misrepresentation actions were recently reconsidered by this Court in *Deloitte & Touche v Livent Inc (Receiver of)*.[84] As applied to this case, *Livent* suggests that if proximity is not considered in circumstances of pure economic loss as a first step, then indeterminate liability can result and be a compelling policy reason to limit the legal obligation. Alternatively, if proximity is established, then liability is controlled and indeterminacy should not arise.

101. Both of those analyses are relevant here: (a) absent proximity, opening up liability under s. 36 for any downstream market effects creates indeterminate liability; and (b) the appropriate proximate relationship would exclude umbrella purchaser claims.

1. Absent Proximity, Claims under s. 36 Create Indeterminate Liability

102. First, claims by umbrella purchasers raise many of the same issues as misrepresentation cases, where the spectre of indeterminate liability has been accepted as a limiting principle. In price-fixing cases, defendants control to whom they sell, at what prices they sell, and how much product they sell. But they have no control over non-defendants' similar business choices, and therefore no control over how many umbrella purchasers to whom they may be liable or the extent of that liability.

103. Those circumstances parallel the facts in *R v Imperial Tobacco Canada Ltd*, where this Court negated a duty of care based on concerns about indeterminacy. The third-party claim against the federal government in that case sought to hold it liable to the public at large for alleged misrepresentations about the safety of "mild" cigarettes. Yet the federal government sold no such cigarettes to the public, and it had no means to assess or control the number of people who would act upon the misrepresentations. This Court held that a duty of care in negligent misrepresentation for pure economic loss should only be recognized "where the class of plaintiffs, the time and the amounts are determinate."[85]

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[84] *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63, [2017] 2 SCR 855.

[85] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at ¶100; see also *Hercules Management Ltd v Ernst & Young*, [1997] 2 SCR 165 at ¶37; See also *Shah v LG Chem, Ltd*, 2017 ONSC 2586 at ¶¶34-35, 38 (Div Ct)

104. Second, while both prior decisions in this case dismissed indeterminacy concerns in part on the assumption that the number of umbrella purchasers would be constrained by the requirements to prove a price-fixing conspiracy case, that reasoning misses a broader point. Unless there is a principled place to stop the cascade of liability, umbrella purchasers are not the only potential additional claimants.[86]

105. Anyone who was affected by the economic ripples downstream of umbrella purchasers could also have a claim. For example, customers of businesses that rely on computers with ODDs could claim they paid more for the products or services they purchased. Similarly, purchasers of products that compete with ODD Products (e.g. a laptop computer that does not have an ODD) could claim that suppliers raised their prices too. And anyone who paid more could claim they did not purchase additional products or services they otherwise would have, resulting in harm to additional classes of plaintiffs. Given the broadness of the wording of s. 36, and the nature of economic losses, potential liability would be virtually limitless without a requirement for a proximate connection to a defendant.

106. The concern about cascading liability was addressed in *Design Services Ltd v Canada*, in which the issue was whether an owner in a tendering process owes a duty of care to the bidders' subcontractors. Even though almost all subcontractors were known, this Court still recognized that if claims by subcontractors were permitted, claims by other downstream parties for consequential losses would necessarily follow.[87] This Court held that such parties could not bring claims, despite their losses being foreseeable.

107. This Court has also rejected the idea that the practical difficulties of proof for remote claimants is sufficient to address the indeterminacy concern. In *Hercules Management Ltd v Ernst & Young*, La Forest J. held it made more sense to circumscribe the ambit of the duty than to rely on those practical litigation difficulties.[88]

108. Unlimited cascading liability also conflicts with s. 36 when read in the context of the statute

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[86] See also *Shah*, *ibid.*, at ¶39.

[87] *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737 at ¶¶63 and 65.

[88] *Hercules*, *supra* note 85 at ¶35.

as a whole. Liability under s. 36 can be triggered by both intentional and ***negligent*** conduct. Predicate offences under Part VI of the *Competition Act* include several prosecutable on a negligence standard: deceptive telemarketing, deceptive notice of winning a prize and multi-level marketing plans.[89] When the statutory cause of action was first introduced, it also applied to an offence for misleading advertising that was absolute liability in some circumstances, so that intention and other forms of fault were irrelevant.[90] Given the importance of encouraging competition and avoiding a chilling effect on aggressive but legitimate market behaviour, it is highly unlikely that Parliament intended to expose the negligent (or originally, the faultless) to a potentially unending cascade of civil liability.

2. Remoteness is the Appropriate Measure of Proximity

109. The appropriate proximity consideration for price-fixing cases under s. 36 is to draw the line at claimants who purchased something with a component manufactured by a defendant. Otherwise, the downstream economic ripples from the defendants' actions can go on forever.

110. Absent a bright-line connection to the prohibited conduct, there would be no inherent limit to liability under s. 36 such as exists with intentional torts. For example, price-fixing liability does not require that any unlawful conduct be directed toward the plaintiff, or that the defendants should know in the circumstances that injury to the plaintiff is likely to occur, as is required for the tort of unlawful means conspiracy.[91]

111. Nor does the *mens rea* component of a price-fixing offence limit its scope, as the courts below assumed.[92] The only subjective intent that must be proved is the intent to enter into the price-fixing agreement.[93]

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[89] *Competition Act*, RSC 1985, c C-35, ss. 52.1(1)-(3) and (6), 53(1)-(3) and 55(1)-(2.2): Part VII hereto, pp. 50-55.

[90] *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 at 185-88, 195 (Lamer C.J.C., concurring), 210 (LaForest J., concurring), 241 (Cory J., concurring).

[91] *LaFarge*, *supra* note 4 at ¶33.

[92] BCSC Reasons at ¶75: JRA Vol I, Tab 1, pp. 27-28; BCCA Reasons at ¶¶230-31: JRA Vol 1, Tab 7, pp. 24-50.

[93] *R v Pharmaceutical Society (Nova Scotia)*, [1992] 2 SCR 606 at ¶119: BOA Tab •.

112. Furthermore, Canadian courts have considered remoteness of injury in connection with statutory liability. In *Pro-Sys*, this Court considered remoteness issues when determining whether indirect purchasers have a cause of action under s. 36. In deciding they do, Rothstein J. did not simply refer to the language of the section ("any person who has suffered loss or damage as a result of"). He also considered whether indirect purchaser claims would cause double or multiple recovery, and whether the claims would be too remote or complex.[94]

113. In other contexts, courts have limited statutory liability because of remoteness considerations. For example:

- The Alberta Court of Appeal held in *Taylor v 1103919 Alberta Ltd* that "while there is no reported case concluding that the principle of remoteness applies to a cause of action arising from the breach of ss 144 and 149 of the [*Land Titles Act*], there is no principled reason why it ought not to apply." [95]

- The British Columbia Supreme Court held in *Gichuru v Law Society (British Columbia)* that a broad provision for compensation under the B.C. *Human Rights Code* had to be considered in light of common law principles:

> Section 37(2)(d)(ii) is very general in its terms. It refers to "wages or salary lost, or expenses incurred, *by the* contravention". Of course any analysis of causation may and sometimes must include such factors as proximity, remoteness, and a consideration of intervening acts. … [N]o one would say Achilles' death was caused by the abduction of Helen rather than the thrust of Paris' spear, although a simplistic "but for" analysis might lead one there.[96]

114. Finally, the Supreme Court of the United States addressed a similar issue in *Associated General Contractors of California Inc v California State Council of Carpenters*, and held that remoteness of injury remains a limiting principle for the civil right of action under the antitrust *Clayton Act*. The court noted that "A literal reading of the statute is broad enough to encompass

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[94] *Pro-Sys*, *supra* note 2 at ¶25, 18-29 and 35-50: BOA Tab •.

[95] *Taylor v 1103919 Alberta Ltd*, 2015 ABCA 201 at ¶50, 19 Alta LR (6th) 407; See also *Haughton v Burden*, 2001 CarswellOnt 4265 at ¶25 (Sup Ct): JBA Tab 2.

[96] *Gichuru v Law Society (British Columbia)*, 2013 BCSC 1325 at ¶39.

every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." Yet it went on to consider several indicia of Congressional intent for the provision, including "the contemporary legal context in which Congress acted".[97]

115. The court concluded that the legal context informed the scope of the provision:

> the question whether the Union can recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of § 4. Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.[98]

116. The principles from *Assoc. General Contractors* have been applied to preclude umbrella purchaser claims in the majority of U.S. cases – both in jurisdictions that maintain the U.S. federal common law rule precluding indirect purchaser claims, and where that rule has been legislatively reversed.[99]

ISSUE 3: Section 36 is the Exclusive Civil Remedy for Breaches of the Act

117. Finally, the decisions below and prior cases to have considered the effect of s. 36 have undermined Parliamentary supremacy by permitting plaintiffs to recover for violations of the *Competition Act* under the inconsistent common law causes of action of unlawful means conspiracy or unjust enrichment. In doing so, courts have upset the delicate balance Parliament struck between consumer and business interests when it amended Canada's competition legislation in the 1970s and 80s.

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[97] *Associated General Contractors of California Inc v California State Council of Carpenters*, 459 US 519 at 529-32 (1983): JBA Tab 1.

[98] *Ibid.*, at 534-35: JBA Tab 1.

[99] *In Re: TFT-LCD (Flat-Panel) Antitrust Litigation*, 2012 WL 6708866 at *6-*7 (ND Cal, 2012): JBA Tab 10; See also *In Re: Processed Egg Products Antitrust Litigation*, 2016 US Dist LEXIS 119731 at *9-*10 (ED Penn, 2016): JBA Tab 9.

1. Existing Case Law Based on Mistaken Premises

118. Based on principles developed by this Court, the *Competition Act* excludes overlapping common law remedies. In *Orpen v Roberts*, Duff J. accepted that "where a statute creates an offence, and defines particular remedies against the person committing the offence, *prima facie* the injured party can avail himself of the remedies so defined, and no other".[100] This Court has also acknowledged that the common law is traditionally reluctant to develop rules about fair competition, and that the economic torts risk undermining legislative schemes.[101] Those principles are particularly important with respect to price-fixing, which has never been prohibited at common law, and is illegal only by virtue of statute.

119. While the courts have accepted those principles to preclude restitutionary remedies based solely on a breach of the *Competition Act*, they have taken an inconsistent approach regarding overlapping tort claims.[102] The false distinction is based on: (a) a mistaken belief that unlawful means conspiracy based on a breach of the *CIA* existed before 1975; or (b) a misreading of this Court's jurisprudence to require that a statutory cause of action be "new and superior" to exclude a common law claim.

(a) No Recognized Common Law Remedy Prior to s. 36

120. The B.C. Court of Appeal in *Watson* held that since the pre-1975 legislation made no provision for civil remedies, there was a "vacuum in the *Combines Investigation Act* [the title of the *Competition Act* prior to 1986] in respect to civil redress that *LaFarge* allowed to be filled by a common law action for unlawful means conspiracy."[103]

121. That statement misunderstands the timing of events. Prior to the 1975 amendments, the leading case was the Ontario Court of Appeal's decision in *Transport Oil Co v Imperial Oil Co.* It

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[100] *Orpen v Roberts*, [1925] SCR 364 at 370.

[101] *AI Enterprises v Bram*, 2014 SCC 12, [2014] 1 SCR 177 at ¶¶29-34.

[102] Compare *Wakelam v Johnson & Johnson*, 2014 BCCA 36 at ¶90, 54 BCLR (5th) 7 and *Watson*, *supra* note 31 at ¶¶56-61.

[103] *Watson* *supra* note 31 at ¶46; see also *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, 2016 ONCA 621 at ¶¶75, 87 and 91, 132 OR (3d) 81.

held that the *CIA* "does not in any way contemplate, nor was it the intention of Parliament to confer, any private right of action."[104]

122. This Court's later decision in *Direct Lumber Co v Western Plywood Co* (from 1962) left open the possibility that a common law cause of action might be recognized in the future,[105] but no case prior to 1975 ever did. A few weeks before the first stage of amendments was passed, the B.C. Supreme Court considered the issue afresh and determined that nothing had changed: "I conclude it is doubtful… whether a conspiracy to violate the *Combines Investigation Act* can form the basis of a civil cause of action."[106]

123. The first case to decide that a civil conspiracy based on a breach of the *CIA* was a tenable cause of action in Canada was the decision of the B.C. Supreme Court in *LaFarge*. That decision was released on August 24, 1979, almost four years after the statutory cause of action was enacted.[107]

124. This Court's decision in *LaFarge* took another four years. As the judgment of Estey J. explains, it was still an open question at that time whether or not unlawful means conspiracy based on a constructive intention to harm existed at all across Canada (let alone one based on a breach of the *CIA*). The Court interpreted its 1961 decision in *Gagnon v Foundation Maritime Ltd* not to have decided the issue, since the evidence in that case clearly showed an intention to inflict injury.[108]

125. Most significantly, the *LaFarge* proceeding did not address the effect of the 1975 amendments, or the statutory cause of action in particular, because the conduct at issue took place before they were passed. Estey J. declined to address the statutory cause of action.[109] Accordingly,

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[104] *Transport Oil Co v Imperial Oil Co* [1935] OR 215 at ¶¶5-6 (CA).

[105] *Direct Lumber Co v Western Plywood Co*, [1962] SCR 646 at 649-50.

[106] *Valley Salvage Ltd v Molson Brewery British Columbia Ltd* (1975), 64 DLR (3d) 734 at 745 (BC SC): JBA Tab 17.

[107] *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd* (1979), 103 DLR (3d) 587 at ¶¶83-91 (BC SC): JBA Tab 2.

[108] *LaFarge* (SCC), *supra* note 4 at 467-72; *Gagnon v Foundation Maritime Ltd*, [1961] SCR 435.

[109] *Ibid.*, at 477-78.

this Court was not faced with a conflict between existing common law and a comprehensive legislative regime. Rather, its decision in *LaFarge* created the relevant common law, while the *CIA* only became a comprehensive legislative regime by virtue of the 1975 amendments.

126. The legislative history demonstrates the same point: Parliament believed no common law remedy existed when it added the statutory cause of action in 1975. For example, when introducing the first version of the Bill that would eventually be enacted in 1975, the Ministry of Corporate and Consumer Affairs stated that: "Provision is made for authorizing and facilitating civil suits for recovery of loss or damages", and "Under the existing law there is no civil recourse under the Act for persons injured by reason of the fact that others have participated in violations of the Combines Investigation Act."[110]

127. In August 1975, while Parliament was still considering the legislation, the Director of Investigation and Research under the *CIA*, Robert J. Bertrand, delivered a paper detailing the major proposed changes. He stated that:

> the Bill provides a right of civil damage to parties who have suffered damage as a result of a violation of the Act. … This is the first time that private parties will have a hand in the enforcement of anti-combines laws in Canada. In the past, the courts in the *Transport Oil* case in 1935, and the *Direct Lumber* case in 1962 held that the statute gave no civil cause of action for its breach.[111]

128. In sum, the common law did not provide any remedy for a breach of the *CIA* before Parliament acted. As a result, there is no basis to exclude the *Orpen* principle and permit overlapping common law remedies. That *LaFarge* subsequently permitted a common law remedy based on the pre-1975 legislation cannot retroactively change the effect of Parliament's prior actions.

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[110] Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada – First Stage: Bill C-227, November, 1973, Combines Investigation Act Amendments* (Ottawa: Information Canada, 1973) at 8, 48-49: JBA Tab 19; See also House of Commons Standing Committee on Finance, Trade and Economic Affairs, *Minutes of Proceedings and Evidence,* 30th Parl., 1st Sess., No 45 (8 May 1975) at 11, 18-19: JBA Tab 29.

[111] Robert J. Bertrand, "The Combines Investigation Act" (1975), 44 Antitrust LJ 465 at 488: JBA Tab 17.

(b) A New and Superior Remedy Not Required

129. Even if unlawful means conspiracy based on a breach of the *CIA* existed prior to the 1975 amendments (which it did not), or even if Parliament must account for *possible* future changes in the law (which it does not), the result endorsed by the Court of Appeal does not follow. The necessary implication from Parliament's enactment of a complex regulatory scheme that balances multiple policy interests, is that Parliament intended to preclude inconsistent common law remedies.

130. This Court addressed the intersection of a complete legislative code and pre-existing common law in *Gendron v Supply & Services Union of PSAC Local 50027*.[112] The case involved a conflict between the *Canada Labour Code* and the pre-existing common law duty of fair representation. Justice L'Heureux-Dubé recognized the principle that legislation ought not to be interpreted as departing from the prevailing law absent clear direction to the contrary, but she held that such direction did not have to be express. Rather, the common law could also be excluded by "necessary implication".[113]

131. Justice L'Heureux-Dubé considered two factors to draw that implication in *Gendron*. The first was the enactment of a comprehensive regulatory regime, which was held to be "a strong indication of Parliament's intention that the Code occupy the whole field in terms of a determination of whether or not a union has acted fairly."[114] (In other cases, lower courts have also focused on whether the legislation constitutes a complete code in determining whether an intention to displace common law may be discerned.[115]) The second factor was whether the legislative scheme provides a "new and superior method of remedying a breach."

132. Applied to the *CIA*, the changes introduced by Parliament with s. 36 were sweeping. The first stage amendments expanded the Act to the services sector, added several new offences, added

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[112] *Gendron v Supply & Services Union of PSAC, Local 50027*, [1990] 1 SCR 1298.

[113] *Ibid.*, at 1315-16: AR Tab 23.

[114] *Ibid.*, at 1316-17, 1319: AR Tab 23.

[115] *Forest Glen Wood Products Ltd v British Columbia (Minister of Forests)*, 2009 BCCA 492 at ¶22, 277 BCAC 297; *Bryan's Transfer Ltd v Trail (City)*, 2010 BCCA 531 at ¶¶41, 45, 59, 75-76; See also *Macaraeg v E Care Contact Centres Ltd*, 2008 BCCA 182 at ¶¶73-74, 77 BCLR (4th) 205.

the statutory cause of action, empowered the Restrictive Trade Practices Commission to grant non-criminal relief with respect to several newly specified anticompetitive practices, and authorized injunctions to prevent the commission of certain offences, among other changes.[116] The second stage amendments included a comprehensive regime of merger pre-notification and review, and provisions related to abuses of dominant market positions.[117] The result was a comprehensive scheme of economic regulation, as recognized by this Court in *City National Leasing Ltd v General Motors of Canada Ltd*,.[118]

133. However, the B.C. Court of Appeal has ignored the complete code that Parliament enacted, and has placed all of the emphasis on the second factor, which L'Heureux-Dubé J. did not state was necessary to draw the required implication. In *Watson*, the court held that a consideration of whether the statute provided a "new and superior" remedy would assist in determining "whether the 1975 (and after) amendments to the combines legislation filled the role that the tort of unlawful means conspiracy, contemplated by *LaFarge*, occupied."[119]

134. Besides the anachronistic error detailed above, the problem with the *Watson* approach is that it grants plaintiffs their choice of evolving common law or fixed statutory remedies, regardless

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[116] See e.g. Bill C-2 (1974): cl. 1(5) and notes on reverse of pp. 2, 23, 28, 29 (extending Act to "products" which includes services); cl. 10 and note on reverse of p. 11 (enacting interim injunction provision s. 29.1); cl. 12 and note on reverse of p. 14 (enacting statutory cause of action in s. 31.1 and new Part IV.1 – Matters Reviewable by Commission); cls. 13-14 (modifying the conspiracy provision); cl. 15 and note on reverse of p. 26 (adding new offences); cl. 18 and note on reverse of p. 30 (adding new offences): JBA Tab 22.

[117] See e.g. Bill C-91 (1984-85): cl. 19 (changing name of statute to the *Competition Act*); cl. 46 and notes on reverse of pp. 39, 49, 58 (replacing Part VII, including new ss. 50-51 addressing Abuse of Dominant Position, and new ss. 63-75 addressing mergers, and adding Part VIII regarding Notifiable Transactions): JBA Tab 25.

[118] *City National Leasing v General Motors of Canada Ltd*, [1989] 1 SCR 641 at 674, 676, 689.

[119] *Watson*, *supra* note 31 at ¶55; cited approvingly by the Ontario Court of Appeal in *Fanshawe*, *supra* note 103 at ¶¶80 and 85.

of what Parliament has already done. However, Parliamentary supremacy requires that Parliament be permitted to select the remedy it deems best.

2. Overlapping Common Law Remedies Undermine Parliamentary Supremacy

135. The effect of the errors in the case law is to substitute the courts' balancing of interests for the balance already adopted by Parliament.

136. Notably, the precise contours of the statutory cause of action were a matter of contention throughout the process of amending the *CIA* in the 1970s and 80s. Several proposals were made that went further than the enacted provision, but those proposals were ultimately abandoned. Among the differences:

(a) Bill C-256 proposed double damages, and to permit claimants to either seek damages by way of civil action or by application to a criminal court that enters a conviction;[120]

(b) Bill C-2 (which was enacted into law in 1975) abandoned the foregoing proposals, but added a provision permitting a civil court to award a claimant the full cost of any connected investigation and of the court proceedings;[121]

(c) Bill C-42 proposed to allow alternative civil remedies besides damages. It also proposed a class action procedure to dovetail with the statutory cause of action, and to allow the government to bring "substitute actions" where harm was not sufficiently concentrated to warrant the cost of administering the relief;[122] and

(d) Bill C-13 also proposed a class action procedure, but abandoned the proposal for substitute actions.[123]

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[120] Bill C-256 (1970-71), cls. 55 and 80: JBA Tab 26

[121] Bill C-2 (1974), cl. 12 (proposed s. 31.1): JBA Tab 22.

[122] Bill C-42 (1976-77), cls. 23 (proposed s. 31.1(1.1) and (1.2) and cl. 34 (proposed s. 39.12-39.15): JBA Tab 24.

[123] Bill C-13 (1977), cls. 24 and 37: JBA Tab 23.

137. As enacted, s. 36 has several limitations that do not apply to the tort of unlawful means conspiracy. Section 36 only applies to some breaches of the Act. It does not permit punitive damages. It is also subject to a two-year limitation period that was shorter than typically applied in Canada in 1975, and continues to be shorter than applies in Manitoba and P.E.I. (this Court also cited the two-year limitation period as a safeguard against the dangers of multiple recoveries in *Pro-Sys*).[124] There were other ways Parliament might have balanced consumer rights against business certainty, but it did not do so.

138. Since Parliament is presumed to act for a purpose,[125] it could not have intended for its restrictions to be avoidable by the simple expedient of adding common law claims to a statutory claim under s. 36. Where Parliament legislates into a space not already occupied by the common law, and enacts a comprehensive scheme of economic regulation that includes a civil remedy for parties injured by a breach of the legislation, the "necessary implication" is that resort to inconsistent common law was not intended.

CONCLUSION

139. The courts below have adopted a standard for certification of harm to indirect and umbrella purchasers that does not comply with legislation, or with the decisions of this Court. That standard undermines the statutory requirements of the *Competition Act* and the fundamental nature of class proceedings as a purely procedural device that does not alter the underlying claims. If any change to the *Competition Act* or the *CPA* is warranted, it can only be made by legislation.

140. Nor is the mere allegation of price-fixing a suitable rationale for different treatment under Canadian law. Allegations are not facts. The plaintiffs in the U.S. ODD proceedings had the same evidence as here of a guilty plea entered by one defendant in relation to bid rigging, but the District Court of Northern California still held that "Defendants are correct that the case advanced by [the indirect purchaser plaintiffs] relies mostly on circumstantial evidence, and requires the drawing of multiple inferences to arrive at the conclusion of an overarching conspiracy among Defendants."

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[124] *The Limitation of Actions Act*, CCSM c L150, s. 2(1)(i): Part VII hereto, p. 60; *Statute of Limitations*, RSPEI 1988, c S-7, s. 2(1)(g): Part VII hereto, p. 60; *Pro-Sys*, *supra* note 2 at ¶38.

[125] Sullivan, *supra* note 82 at §9.3: JBA Tab 21.

Moreover, their claims were dismissed on a motion for summary judgment due to plaintiffs' failure to substantiate that overcharges were actually passed on to indirect purchasers.[126]

141. Since the plaintiff has not provided adequate evidence for certification of the claims under the appropriate standard, certification should be denied.

142. In any event, there is no basis to permit class members with no connection to the defendants to assert claims under s. 36, or to permit any common law relief based on a breach of the *Competition Act*.

143. For any of the foregoing reasons, the appeal should be allowed.

PART IV: SUBMISSION ON COSTS

144. The appellants request costs of this appeal and the application for leave to appeal. Pursuant to *CPA* s. 37(1), costs are not payable for the certification motion itself or for the appeal before the B.C. Court of Appeal.[127]

PART V: ORDER SOUGHT

145. The appellants seek an order that the appeal be granted and the plaintiff's application for certification be denied, with costs as indicated in Part IV.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of August, 2018.

Marie-France Major as agent for

John F. Rook, Q.C., Christiaan A. Jordaan and Emrys Davis

Bennett Jones LLP, lawyers for Panasonic Corporation, Panasonic Corporation of North America and Panasonic Canada Inc.

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[126] *In re Optical Disk Drive Antitrust Litigation,* 2017 WL 6503743 at *6 and *10 (ND Cal, 2017) (an appeal from the decision has been commenced): JBA Tab 9.

[127] *Class Proceedings Act,* RSBC 1996, c 50, s. 37(1): Part VII hereto, p. 59.

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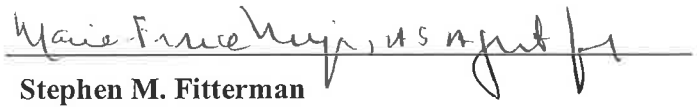

Stephen M. Fitterman

Shapray Cramer Fitterman Lamer LLP, counsel for the appellants BenQ Corporation, BenQ America Corporation and BenQ Canada Corp.

PART VI: TABLE OF AUTHORITIES

Legislative Materials

Bill C-13, *An Act to amend the Combines Investigations Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof*, 3d Sess, 30th Parl, 1977 ¶136

Bill C-42, *An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof*, 2d Sess, 30th Parl, 1976-77 ¶136

Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, 1st Sess, 33rd Parl, 1984-85 ¶132

Bill C-256, *An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act*, 3d Sess, 28th Parl, 1971 ¶136

Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada – First Stage: Bill C-227, November 1973, Combines Investigation Act Amendments* (Ottawa: Information Canada, 1973) ¶126

European Parliament and the Council of the European Union, Damages Directive 2014/104/EU ¶75

European Commission (2018), Draft guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchasers ¶75

House of Commons Standing Committee on Finance, Trade and Economic Affairs, Minutes of Proceedings and Evidence, 30th Parl., 1st Sess., No. 45 (8 May 1975) ¶126

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Loi sur la concurrence, LRC 1985, c C-34, ss. 36, 52.1(1)-(3) et (6), 53(1)-(3), 55(1)-(2.2)

Competition Act, RSC 1985, c C-34, ss. 45(1)-(2.2) – PRE MARCH 12, 2010 VERSION

Loi sur la concurrence, LRC 1985, c C-34, ss. 45(1)-(2.2) – VERSION D'AVANT LE 12 MARS 2010

Class Proceedings Act, RSBC 1996, c 50, ss. 4, 5(4), 29 and 37(1)-(2)

The Limitations of Actions Act, CCSM c L150, s. 2(1)(i)

Loi sur la prescription, L150 de la CPLM, s. 2(1)(i)

Statute of Limitations, RSPEI. 1988, c S-7, s. 2(1)(g)