SCC Court File No.: 37810

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

Between

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)

and

NEIL GODFREY

Respondent
(Respondent)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The plaintiff alleges that the defendants participated in a global, criminal price-fixing conspiracy, with the intention of raising prices across the entire market for optical disk drives. In this certified class proceeding, the plaintiff seeks to use the statutory and common law causes of action available to hold the defendants to account for the significant harms he alleges they have caused class members.

2. Through this appeal, the defendants attempt to foreclose the opportunity to proceed to the merits stage, where these allegations can be meaningfully addressed. Certification is meant to be a procedural motion; it does not determine the extent of the defendants' liability to the class. Each of the submissions advanced by the defendants against certification are designed to ensure that their potential liability to the victims of their alleged crimes goes unexamined.

3. None of the challenges to certification have any merit, as discussed below.

4. First, the defendants are incorrect in contending that it is plain and obvious that Parliament intended with the creation of the cause of action under s. 36 of the *Competition Act* to abolish private common law remedies that were available to victims of price-fixing conspiracies. There is nothing in the *Competition Act* that suggests such a radical intention. Rather, the well-established rule of statutory interpretation applies: Parliament is presumed not to abolish such remedies unless it does so with irresistible clearness. Such an intent is clearly lacking here. Victims of price-fixing should be permitted to pursue a remedy under s. 36 and any available remedy under provincial law.

5. Second, the defendants are wrong in contending that it is plain and obvious that umbrella purchasers do not have a cause of action under s. 36 of the *Competition Act*. Umbrella purchasers are those persons who purchased optical disk drives or products containing optical disk drives manufactured by non-defendants. Section 36 provides that "any person" who has suffered a loss as a result of conduct contrary to Part VI of the Act can assert a claim. Umbrella purchasers are such persons.

6. The allegation is the defendants entered into a conspiracy that would have had the effect of raising prices across the entire market. Not only did the defendants foresee that losses would be suffered by umbrella purchasers, this was the intended result. Allowing umbrella purchaser claims is thus consistent with the compensation and deterrence objectives of the Act. These objectives are best served by requiring wrongdoers to account for the full extent of the harm they caused. The defendants' concerns about remoteness and indeterminancy are misplaced. Umbrella effects are casually related to cartel conduct: they are a recognized and foreseeable consequence of a price-fixing conspiracy. There is no spectre of indeterminacy: the combined effect of s. 36 and s. 45 (which renders price-fixing unlawful) circumscribes the defendants' potential liability.

7. Third, the defendants incorrectly assert that the courts below applied the wrong standard when assessing the plaintiff's methodology for proving class-wide harm. They assert that the methodology must be capable of establishing harm to all class members or identifying the particular class members who were harmed. Here, the defendants seek to revisit this Court's careful consideration of this very question in *Pro-Sys Consultants Ltd v Microsoft Corporation*.[1] In that case, the Court provided clear direction: the plaintiff must adduce a methodology with a reasonable prospect of establishing loss to the indirect purchaser level of the distribution chain. This is the standard that the courts below applied.

8. There are no grounds for contending that *Microsoft* should be revisited. The defendants offer no academic commentary or lower court jurisprudence that suggest *Microsoft* struck the wrong balance.

9. The defendants' proposed standard would alter the standard set by this Court to one which would entail a preliminary merits assessment of which class members suffered or were likely to have suffered harm. This is akin to an American-style assessment of the facts and evidence that was rejected in *Microsoft*. The defendants' arguments give no moment to the different Canadian context, where there is generally no pre-certification discovery and there is a significant informational asymmetry between the parties. Class proceedings are about joining individuals together with provable claims, not claims that are already proven, as the defendants seem to suggest.

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[1] 2013 SCC 57, [2013] 3 SCR 477 [*Microsoft*].

10. Regardless, as held by the certification judge, the plaintiff's expert, Dr. Keith Reutter, has provided a methodology that is capable of establishing harm to all class members. His conclusions were supported by extensive market research and reflect the realities of the industry. The defendants have not demonstrated that the certification judge's analysis of Dr. Reutter's methodology contained any palpable and overriding error.

11. The appeal should be dismissed and the plaintiff permitted to proceed to the merits stage of this proceeding on all of his claims.

B. The Claims

12. The plaintiff, Mr. Neil Godfrey, claims on behalf of BC residents who purchased optical disk drives ("ODDs") or certain products containing ODDs ("ODD Products"), between 2004 and 2010.[2] The class includes residents who purchased ODDs or ODD Products either directly or indirectly from the defendants as well as purchasers of ODDs that were manufactured by non-defendants. The latter are commonly referred to as "umbrella purchasers."[3]

13. The plaintiff alleges that the defendants breached s. 45 of the *Competition Act*,[4] which makes participating in a price-fixing conspiracy an indictable offence. He advances causes of action based on both s. 36 of the *Competition Act* and the tort of civil conspiracy on behalf of direct purchasers, indirect purchasers and umbrella purchasers. Alternatively, he claims that the non-umbrella purchasers are entitled to recover the defendants' ill-gotten gains under restitutionary principles.[5]

14. After starting this action, the plaintiff started a parallel action against the Pioneer defendants.[6] The actions were consolidated at certification.

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[2] ODD Products are defined in the certification order as meaning computers, video game consoles and ODDs that are designed to be attached externally to devices such as computers: JRA Vol I, Tab 5, pp 121-122 at para 2.

[3] Third Amended Notice of Civil Claim: JRA Vol II, Tab 12.
[4] RSC, 1985, c C-34.
[5] Third Amended Notice of Civil Claim at paras 86 and 90: JRA Vol II, Tab 12, pp 41-43.
[6] JRA Tab 11.

15. Settlements have been reached with a number of defendants originally included in the action. These defendants are not participating in the appeal.

C. Related Criminal Investigations

16. Regulators in the U.S. and Europe have penalized ODD manufacturers and suppliers for price-fixing. In the US, Hitachi-LG Data Storage Inc., one of the settled defendants, pleaded guilty and paid a US$21 million fine for participating in conspiracies to rig bids and fix prices for the sale of ODDs to Dell, Hewlett Packard and Microsoft between 2004 and 2009.[7] Three company executives also pleaded guilty and agreed to serve prison sentences.[8]

17. In 2015, the European Commission fined eight ODD suppliers, including Phillips, Lite-On, Phillips & Light On Original Solutions, and Toshiba Samsung Storage Technology, for colluding in procurement tenders for ODDs in computers sold by Dell and Hewlett Packard.[9] The fines totalled €116 million.[10]

D. The Certification Decision

1. The Economic Evidence

18. Dr. Reutter provided two detailed affidavits in support of the plaintiff's certification motion. Dr. Reutter's opinion was that all proposed class members would have been impacted by the alleged conspiracy and that there were methods available to estimate aggregate damages.[11] Although Dr. Reutter assumed that the allegations in the pleadings were true, he did not assume impact on class members.[12] Instead, Dr. Reutter investigated the issues independently and arrived at his opinions based on the application of accepted methods of economic analysis using publicly available information.[13]

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[7] Affidavit #1 of David G.A. Jones, made January 13, 2014 [Jones #1] at para 13 and Exhibit "B": JRA Vol III, Tab 16, pp 4 and 39-40.
[8] Jones #1 at para 14 and Exhibit "C": JRA Vol III, Tab 16, pp 4 and 41.
[9] *Godfrey v Sony Corporation*, 2016 BCSC 844 [Certification Reasons] at para 11: JRA Vol I, Tab 1, p 8.
[10] *Ibid*.
[11] Certification Reasons at paras 151-152: JRA Vol I, Tab 1, p 47; Affidavit #1 of Keith Reutter, made October 8, 2013 [Reutter #1] at Exhibit "B", paras 5 and 106: JRA Vol III, Tab 17, pp 119 and 167-168.
[12] Certification Reasons at para 152: JRA Vol I, Tab 1, p 47.
[13] Certification Reasons at para 152: JRA Vol I, Tab 1, p 47.

19. Dr. Reutter's opinions regarding class-wide impact and the availability of an appropriate methodology are grounded in his detailed examination of the ODD industry. His evidence is that the ODD industry exhibited four characteristics that facilitate collusive behaviour: (1) the defendants produced interchangeable ODDs based on conformity to common standards;[14] (2) the defendants (including settled defendants) had market power – by the middle of the class period in 2007-2008, six defendant companies accounted for over 90% of ODD shipments;[15] (3) there were no economic substitutes for ODDs, meaning class members had no choice but to purchase price-fixed ODDs;[16] and (4) there were barriers to entry, such as the need for licensing agreements and patent rights, that would have discouraged new entrants from entering the market and gaining sufficient market power to force prices down to competitive levels.[17]

20. Based on these factors, Dr. Reutter's opinion was that, assuming the plaintiff's allegations about the existence of the cartel were true, all direct purchasers would have paid more for ODDs than they otherwise would have paid had there been no conspiracy.[18]

21. Dr. Reutter also opined that, given the competitive nature of the downstream market, any overcharges would have been absorbed in part by direct purchasers and passed through and absorbed in part at each level of the distribution chain.[19] He supported this opinion with an explanation of well-established economic principles in the context of the ODD industry.[20]

22. Finally, Dr. Reutter provided detailed evidence about his proposed methods to estimate the overcharge and the corresponding loss to the class. His opinion was that damages for direct and first level indirect purchasers in BC can be quantified on a class-wide basis, using accepted economic and statistical methods.[21] These methods are adaptable to the realities of the ODD market and are not simply theoretical.[22]

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[14] Reutter #1 at para 42: JRA Vol III, Tab 17, pp 136-137.
[15] Reutter #1 at Exhibit "B", paras 46 and 55: JRA Vol III, Tab 17, pp 138-139 and 142-143.
[16] Reutter #1 at Exhibit "B", paras 56-57: JRA Vol III, Tab 17, pp 143-144.
[17] Reutter #1 at Exhibit "B", paras 22 and 59: JRA Vol III, Tab 17, pp 117 and 144-145.
[18] Affidavit #2 of Keith Reutter, made October 31, 2014 [Reutter #2] at Exhibit "A", para 25: JRA Vol IV, Tab 22, pp 91-92.
[19] Reutter #1 at Exhibit "B", para 67: JRA Vol III, Tab 17, p 148.
[20] Reutter #1 at Exhibit "B", paras 60-67: JRA Vol III, Tab 17, pp 145-148.
[21] Reutter #1 at Exhibit "B", paras 94 and 105: JRA Vol III, Tab 17, pp 162 and 167.
[22] Reutter #2 at Exhibit "A", paras 26-31: JRA Vol IV, Tab 22, pp 92-94.

23. In order to estimate the overcharge on the sale of ODDs, Dr. Reutter proposed to construct a model to estimate the price of ODDs "but-for" the alleged anticompetitive conduct. He proposed to use a multiple regression analysis to control for other factors that might have affected prices.[23] The multiple regression analysis will also be used to determine pass-through rates to indirect purchasers.[24] Dr. Reutter identified sources of data needed to implement his proposed methods. These include data from the defendants who had sales of ODDs and ODD Products into BC and public sources of data from statistical agencies and consultancies.[25]

24. In his second report, Dr. Reutter addressed the possible effects of various market circumstances such as a "standards war" fought between several defendants about whether Blu-ray would achieve market dominance over the HD DVD format.[26] Dr. Reutter noted there is no evidence that this event in the downstream ODD Products market disrupted the alleged collusion in the upstream ODD market.[27] Whether this event had an impact on the conspiracy is an empirical question.[28] It requires data to answer – data that is unavailable to the plaintiff until post certification discovery. The defendants' reliance on the possible effect of a "standards war" would be to effectively ask the Court to pre-judge a merits issue by assuming, without empirical support, that this event would have disrupted the conspiracy's overcharge on the price of ODDs and its pass through to indirect purchasers.

25. Further, the plaintiff's proposed methodology can account for this type of event, should it turn out to be necessary to do so, based on information garnered through discovery. Dr. Reutter's econometric model can be modified to estimate overcharges for different categories of ODDs or ODD Products. Product numbers can be used to identify and account for compositional changes

[23] Reutter #1 at Exhibit "B", para 69: JRA Vol III, Tab 17, p 150.
[24] Reutter #1 at Exhibit "B", paras 80-93 and footnote 112: JRA Vol III, Tab 17, pp 155-162 and 166.
[25] Reutter #1 at Exhibit "B", paras 8, 69, 72, 76, 79, 97, 101-104: JRA Vol III, Tab 17, pp 120, 150-155 and 163-167; and Reutter #2 at Exhibit "A", paras 34-35: JRA Vol IV, Tab 22, pp 95-96.
[26] Reutter #2 at Exhibit "A", paras 20-22: JRA Vol IV, Tab 22, p 90.
[27] Reutter #2 at Exhibit "A", para 22: JRA Vol IV, Tab 22, p 90.
[28] Reutter #2 at Exhibit "A", para 22: JRA Vol IV, Tab 22, p 90.

in ODDs and ODD Products over time.[29] The proposed methodology can exclude windows of time where the cartel might have broken down, should this turn out to be the case.[30]

26. On cross-examination, Dr. Reutter explicitly stated that he did not see how "some subset" of class members may not have been impacted given his understanding of the industry. He was not willing, however, to exclude the hypothetical possibility that some subset of the class might not have been harmed.[31] As an impartial expert, Dr. Reutter cannot exclude any outcome until he has done the necessary analysis during the merits phase of the case.

2. Certification Reasons

27. After considering expert and fact affidavit evidence, written submissions and six days of oral argument, Masuhara J. certified the class proceeding on the condition that the class definition be amended to distinguish between umbrella and non-umbrella purchasers.[32]

28. Masuhara J. devoted a considerable portion of his lengthy reasons to an examination of Dr. Reutter's proposed methodology.[33] He found that Dr. Reutter's opinion was that all class members would have been impacted by the alleged conspiracy.[34] He also found Dr. Reutter maintained this opinion after considering the defendants' expert evidence.[35] Masuhara J. considered both experts' evidence, but declined to resolve their conflicting opinions about whether all class members would have been harmed, as cautioned against in *Microsoft*.[36]

29. Despite the variabilities among ODDs that the defendants pointed to, Masuhara J. was satisfied that Dr. Reutter's analysis established that there was a large degree of homogeneity in the ODD market.[37] Nevertheless, he found that Dr. Reutter's methodology was flexible enough

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[29] Reutter #2 at Exhibit "A", paras 26 and 30: JRA Vol IV, Tab 22, pp 93-94.
[30] Transcript of the cross-examination of Dr. Keith Reutter conducted on November 13, 2014 [Reutter Cross] at pp 121-122, Q&A 416: JRA Vol V, Tab 26, pp 220-221.
[31] Reutter Cross at p 117- Q&A 399: JRA Vol V, Tab 26, p 216.
[32] Certification Reasons at paras 221-222: JRA Vol I, Tab 1, p 63. Masuhara J. found that umbrella purchasers could not advance a claim for unjust enrichment.
[33] Certification Reasons at paras 151-166; 170-179, 185-186 and 188: JRA Vol I, Tab 1, pp 47-57.
[34] Certification Reasons at paras 151-152; JRA Vol I, Tab 1, p 47.
[35] Certification Reasons at para 179; JRA Vol I, Tab 1, p 55.
[36] Certification Reasons at paras 18-19, 162-165; JRA Vol I, Tab 1, p 10 and 50-51.
[37] Certification Reasons at para 174: JRA Vol I, Tab 1, p 54.

to be applied separately to sub-categories of ODDs if this became necessary. He found that the methodology was "specifically designed to isolate the effect of the conspiracy" and that therefore "other factors that impact pricing are accounted for in his model."[38] Dr. Reutter had identified the necessary data inputs and possible data sources. Masuhara J. found that it was "difficult to imagine what more could be required" of Dr. Reutter in order to show some basis in fact that the required data for his methodology exists.[39]

30. Masuhara J. found that Dr. Reutter's opinion that the proposed methodology is capable of establishing loss on a class wide basis was supported by his detailed analysis of the ODD market. He found that Dr. Reutter's methodology was plausible and his approach to measuring class-wide impact, overcharge and pass-through met the standard set out by this Court in *Microsoft*.[40]

31. With respect to umbrella purchasers, Masuhara J. accepted that it is plausible that Dr. Reutter's methodology will show that collusion among the defendants led to market-wide price increases. Since Dr. Reutter had not proposed a separate methodology for determining aggregate damages to umbrella purchasers, he did not certify aggregate damages as a common issue for the umbrella purchaser subclass.[41]

32. Masuhara J. found that it was not plain and obvious that umbrella purchasers have no right of action under s. 36 of the *Competition Act*.[42] Both the ordinary meaning of the section and the purposes of the *Competition Act* supported this conclusion.[43] Masuhara J. also found that it was not plain and obvious that the *Competition Act* bars class members from advancing tort or restitutionary claims. On this point, Masuhara J. followed recent BC Court of Appeal authority.[44]

33. The Court of Appeal unanimously upheld Masuhara J.'s decision. Writing for the panel, Savage J.A. agreed that Dr. Reutter's methodology met the *Microsoft* standard. He noted Dr. Reutter's conclusion that all class members would have been impacted by the alleged

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[38] Certification Reasons at para 175: JRA Vol I, Tab 1, p 54.
[39] Certification Reasons at para 177: JRA Vol I, Tab 1, pp 54-55.
[40] Certification Reasons at para 179: JRA Vol I, Tab 1, p 55.
[41] Certification Reasons at para 188: JRA Vol I, Tab 1, p 56.
[42] Certification Reasons at para 71: JRA Vol I, Tab 1, p 27.
[43] Certification Reasons at para 71, 73 and 78: JRA Vol I, Tab 1, p 9, 27 and 29.
[44] Certification Reasons at paras 88-89: JRA Vol I, Tab 1, p 31.

conspiracy.[45] Even so, he held it is sufficient if the methodology offers a reasonable prospect of establishing that overcharges have been passed on to the indirect purchaser level of the distribution chain.[46]

34. Savage J.A. also agreed that umbrella purchasers have a cause of action under s. 36 of the *Competition Act*.[47] In addition, he concluded that class members can advance common law causes of action for which the required "unlawful conduct" was conduct in violation of s. 45 of the *Competition Act*.[48]

PART II - STATEMENT OF ISSUES

35. Of the five requirements for certification, only the cause of action and common issues requirements remain in issue. The specific questions raised on this appeal are:

(a) Is it plain and obvious that s. 36 of the *Competition Act* prohibits the plaintiff from advancing concurrent claims in in tort and unjust enrichment?

(b) Is it plain and obvious that umbrella purchasers are excluded from the meaning of "[a]ny person" who may sue for loss or damage suffered as a result of conduct contrary to Part VI of the *Competition Act*?

(c) Does the plaintiff's proposed methodology for determining harm meet the "credible or plausible" standard set by this Court in *Microsoft*?

36. Absent an error in principle, decisions on certification are entitled to substantial deference.[49] Appellate courts should only interfere if the certification judge erred in law or was clearly wrong.[50] A certification judge's decision that a claim raises common issues is entitled to deference from appellate courts.[51]

37. The first two issues raise questions of law. The defendants' framing of the issues ignores

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[45] Appeal Reasons at para 125: JRA Vol I, Tab 7, p 221.
[46] Appeal Reasons at para 163: JRA Vol I, Tab 7, p 255.
[47] Appeal Reasons at para 247: JRA Vol I, Tab 7, p 255.
[48] Appeal Reasons at para 186: JRA Vol I, Tab 7, p 239.
[49] *AIC Limited v Fisher*, 2013 SCC 69, [2013] 3 SCR 949 [*AIC Limited*] at para 65.
[50] *Pro-Sys Consultants Ltd v Infineon Technologies AG,* 2009 BCCA 503 [*Pro-Sys*] at para 28.
[51] *Microsoft, supra* note 1 at para 111.

the standard on which these questions are assessed at certification and on which they must be considered here. As they relate to the cause of action requirement in s. 4(1)(a) of the *Class Proceedings Act*,[52] they are assessed on the same standard of proof that applies to a motion to dismiss.[53] A claim will only fall short of meeting s. 4(1)(a) if, based solely on a review of the pleadings, it "has no reasonable prospect of success" and it is plain and obvious that it cannot succeed.[54]

38. The third issue raised on this appeal involves the application of the evidence to a legal standard and is therefore a question of mixed fact and law.[55] Unless the certification judge made an extricable error in principle, findings of mixed fact and law should only be overturned for palpable and overriding error.[56] Many of the defendants' arguments on this issue address factual findings or Masuhara J.'s application of a legal standard already decided in *Microsoft*.[57] These arguments must be approached through the lens of review for overriding and palpable errors. As this Court recently affirmed in *Benhaim v St-Germain*, such an error is a "beam in the eye", not a needle in a haystack.[58] It must be obvious and go to the very core of the outcome of a case.[59]

PART III - STATEMENT OF ARGUMENT

A. Competition Class Actions Provide an Effective Means of Deterring Criminal Conduct

39. Through this appeal, the defendants seek to confine and limit existing avenues of redress for victims of illegal price-fixing conspiracies and minimize the potential liability of wrongdoers. The Court should resist these attempts.

1. Price-Fixing is a Criminal Act

40. The *Competition Act* aims to both deter anti-competitive conduct and compensate for

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[52] RSBC 1996, c 50 [the "*CPA*"].
[53] *Microsoft, supra* note 1 at para 63.
[54] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*], at paras 17 and 22.
[55] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 26.
[56] *Ibid* at para 37; *Hryniak v Mauldin*, 2014 SCC 7 at para 81.
[57] *Microsoft, supra* note 1 at para 111.
[58] 2016 SCC 48, [2016] 2 SCR 352 at para 39.
[59] *Ibid* at para 38.

harms suffered from prohibited conduct.[60] At the heart of this scheme is the criminal prohibition against price-fixing cartels, set out in s. 45 of the *Competition Act*. At the time of the defendants' alleged wrongful conduct, the maximum penalty for a breach of s. 45 was five years in prison and a fine of up to $10 million dollars. The provision has since been amended to allow for a maximum penalty of 14 years in prison, a $25 million fine, or both.[61]

41. The criminal prohibition against price-fixing has been at the centre of competition law since the enactment of the *Act for the Prevention and Suppression of Combinations formed in Restraint of Trade* in 1889.[62] That Act's only substantive provision was a direct ancestor of what is now s. 45 of the *Competition Act*. Parliament's designation of price-fixing as a criminal offence reflected the prevailing view that price-fixing is morally reprehensible conduct.[63]

42. Courts and policymakers continue to recognize the reprehensible nature of price-fixing. Recently, the Commissioner of Competition reiterated that cartel activity is the most egregious of anti-competitive behavior.[64] It deprives consumers of competitive prices, better choices and greater innovation.[65] As Crampton C.J. of the Federal Court has observed, price-fixing conspiracies are analogous to fraud or theft and are an assault on the open market economy.[66] Consumers who purchase products that have been price-fixed are "effectively defrauded."[67] Price-fixing conspiracies lead not only to a transfer of wealth from victim to the conspirator, but also to "further detrimental effects on the economy."[68] Price-fixing therefore "ought to be treated at least as severely as fraud and theft, if not even more severely than those offences."[69]

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[60] *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59, [2013] 3 SCR 600 [*Infineon*] at para 111.
[61] *Competition Act*, RSC, 1985, c C-34, s 45(2), as amended by the *Budget Implementation Act*, SC 2009 c. 2, s 410.
[62] S.C. 1889, c. 41: Respondent's Book of Authorities [AR] Tab 8.
[63] Douglas Rutherford & J.S. Tyhurst, "Competition Law and the Constitution: 1889-1989 and Into the Twenty-First Century" in R.S. Khemani & W.T. Stanbury eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: The Institute for Research on Public Policy, 1991) 253 at 254-255: AR Tab 15.
[64] Peckman, John "Building Antitrust With Trust" (Remarks delivered at the Canadian Bar Association Spring Conference, Toronto, 10 May 2018).
[65] *Ibid*.
[66] *R v Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117, [2014] 1 FCR 871 at para 54.
[67] *Ibid* at para 54.
[68] *Ibid* at para 55.
[69] *Ibid* at para 56.

43. The harms of price-fixing are recognized world-wide. The US Supreme Court has referred to price-fixing as the "supreme evil" of anti-trust law.[70] The Organisation for Economic Co-operation and Development ("OECD") recognizes hard core cartels such as price-fixing conspiracies as being one of "the most egregious violations of competition law".[71] Cartels cause significant harm, totaling many billions of dollars each year.[72] Deterrence and punishment of cartel activity is an OECD priority.[73]

2. Private Enforcement is Integral to the Enforcement of Competition Law and Economic Policy

44. The Competition Bureau does not pursue compensation for victims of price-fixing and does not prosecute every allegation of anti-competitive behaviour. Its resources are limited. When the Bureau does not act, the involvement of private individuals in the enforcement of the *Competition Act* is the primary means of compensation and deterrence.[74] Section 36 of the Act grants any person who has suffered loss or damage as a result of conduct prohibited by the competition-related offences in Part VI of the Act a right to recover these losses from the wrongdoer. As this Court recognized in *Microsoft*, s. 36 supports the Act's goals of deterrence and compensation by granting private parties a role in enforcing the Act's prohibition against price-fixing.[75]

45. In *General Motors of Canada v City National Leasing*, this Court noted that private enforcement enhances the deterrence effects of the *Competition Act* and provides compensation to individuals injured by illegal conduct.[76] The Court recognized that an earlier version of s. 36 was "clearly as much a part of the legislative scheme" for the regulation of competition in Canada as the criminal and administrative provisions of the Act.[77] Together, these avenues of

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[70] *Verizon Communications Inc v Law Offices of Curtis v Trinko LLP* (2004), 540 US 398 at 408: AR Tab 7.
[71] OECD, "Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels" (1998) at 1 [OECD Recommendations].
[72] OECD, "Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation" (2005) at 7.
[73] OECD Recommendations, *supra* note 71 at 2.
[74] *Microsoft*, *supra* note 1 at para 141.
[75] *Microsoft*, *supra* note 1 at para 46.
[76] [1989] 1 SCR 641[*General Motors*] at 684-86.
[77] *Ibid* at 685.

enforcement are intended to create "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance".[78]

3. The Class Proceedings Act Facilitates the Objects of the Competition Act

46. The *CPA* complements the goals of the *Competition Act*. As this Court concluded in *Canadian Imperial Bank of Commerce v Green*, class proceedings legislation creates powerful tools to overcome barriers that might otherwise prevent victims from being compensated for widespread wrongful conduct:

> The aggregation of the class helps overcome social, psychological and economic barriers to redress. The possibility of a class action discourages unjust enrichment and encourages an internalization of costs. Finally, class proceedings extend the substantive rights of a representative plaintiff to the class in order to make the legal system more efficient, more accessible and more effective.[79]

47. In *Microsoft*, this Court recognized that indirect purchaser class actions promote the powerful public policy of "insuring the continued effectiveness of the [antitrust] action and preventing wrongdoers from retaining the spoils of their misdeeds".[80] The *CPA* must be interpreted generously to give full effect to its goals and to ensure an efficient mechanism to achieve redress for widespread harm.[81] As was the case in *Microsoft*, there is no evidence here that the Competition Bureau will take action against the defendants, meaning that the only potential avenue of enforcement of the *Competition Act* in Canada is through class proceedings.[82]

B. The *Competition Act* Does Not Bar Concurrent Common Law or Equitable Claims

48. In addition to seeking a remedy under the *Competition Act*, the plaintiff advances claims in civil conspiracy.[83] Alternatively, he waives the tort and pleads that the non-umbrella purchaser

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[78] *Ibid* at 686.
[79] 2015 SCC 60, [2015] 3 SCR 801 at para 59.
[80] *Microsoft*, *supra* note 1 at para 48.
[81] *Fischer v IG investment Management*, 2013 SCC 69, [2013] 3 SCR 949 at para 32; *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158.
[82] *Microsoft*, *supra* note 1 at para 141.
[83] Third Amended Notice of Civil Claim at para 85: JRA Vol II, Tab 12, p 41.

subclass members are entitled to recovery under restitutionary principles.[84]

49. It is neither plain nor obvious that the *Competition Act* bars the plaintiff from pursuing these claims. By focusing their arguments on the timing of Parliament's addition of the statutory cause of action, the defendants miss the larger question of legislative intent. Parliament's intention is clear: it did not intend to abolish private law remedies for conduct in breach of the criminal offence provisions of the *Competition Act*.

1. The Tort of Conspiracy Existed Long Before s. 36 of the *Competition Act*

50. In any event, the defendants' characterization of the law at the time of the enactment of the civil remedies provision is incorrect.[85] The tort of civil conspiracy has been a part of Canadian law since well before s. 36 of the *Competition Act*. The classic formulation of the tort derives from the 19th century case of *Mulcahy v The Queen*: a conspiracy is an agreement between two or more people "to do an unlawful act, or to do a lawful act by unlawful means".[86] The plaintiff pleads both branches here.[87]

51. In a series of cases dating back to 1960, this Court held that a civil conspiracy can be brought based on a breach of a statute. In *International Brotherhood of Teamsters v Therien*, this Court held that a breach of the *Labour Relations Act* provided the unlawful means element in a conspiracy claim.[88] In *Gagnon v Foundation Maritime Ltd*, a majority of this Court found that union members were liable for an unlawful means conspiracy, based on the fact that their conduct was prohibited by statute: "this of itself supplies the ingredient necessary to change a

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[84] Third Amended Notice of Civil Claim at para 87: JRA Vol II, Tab 12, p 42. The availability of waiver of tort is not an issue on this appeal. For a discussion of the concept see *Microsoft supra* note 1 at paras 93-97.

[85] At the time Parliament added the civil remedies provision (now s. 36), the *Competition Act* was entitled the *Combines Investigation Act*. For simplicity, the plaintiff refers to the statute throughout as the *Competition Act*.

[86] *Mulcahy v The Queen* (1868), LR 3 HL 306 at 317 cited in *Microsoft, supra* note 1 at para 72.

[87] Third Amended Notice of Civil Claim at para 85: JRA Vol II, Tab 12, p 41.

[88] [1960] SCR 265.

lawful agreement which would not give rise to a cause of action into a tortious conspiracy".[89] Another example is *Mark Fishing Co v United Fisherman & Allied Workers' Union*.[90] Affirmed by this Court, the BC Court of Appeal found a common law conspiracy of unlawful means based on a finding that the conspirators' actions were *prima facie* unlawful under statute.[91]

52. The defendants ignore these cases and rely instead on the older 1935 Ontario Court of Appeal decision in *Transport Oil Ltd v Imperial Oil Ltd and Cities Service Oil Co Ltd*.[92] In *Direct Lumber Co. v Western Plywood Co.*, this Court doubted the correctness of *Transport Oil*.[93] *Direct Lumber* recognized that the common law imposes liability for conspiracies to injure by unlawful means, and that the "unlawful" element of the claim could be a breach of the *Competition Act*.[94]

53. The legislative history demonstrates that Parliament was aware that the common law tort of conspiracy provided a possible remedy for those affected by price-fixing arrangements. For example, when discussing Bill C-7, the Chairman of the Standing Senate Committee on Banking, Trade and Commerce concluded that *Direct Lumber* indicated in *obiter* that "at common law […] a person who has been injured by unlawful means would have a civil right of action, but it must be in relation to an offence that involves conspiracy."[95]

54. One does not have to resort to Blackstone's principle that "judges do not create law but merely discover it" to conclude that *Cement LaFarge v BC Lightweight Aggregate*[96] did not create the unlawful means branch of civil conspiracy in 1983.[97] At the time Parliament enacted s.

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[89] [1961] SCR 435 at 446, per Ritchie J.; see *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12, [2014] 1 SCR 177 [*Bram*] at para 63.
[90] 1972 CanLII 1016 (BCCA) aff'd 1973 CanLII 1325 (SCC).
[91] *Ibid* at 609 and 617 aff'd 1973 CanLII 1325 (SCC).
[92] 1935 CanLII 129 (ONCA)
[93] [1935] OR 215, 1935 CanLII 129 (ON CA) at 649 [*Direct Lumber*].
[94] *Ibid* at 649.
[95] Senate Standing Committee on Banking Trade and Commerce, *First Proceedings on "The Advance Study of Proposed Legislation Respecting the Combines Investigation Act, Competition in Canada or Any Matter Related Thereto"*, 29 Parl, 2nd Sess, (May 1, 1974) at 2:19: AR Tab 17 (Bill C-7 was a predecessor of Bill C-2, which was enacted into law in 1975).
[96] [1983] 1 SCR 452 [*Cement LaFarge*].
[97] *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429 at paras 84-86.

36, the law was clear that a breach of statute could provide the "unlawful means" in a common law conspiracy claim.[98]

2. The Weight of Appellate Authority Shows that s. 36(1) of the Competition Act is Not an Exhaustive Code

55. Starting with the Manitoba Court of Appeal's 1989 decision in *Westfair Foods Ltd v Lippens Inc*,[99] many courts have held that it is not plain and obvious that plaintiffs are barred from pursuing private law causes of action.[100] The Ontario Court of Appeal reached the same conclusion in *Apotex Inc v Hoffmann-La Roche Ltd*,[101] and most recently in *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*.[102]

56. The one appellate level exception is *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*.[103] *Wakelam* has been narrowed by the BC of Appeal and not followed by the Ontario Court of Appeal. In *Watson v Bank of America Corporation*,[104] decided a year and a half after *Wakelam*, the BC Court of Appeal restricted *Wakelam*, noting that *Wakelam* did not address the relevant question.[105] In *Fanshawe*, the Ontario Court of Appeal preferred the approach in *Watson* and held that *Wakelam* took the wrong analytical approach.[106]

57. *Wakelam*'s reasoning is inconsistent with this Court's decisions in *A.I. Enterprises Ltd v Bram Enterprises Ltd*. *Bram* interpreted *Cement LaFarge* as meaning that a breach of s. 45 of the *Competition Act* could supply the unlawful component of the tort of conspiracy.[107] In contrast, *Wakelam* (decided before *Bram*) had read *Cement LaFarge* as having declined to comment on this issue.

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[98] *Ibid* at paras 84 and 86.
[99] 61 Man R (2d) 282, 1989 CanLII 5257 (MBCA) [*Westfair*].
[100] *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2014 BCSC 1280 at paras 36 and 60; *Fairhurst v Anglo American PLC*, 2014 BCSC 2270 [*Fairhurst*] at para 15; *Airia Brands v Air Canada*, 2015 ONSC 5352 at paras 81-95; *Dale v The Toronto Real Estate Board*, 2012 ONSC 512 at para 50.
[101] 2000 CanLII 16984 (ONCA) at para 21,
[102] 2016 ONCA 621 [*Fanshawe*] at para 85.
[103] 2014 BCCA 36 [*Wakelam*]
[104] 2015 BCCA 362 [*Watson*].
[105] *Ibid* at para 49.
[106] *Fanshawe, supra* note 102 at para 87.
[107] *Bram, supra* note 89 at para 64, citing *Cement LaFarge, supra* note 96 at 472.

58. *Wakelam* also failed to account for this Court's decision in *Infineon Technologies AG v Option consommateurs*, which held that it was open to the plaintiff, despite having abandoned its claim under s. 36(1) to proceed with its claim under what was then art 1457 of the *Civil Code of Quebec*, based on an alleged violation of s 45 of the *Competition Act*.[108] *Wakelam* provides no rationale on why Parliament would have intended to foreclose common law claims while permitting recourse to similar remedies under the civil law.

3. Parliament Did Not Express a Clear and Unambiguous Intention to Oust the Common Law

59. A fundamental principle of statutory interpretation is that legislatures are presumed not to intend to interfere with common law rights absent a clear and unambiguous direction.[109] Intentions to depart from existing law must be expressed "with irresistible clearness."[110] The same principle applies even if the legislation is a comprehensive scheme – the intention to oust the common law must be either express or be clear by necessary implication.[111]

60. There is no language in the *Competition Act* that shows an intention to oust the common law. Section 36(1) is permissive, it provides that "[a]ny person […] may, in any court of competent jurisdiction, sue" for loss or damages caused by a defendant's breach of the substantive competition offence provisions of the Act.[112]

61. Instead, s. 62 indicates an intention to allow victims of anti-competitive behaviour to continue to pursue private law remedies. Section 62 provides that "[e]xcept as otherwise provided in this Part [Part VI: Offences in Relation to Competition], nothing in this Part shall be construed as depriving any person of any civil right of action."[113] While s. 36 is found in Part IV of the *Competition Act*, it is a remedial provision, its purpose being to "help enforce the

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[108] *Infineon, supra* note 60 at para 83.
[109] Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: Lexis Nexis Canada, 2014) at §17.5: AR Tab 18; see also *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, [2003] 2 SCR 157 at para 36.
[110] *Rawluk v Rawluk*, [1990] 1 SCR 70 at para 36, *citing Goodyear Tire &Rubber Co. of Canada v T. Eaton Co.*, [1956] SCR 610.
[111] *Gendron Supply & Services Union of PSAC, Local 50057*, [1990] 1 SCR 1298 [*Gendron*] at 1315-13016.
[112] *Competition Act*, s. 36(1).
[113] *Competition Act*, s. 62.

substantive aspects of the Act."[114] Through the inclusion of s. 62 in the substantive offence part of the Act, Parliament has signalled that its regulation of anticompetitive conduct is not intended to intrude into the provincial domain of civil rights.[115]

62. This is a complete answer to the defendants' reliance on *Orpen v Roberts* for the proposition that Parliament's creation of an offence is *prima facie* proof the injured party is restricted to the remedies provided for under the statute. This position is flawed for two reasons. First, what Duff J. actually said in *Orpen* was that, while this principle may be a consideration, the overall question is one of legislative intent:

> But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.[116]

Section 62 is evidence that Parliament did not intend the offence provisions of the *Competition Act* to preclude other possible remedies for victims of anticompetitive conduct.

63. Second, the defendants' reading of *Orpen* is not supported by this Court's subsequent jurisprudence. While breach of a statute does not, without more, create a tort,[117] it may give rise to civil liability if the constituent elements of the private law cause of action are satisfied.[118] Put plainly in *Odhavji Estate v Woodhouse*, "the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the [defendant] from civil liability."[119]

64. Nor is there any basis to conclude that Parliament intended by necessary implication to bar victims of price-fixing from private law remedies. This Court considered the question of "necessary implication" in *Gendron v Supply & Services Union of PSAC, Local 50057*, where it held that the *Canada Labour Code* ousted the common law duty of fair representation. The Court

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[114] *General Motors, supra* note 76.
[115] *Westfair, supra* note 99 at para 18.
[116] [1925] SCR 364 [*Orpen*] at 370; see also *NCC et al. v Puliese et al*, [1979] 2 SCR 104 at 114.
[117] *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 227 and 225.
[118] *Odhavji Estate v Woodhouse*, 2003 SCC 69, 2003] 3 SCR 263 at para 31.
[119] *Ibid*, 2003 SCC 69 at para 31.

based this conclusion on several factors, including that: the statutory duty was identical in content to the common law duty, making the common law duplicative; the legislative scheme granted the labour relations board extensive powers to both investigate and adjudicate such claims; and the statutory framework provided a broader and superior range of remedies to remedy a breach of the duty.[120]

65. These factors support the plaintiff's position. Unlike the situation in *Gendron*, the *Competition Act* does not duplicate the tort of civil conspiracy. For example, the tort requires that the defendant's conduct be directed towards the plaintiff and that the defendant knew injury to the plaintiff was likely to occur (which is not required under the *Competition Act*). Further, the tort carries broader remedies, including the potential for punitive damages.[121] Also, the limitation periods that apply to tortious conduct may be longer, according to different provincial limitation periods.[122] Furthermore, in *Gendron*, if the common law duty had been allowed to persist there was the risk of conflict between decisions of a specialized administrative tribunal and the courts. Here, there is no similar potential for conflict as s. 36(1) directs statutory claims to the courts.[123]

66. There is also a constitutional dimension to this issue that *Gendron* did not need to address. Civil causes of action are matters within the exclusive constitutional jurisdiction of the provinces.[124] "This provincial power over civil rights is a significant power and one that is not lightly encroached upon."[125] In upholding the validity of s. 36's predecessor in *General Motors*, Dickson C.J. commented on the provision's restricted scope: it did not create a general cause of action and, as a remedial provision, it intruded less into provincial powers than a substantive provision might have.[126] It seems unlikely that Parliament intended to extinguish provincial civil causes of action through the enactment of a non-substantive remedial provision, without any clear statutory language to this effect.

67. Assuming, for the sake of argument, that the defendants are correct that there was no

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[120] *Gendron, supra* note 111 at 1316-1318.
[121] *Watson, supra* note 104 at para 57.
[122] See e.g. *The Limitation of Actions Act*, CCSM c L150, S. 2(1)(n); *Statute of Limitations*, RSPEI 1988, c S-7, s. 2(1)(g).
[123] *Gendron, supra* note 111.
[124] *General Motors, supra* note 76 at 672.
[125] *Ibid* at 672-73.
[126] *Ibid* at 673, 683-85.

existing common law claim to oust, the defendants' focus on the state of the law at the time would lead to an inexplicable difference between the availability of private law remedies for breaches of the *Competition Act* in Quebec as opposed to the common law provinces. At the time of the enactment, it was understood that Quebec civil law provided a right to claim damages for fault arising out of illegal conduct (including breaches of the *Competition Act*).[127] The defendants cannot point to anything in the legislative history that indicates Parliament intended s. 36 of the *Competition Act* to be a complete code in common law provinces but not in Quebec.

68. Private law causes of action promote the objects of the *Competition Act* by serving the goals of deterrence and compensation. As the Ontario Court of Appeal reasoned in *Fanshawe*, there is no reason to believe that Parliament intended to undermine these goals by eliminating common law causes of action that punish and deter criminal wrongdoing.[128]

C. It is Not Plain and Obvious that Umbrella Purchasers Have No Claim Under s. 36 of the *Competition Act*

69. The plaintiff alleges that that the defendants intentionally set out to illegally increase their profits on ODDs and to harm the plaintiff and other class members – including umbrella purchasers – by requiring them to pay artificially high prices.[129] The allegation is that a necessary and intended effect of the conspiracy was to cause an overcharge on all ODDs and ODD Products in the market, creating an "umbrella" over the market that led to overall price overcharges. This is supported by Dr. Reutter's evidence that the alleged conspiracy would likely have raised prices across the ODD market. Otherwise, price differentials would have been counter-productive to the success of the conspiracy.[130]

70. With the very recent Ontario Court of Appeal decision in *Shah v LG Chem Ltd*, all provincial courts of appeal that have considered the issue have confirmed that umbrella

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[127] Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, April 16, 1975, p. 34:12: AR Tab 14.
[128] *Fanshawe*, *supra* note 102 at para 85.
[129] Third Amended Notice of Civil Claim at para 80 and 81: JRA Vol II, Tab 12, pp 39-40.
[130] Reutter #1 at Exhibit "B", para 102: JRA Vol III, Tab 17, p 166.

purchasers may bring claims under s. 36(1).[131] In *Shah*, the Ontario Court of Appeal rejected the Divisional Court's analysis (which the defendants rely on) and came to the same conclusion as the courts below did here: Parliament intended to include umbrella purchasers within the ambit of persons who may sue for losses they suffered as a result of a price-fixing conspiracy.[132] This is necessarily a limited class of people and, as discussed below, there is no need to artificially impose principles of negligence law into an interpretation of the provision.

71. Fundamentally, this is an issue of statutory interpretation. The words of s. 36(1) "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[133] While the larger jurisprudential context may provide guidance, the starting point is the specific words used by Parliament.[134]

1. Umbrella Purchasers fall within the Plain Language of s. 36(1)

72. Umbrella purchasers fall within the ordinary meaning of "any person." As the Ontario Court of Appeal held in *Shah*, "[t]he language is broad and inclusive. Conspicuously absent from s. 36(1) is any restriction on who can claim losses."[135]

73. Section 36(1) requires that the claimed loss or damage be "as a result of" conduct contrary to Part VI of the *Competition Act*. Recovery under s. 36(1) therefore requires plaintiffs to establish a causal link between the claimant's injury and criminal anti-competitive conduct by the defendant. In the domain of economics, umbrella effects are recognized as "an economically logical consequence of the cartel's pricing decisions…. Customers of the nonconspirators are

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[131] 2018 ONCA 819 [*Shah*]; see also *Panasonic Corporation c. Option consommateurs*, 2017 QCCA 1442, where the Quebec Court of Appeal denied leave to appeal on the lower court's certification of a class that included umbrella purchasers. The Court of Appeal held that any possible appeal on this issue should occur after the issue is determined on its merits.

[132] *Shah, supra* note 131; Certification Reasons at paras 64-79: JRA Vol I, Tab 1, pp 24-29; and Appeal Reasons at paras 228 and 247: JRA Vol I, Tab 7, pp 249 and 255.

[133] *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, [2017] 2 SCR 795 [*Schrenk*] at paras 29-30; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para. 21; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 26.

[134] *Schrenk, supra* note 133 at para 29.

[135] *Shah, supra* note 131 at para 33.

overcharged as a direct consequence of the cartel behavior."[136] Harm to umbrella purchasers is a possible causal consequence of a criminal price-fixing conspiracy and therefore falls within the ordinary meaning of the provision.

2. A Purposive Reading of s. 36(1) Includes Umbrella Purchasers

74. Permitting umbrella purchaser claims is consistent with the modern approach to statutory interpretation, which requires courts to interpret legislation "in the manner that best reflects the underlying aims of the statute."[137] The plaintiff's interpretation of s. 36 promotes the legislative purposes of the *Competition Act*; this interpretation should be preferred.[138]

75. The deterrence and compensatory objectives of the *Competition Act* are best served by an interpretation that requires criminal actors to account for the full extent of harm caused by their illegal actions.[139] Just as a bar against indirect purchaser claims runs counter to the compensatory goals of the scheme, so would a bar against umbrella purchaser claims.[140] Further, allowing umbrella claims would support the *Competition Act*'s purposes of maintaining and encouraging competition in Canada and of providing consumers with competitive prices and products.[141]

76. The legislative history of s. 36 indicates that Parliament intended that the private cause of action would be available to a broad spectrum of victims of cartel activity. When Parliament presented the first stage modernization amendments that introduced the civil remedies provision that is now s. 36, the accompanying briefing document explained that the new civil damages provision would be available to small business persons hurt by anticompetitive conduct as well as be "equally available to consumers and any other members of the public who have been so damaged."[142] When discussing the provision in Committee, the responsible Minister rejected

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[136] Roger D. Blair, Christine P. Durrance & Wenche Wang, "The *Kone* Decision: Economic Logic and Damage Estimation" (2016) 61:3 393 Antitrust Bull 393 at 399 [The *Kone* Decision]: AR Tab 10.
[137] *Schrenk, supra* note 133 at para 50.
[138] *Schrenk, supra* note 133 at para 50.
[139] *Infineon, supra* note 60 at paras 48, 49 and 58.
[140] *Microsoft, supra* note 1 at para 58.
[141] *Competition Act*, s. 1.1.; see also *Shah, supra* note 131 at para 38.
[142] Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada – First Stage: Bill C-227, November, 1973* (Ottawa: Information Canada, 1973) at p 48: AJBA Tab 19, (Bill C-227 was a predecessor to Bill C-2, which became law in 1975).

suggestions that the right of action should be narrowed to "direct loss or damage." He saw no reason to diminish the rights of consumers in this way. Those able to establish that the anti-competitive and criminal conduct caused them harm should be able to recover their losses.[143]

3. Umbrella Effects are a Causal Consequence of Price-Fixing

77. The *Competition Act* is a creation of Parliament. In enacting s. 36(1), Parliament combined duties on commercial actors to obey the conspiracy offence provision of the *Competition Act* with reciprocal rights for any person harmed by illegal conduct to recover from the wrongdoers. There is no need for the Court to embark on a negligence analysis.

78. In any event, market-wide increases in prices are neither remote nor speculative. Umbrella effects are a recognized and foreseeable consequence of a price-fixing conspiracy.[144] Success for a cartel that controls less than the whole market depends on its ability to raise prices across all of the market. In the context of mergers, the Canadian Competition Tribunal and the Competition Bureau recognize the significance of umbrella effects.[145] These price increases are not speculative or unpredictable – they are necessary for the cartel to function effectively. Unlike the type of unforeseeable consequence in *Taylor v 1103919 Alberta Ltd* (a case the defendants rely on), this is harm well within the range of possible results that the conspirators might have contemplated at the time.[146]

79. Furthermore, principles of proximity and remoteness do not depend on the type of "bright-line" boundaries that the defendants propose. Canadian law provides recompense for reasonably foreseeable consequences, not only for ones that follow an immediate and direct line of causation.[147] In *Deloitte & Touche v Livent Inc (Receiver of),*, the majority of the Court rejected the minority's analysis that would have excluded recovery for losses that were "informed" by, rather than dependent on, the negligent conduct.[148] Similarly, the pricing

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[143] House of Commons Standing Committee on Finance, Trade and Economic Affairs, *Minutes of Proceedings and Evidence*, 30th Parl, 1st Sess (8 May 1975) at 48: AR Tab 13: AJBA Tab 29.
[144] The *Kone* Decision, *supra* note 136 at 393 and 399-400: AR Tab 10.
[145] *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2003 FCA 53, [2003] 3 FC 529 at para 41; Government of Canada, Competition Bureau, "Merger Enforcement Guidelines", *Merger Enforcement Guidelines*, Enforcement Guidelines (October 6, 2011) at ss. 6.19-6.20.
[146] 2015 ABCA 201 at para 51.
[147] *Deloitte & Touche v Livent Inc (Receiver of),* 2017 SCC 63 [*Livent*], at para 88.
[148] *Livent, supra* note 147 at paras 85 and 87-88

decisions of non-conspirators are made within a market that is artificially and wrongfully manipulated by the impugned conduct.[149] In this sense, the pricing decisions of non-conspiring manufacturers are not truly independent and cartel members may be held to account for them.

80. Indeed, the pleadings allege that the defendants *intended* to injure class members, including umbrella purchasers.[150] Both the BC and Ontario Courts of Appeal have rejected arguments that defendants have "no control" over other market participants. As the court below held, this position ignores that non-defendants made pricing decisions in reference to a distorted market price and that the conspirators intentionally acted to raise market prices.[151] The Ontario Court of Appeal held that such arguments fail to account for "the very essence of an umbrella purchaser claim", that is, the allegation that the defendants had control of the market and intended to move it.[152]

81. The European Court of Justice has also recognized that the pricing decisions of non-cartel manufacturers are not truly independent, as they are made in reference to a market price distorted by the cartel.[153] Harm suffered by umbrella purchasers is a "but for" consequence of cartel activity that cartel members "cannot disregard."[154] Umbrella damages are therefore recoverable in the European Union under the *Treaty of the Functioning of the European Union.*[155]

82. In the US, where the Supreme Court has never decided whether umbrella damages are recoverable and lower court case law is mixed, courts generally reject a "bright-line test" for

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[149] *Kone AG and Others v OBB-Infrastruktur AG*, Case C-557/12 (5 June 2014), ECLI:EU:C:2014:1317 [*Kone*] at paras 28-30.
[150] Third Amended Notice of Civil Claim at para 81: JRA Vol II, Tab 12, p. 40.
[151] Appeal Reasons at para 239: JRA Vol I, Tab 7, p 252.
[152] *Shah, supra* note 131 at paras 63-65
[153] *Kone, supra* note 149 at para 29.
[154] *Kone, supra* note 149 at para 30.
[155] Treaty of the Functioning of the European Union, 2008/C 115/01 art101; *Kone, supra* note 149 at paras 33-34; Mark Sansom, Anna Morfey & Patrick Teague, "Recent Developments in Private Antitrust Damages Litigation in Europe, (2015) 29 Antitrust 33 at 35: AR Tab 16. Umbrella damages are recoverable in the European Union "where it is established that the cartel at issue was, in the circumstances of the case, and in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel."

standing to sue in antitrust litigation.[156] Standing is determined through a multi-factored and case-specific inquiry deriving from the US Supreme Court decision in *Associated Gen. Contractors of California, Inc. v California State Council of Carpenters* (which did not address umbrella damages).[157] In the recent *In re Processed Egg Products* decision, for example, the US Third Circuit Court of Appeals overturned the District Court decision cited by the defendants in their factum.[158] The Third Circuit concluded that the plaintiffs had standing to sue defendants from whom they purchased egg products allegedly affected by price-fixing, notwithstanding that only some of the eggs were price-fixed.

83. American jurisprudence rejecting umbrella purchaser claims offers little guidance, as it is often motivated by concerns about the potential for treble damages,[159] and concerns about complexity of evidence and duplicative awards, which are grounded in the US Supreme Court's prohibition against indirect purchaser claims in *Illinois Brick Co v Illinois*.[160] These concerns were rejected by this Court in *Microsoft*.[161]

84. More apt is the reasoning of cases such as *In re Uranium Antitrust Litigation*, where the Court allowed umbrella purchaser claims to proceed, despite some possible difficulties in proof.[162] Like this Court concluded in *Microsoft,* evidentiary hurdles should not deprive a plaintiff of a right to bring a claim.[163] Instead, the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."[164]

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[156] *In re Processed Egg Products Antitrust Litigation*, (2018) United States Court of Appeals, Third Circuit, 881 F 3d 262 [*In re Processed Egg Products*] at 269: AR Tab 3.
[157] *In re Processed Egg Products Antitrust Litigation, supra* note 156 at 269: AR Tab 3; *Associated Gen. Contractors of California, Inc. v California State Council of Carpenters* (1983), 459 US 519: Appellants Joint Book of Authorities [AJBA] Tab 1.
[158] Toshiba Factum at para 116.
[159] *In re Processed Egg Products, supra* note 156 at 271: AR Tab 3.
[160] 431 US 720; Roger D. Blair, Virginia G. Maurer, "Umbrella Pricing and Antitrust Standing: An Economic Analysis" (1982) Utah L Rev 763 at 764-765: AR Tab 11; *Illinois Brick Co. v. Illinois* (1977), 431 U.S. 720; see also *In re Processed Egg Products, supra* note 156 at 271-272: AR Tab 3.
[161] *Microsoft*, supra note 1 at paras 36-44.
[162] (1993), US Dist Ct (ND IL, E Div), 552 F Supp 518 [*In re Uranium Antitrust*] at 525-526.
[163] *Microsoft, supra* note 1 at paras 44 and 45.
[164] *In re Uranium Antitrust Litigation*, *supra* note 162 at 525-526: AR Tab 4.

4. Liability is Not Indeterminate

85. This is not a negligence case. Parliament has already struck an appropriate balance between rights of recovery for victims of anti-competitive conspiracies on one hand and safeguards for alleged conspirators on the other. There is no reason or basis for the Court to intervene through the imposition of a negligence analysis. Further, even in the negligence context, indeterminancy is a policy consideration, not a policy veto.[165]

86. In any event, concerns over indeterminancy are unwarranted. In *Shah*, the Ontario Court of Appeal concluded that concerns about possible indeterminate liability do not arise in this statutory context: "the normative concerns have already been taken care of by Parliament."[166] Concerns about indeterminate liability are mitigated by the limitations set out in ss. 36 and 45 of the *Competition Act*. Fears about overbroad liability are answered by the requirement of intentional wrongdoing, the fault requirement in s. 45, and the need under s. 36 for plaintiffs to demonstrate harm resulting from intentional wrongdoing.[167] These limitations eliminate any real concerns about indeterminate liability.

87. Further, concerns over indeterminancy only arise where liability is indeterminate as to "a specific *character*, not of a specific *amount*."[168] Significant does not equal indeterminate.[169] As Savage J.A. reasoned below, while the defendants might not be able to ascertain the individual identities of the umbrella purchasers, they would have had "a clear sense for the size of the market and the impact their price-fixing agreement would have had on the market, and therefore the extent of their potential liability."[170] *Shah* similarly held that the exposure was not limitless; exposure would be limited to specific products and a defined time period.[171]

88. The known and intended effects on the market distinguish umbrella claims from scenarios such as that in *R v Imperial Tobacco Canada Ltd*, where the potential impact of the

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[165] *Livent, supra* note 147 at para 45.
[166] *Shah, supra* note 131 at para 47.
[167] *Shah, supra note* 131 at para 59
[168] *Livent, supra* note 147 at para 43 (emphasis in original).
[169] *Livent, supra* note 147 at para 43.
[170] *Appeal Reasons* at para 241: JRA Vol I, Tab 7, p 253.
[171] *Shah, supra note* 131 at para 60.

alleged misrepresentations was outside the government's knowledge and control.[172] As discussed above, it cannot be said that cartel members do not control the extent of their liability.

89. Similarly, the defendants' concern about hypothetical ripple effects are misplaced. The question is whether umbrella purchasers come within the meaning of "any person" in the statute – not whether other types of persons could.

90. The economic underpinning of the theory of umbrella purchaser claims is that conspirators used their market power to move prices across the relevant product market. Criminal conspirators should not be entitled to disregard the market-wide impacts their actions cause. As the court below held, any tensions between what might be viewed as broad liability and the objectives of the *Competition Act* should be resolved in favour of the latter.[173] Conspirators should be accountable for the full impact of their conduct.

D. The Plaintiff's Proposed Methodology Meets a Standard Already Set in Microsoft

1. ***Microsoft*** **Sets Out a Clear Test to be Followed**

91. The defendants' arguments on the common issues requirement are a thinly veiled attempt to reargue many of the same issues that this Court recently addressed in the 2013 trilogy of *Microsoft*, *Sun-Rype Products Ltd v Archer Daniels Midland Company*[174] and *Infineon*. In the trilogy, this Court considered and rejected attempts by the defendants to import the American requirement of "robust and rigorous" scrutiny of the evidence on commonality into Canadian law.[175] Further, *Microsoft* directed lower courts not to weigh evidence or resolve conflicts between experts at the certification stage.[176] These are all issues the defendants attempt to revisit here.

92. The defendants frame the issue on appeal as: "[w]hat is the required standard to certify harm as a common issue based on an economic methodology?"[177] As both Courts below recognized, *Microsoft* answered this question as follows:

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[172] *Imperial Tobacco*, *supra* note 54 at para 99.
[173] Appeal Reasons at para 243: JRA Vol I, Tab 7, pp 253-254.
[174] 2013 SCC 58 [*Sun-Rype*].
[175] *Microsoft*, *supra* note 1 at para 119.
[176] *Microsoft*, *supra* note 1 at para 125.
[177] Toshiba Factum at para 41.

> In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.[178]

93. Speaking specifically of the standard in indirect purchaser price-fixing class actions, *Microsoft* was clear: "the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain."[179]

94. Certification is a procedural step to determine whether a class proceeding is appropriate. The analysis is focused on the existence of a plausible methodology to establish loss, not whether the methodology is more likely than not to yield a particular result.[180] As shown below, Dr. Reutter's methodology meets this standard.

95. On this appeal, the defendants are attempting to inject a merits determination into the commonality analysis by arguing that the plaintiff must establish actual harm to all class members at certification. This is evident from their suggestion that the action could still be certified if only the plaintiff narrowed the class definition to exclude some categories of ODD purchasers.[181] This can only be done by making a merits assessment about whether the price overcharges were actually passed on to all or only some subgroups of ODD purchasers. *Microsoft* emphatically rejected such a standard: "to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage."[182]

2. <u>The Methodology Must Establish a Reasonable Prospect of Showing Harm to the Indirect Purchaser Level</u>

96. Even though Dr. Reutter's evidence meets the standard the defendants propose, the Court of Appeal was correct to conclude that *Microsoft* only requires that "the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the

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[178] *Microsoft, supra* note 1 at para 118.
[179] *Microsoft, supra* note 1 at para 115.
[180] *Microsoft, supra* note 1 at para 118.
[181] Toshiba Factum at para 94.
[182] *Microsoft, supra* note 1 at para 119.

distribution chain."[183] Contrary to the defendants' assertion, the methodology does not need to show that all class members were harmed or be able to distinguish between class members in an individualized fashion.[184]

a. The Defendants' Proposed Standard is Contrary to *Microsoft* and *Sun-Rype*

97. In *Microsoft*, by using terms such as "class-wide" and "indirect-purchaser level" interchangeably, Rothstein J. recognized the market or group-based nature of pricing decisions. For example, he explained that an overcharge "common to the class" means "that passing on has occurred" – not "that passing on has occurred" *for every class member*.[185]

98. The fact that Rothstein J. cited to *Chadha v Bayer Inc* and *In re Linerboard Antitrust Litigation* does not undermine this interpretation. In *Chadha*, there was no evidence that the harm was passed on to *any* of the class members.[186] The certification judge erred by accepting the plaintiff's expert's assumption of pass-through. In *Linerboard*, the evidence the US Third Circuit Court of Appeals accepted as evidence of common impact was similar to Dr. Reutter's proposed methodology – it consisted of an opinion, based on a market power analysis, that the conspiracy would be felt "class-wide."[187]

99. The defendants' arguments on this issue are not new. In *Microsoft*, the case was certified by the BC Supreme Court in the face of arguments by the defendant that the plaintiff's proposed methodology was "overly reliant on the use of averages, resulting in the sweeping-in of uninjured plaintiffs."[188] And before this Court, the defendant argued that it was not feasible to prove loss to each class member.[189] Despite these arguments, this Court upheld the finding of the certification judge that loss could be determined on a class-wide basis.[190] Lower court decisions

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[183] *Microsoft, supra* note 1 at para 115; and Appeal Reasons at para 163: JRA Vol I, Tab 7, p 233.
[184] Toshiba Factum at para 63.
[185] *Microsoft, supra* note 1 at para 115.
[186] 2003 CanLII 35843 (ON CA)[*Chadha*] at para 30-31; see *Markson v MBNA Canada Bank*, 2007 ONCA 334 [*Markson*] at paras 49, 54 and 55.
[187] *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002) [*Linerboard*] at 153: AJBA Tab 5.
[188] *Pro-Sys v Microsoft*, 2010 BCSC 285 [*Microsoft BCSC*] at para 156.
[189] *Microsoft, supra* note 1 at para 109.
[190] *Microsoft, supra* note 1 at paras 125 and 126.

across the country have come to similar conclusions.[191]

100. *Sun-Rype* also supports the standard adopted by the courts below. That case turned on the identifiable class requirement.[192] There was no dispute in *Sun-Rype* that a methodology similar to the one proposed here met the commonality requirement.[193] The majority also used the words "indirect purchaser level" to refer to the certification requirement that there be a plausible methodology to measure harm to indirect purchasers.[194]

101. Importantly, *Sun-Rype* held that aggregate damages may be certified as a common issue when there is some basis in fact for believing "at least two persons" will be able to prove they incurred a loss.[195] The majority held that the aggregate damages provisions allow the court to "dispense with the need to calculate the quantum of damages for each individual class member…. However, where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss."[196] Here, the defendants' expert acknowledged the alleged conspiracy likely would have caused harm to some class members.[197]

102. The defendants' argument that the Court of Appeal's application of the 2013 trilogy impermissibly treats the class as a "juridical entity" is a red herring. Certification based on a methodology that can plausibly trace harm to a group does not grant class members any substantive rights. It does not guarantee that all class members will ultimately share in an award. Certification is a procedural step created by statute – not a final resolution of the merits. It does not require assurance that only persons with claims sure to, or even likely to, succeed are included in the class. Such a requirement would be inconsistent with the rule against merits-

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[191] *Watson v Bank of America Corporation*, 2014 BSC 532 at paras 274-275, aff'd on appeal at *Watson*, supra note 104 at paras 154-161; *Crosslink v BASF Canada*, 2014 ONSC 1682 [*Crosslink*] at paras 66-68; *Fanshawe College v Hitachi, Ltd et al.*, 2017 ONSC 2791 at paras 52-57.
[192] *Sun-Rype, supra* note 174 at paras 3 and 69.
[193] *Ibid* at paras 48-51; *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2010 BCSC 922 at paras 162-167.
[194] *Sun-Rype, supra* note 174 at para 65.
[195] *Sun-Rype, supra* note 174 at para 76.
[196] *Sun-Rype, supra* note 174 at para 76.
[197] Affidavit #2 of Dr. James A. Levinsohn made on January 13, 2015 [Levinsohn #2] at Exhibit "A", paras 39 and 73, pp 204 and 222: JRA Vol IV, Tab 23, pp 119 and 137.

based class definitions.[198]

b. A Requirement of Showing Harm to the Indirect Level is Consistent with the Principles Guiding the Commonality Requirement

103. Even if Dr. Reutter's proposed methodology is not ultimately enough on its own to establish that all class members were harmed at the common issues trial, his analysis would significantly advance the litigation and the fact of harm is appropriately certified as a common issue.

104. Section 4(1)(a) of the *CPA* requires that the class members' claims raise common issues, whether or not these common issues predominate over individual ones. The requirement is to be assessed purposively, the underlying question being whether allowing the action to proceed "will avoid duplication of fact-finding or legal analysis."[199] As McLachlin C.J. reasoned in *Rumley v British Columbia*, class proceedings legislation is well-equipped to address the possibility that common issues will lead to nuanced, rather than uniform, answers at the merits stage.[200] Class definitions may be amended to exclude subsets of class members who might not have been harmed or the court may decertify the proceeding if the certification requirements are no longer met.[201]

105. Following *Rumley*, in *Vivendi Canada Inc. v Dell'Aniello*, this Court explained that for the commonality requirement to be met, it is not necessary that the answer to a common issue be the same for all class members, so long as success for one member does not mean failure for another. Instead, "for a question to be common, success for one member of the class does not necessarily have to lead to success for all members."[202]

106. Harm in an indirect purchaser class action is a perfect example of a common issue that may still move the litigation forward for the class by avoiding duplication of fact-finding and

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[198] *Merck Frosst Canada Ltd v Wuttunee*, 2009 SKCA 43 [*Merck Frosst*] at paras 72-73 and 83-84.

[199] *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 at para 39; *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 RCS 184 [*Rumley*] at para 29.

[200] *Rumley, supra* note 199 at para 32.

[201] *CPA* at ss. 8(3), 10. Flexible mechanisms are also available to resolve remaining individual issues after the common issues trial: *CPA* at s. 27.

[202] 2014 SCC 1 [*Vivendi*] at para 45.

analysis. A single analysis of whether there was an overcharge and whether that overcharge was passed on to the indirect purchaser level would significantly advance the claim for all class members by avoiding repetition of the collection and analysis of large quantities of economic data. Success for some class members on the common issue of whether "the Class Members suffer[ed] economic loss?" would not mean failure for any other class members. This holds true even if the outcome varies among class members.[203] Loss is still a common issue if, for example, the evidence reveals that a price war broke out in March 2007 and Dr. Reutter's analysis shows that there was no overcharge during that period. This is the exact type of nuanced answer that *Rumley* and *Vivendi* contemplate.[204]

3. There is No Statutory or Common Law Requirement that Harm Be Individualized

107. Furthermore, there is no requirement that plaintiffs prove loss in an "individualized" fashion. The defendants attempt to read in a requirement of "individualized" loss that is present in neither the *Competition Act* nor the common law. Such an interpretation would undermine judicial economy by requiring needless duplication of the same evidence and analysis. Any individual action (assuming it would be viable) would require similar methods and analysis that Dr. Reutter proposes for the class here.

a. Section 36 Does Not Require Individualized Proof of Harm

108. Section 36(1) provides that any person who has suffered loss or damage as a result of the commission of a competition-related offence may sue the wrongdoer for "an amount equal to the loss or damage proved to have been suffered" by the victim. The defendants' argument that this requires *individualized* loss appears to be based on Parliament's use of the single tense. They cite no authority for their interpretation. However, the provision says nothing about the *manner* in which those who have been harmed may prove their losses. The language highlighted by the defendants only emphasizes the compensatory purpose of the provision: those who have been harmed may sue to recover their losses and associated investigation costs.

109. A requirement of individualized proof of harm runs counter to the purpose and scheme of the Act. Such a requirement would, in many circumstances, render price-fixing cases impractical.

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[203] *Vivendi*, *supra* note 202 at paras 46-47.
[204] *Vivendi*, *supra* note 202 at para 46.

This would undermine the goal of facilitating efficient private enforcement of the *Competition Act*'s criminal offence provisions, as well as the Act's deterrence and compensatory objectives.

110. The scheme of the Act reflects a market-based approach. Other provisions of the *Competition Act* rooted in the same modernization amendments as s. 36 reflect the market-based nature of economic analysis. For example, at the same time Parliament introduced s. 36, Parliament enacted what is now s. 71 of the *Competition Act*.[205] The provision mandates that statistical analyses collected by sampling methods be admissible in evidence in court proceedings relating to the *Competition Act*.[206] As one leading commentator has stated, the language of the Act "reflects the underlying economic content of the law and application of the Act often revolves around the economic evidence and economic analysis necessary to address the questions at issue."[207]

b. Neither Common Law nor Civil Law Requires Proof of Individualized Harm

111. The defendants' argument that proving loss through generalized evidence would violate "a central tenet of the common law" relies on a misreading *Palsgraf v Long Island Railroad Co.*[208] *Palsgraf* is about the boundaries of duties of care in negligence, not about how two similarly situated individuals might prove they suffered loss. In *Palsgraf*, there was no question that the plaintiff had been injured. The issue was whether the defendant had owed her a duty to prevent the harm.

112. This Court has previously recognized that individualized evidence on harm may not be necessary in all circumstances. *Infineon* explicitly held that at the authorization stage (the civil law equivalent of certification), it was "unnecessary at this preliminary stage to prove that each member of the group suffered a loss."[209] Further, the Court recognized that unlike cases alleging more personal injuries, such as damages to reputation, even at the merits stage it may be

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[205] *An Act to Amend the Combines Investigation Act and the Bank Act and to Repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1975 c 76, s 22: AR Tab 9.
[206] *Competition Act*, s. 71.
[207] Trebilcock, Michael et. al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press Incorporated, 2002) at p. 37: AR Tab 19.
[208] Toshiba Factum at paras 52-53; *Palsgraf v Long Island Railroad Co*, [*Palsgraf*] 248 NY 339 (NY App Ct, 1928): AJBA Tab 13.
[209] *Infineon, supra* note 60 at para 130.

sufficient for the plaintiff in a price-fixing action to establish proof of injury to individuals through inferences drawn from generalized evidence rather than a detailed examination of the characteristics of individual class members.[210]

113. The reasoning in *Infineon* is consistent with the realities of economic evidence and statistical analysis. As Dr. Reutter opined, there is no separate economic methodology available to assess harm on a purely individual level.[211] Rather, commonality and fact of harm in indirect purchaser cases must be based on economic analysis of the market as a whole because market participants face market-wide conditions and influences when purchasing ODDs and ODD Products.[212] By its very nature, the analysis is market-wide.

114. While the defendants argue that various events and conditions mean that any overcharge would not have been passed on consistently across the class, they do not contend that any price-fixing occurred on a per-unit basis. Product manufacturers do not price fix at a level of an *individual* item and therefore any overcharges are not passed on in a purely *individualized* fashion. It would therefore be illogical and contrary to the nature of economics and the objects of the *Competition Act* to insist that plaintiffs nevertheless provide a methodology to measure harm in an individualized way.

115. The possibility that individualized proof may not be necessary does not relieve class members of their burden of establishing loss and liability (in so far as loss is a required element of the cause of action), and nor does it mean that the Court of Appeal's reasoning allows class members as a group to prove a claim that no individual could.[213] Instead, it recognizes that the evidence and data ultimately uncovered through the litigation may be enough for any one class member to be able to establish, based on Dr. Reutter's proposed analysis, that she likely experienced a loss. As *Infineon* envisions, proof that an individual paid an inflated price does not necessarily require an individualized analysis.

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[210] *Infineon, supra* note 60 at para 131.
[211] Reutter #2 at Exhibit "A", para29, footnote 58: JRA Vol IV, Tab 22, p 94.
[212] Reutter #1, at Exhibit "B", paras 5-8: JRA Vol III, Tab 17, pp 119-120; and Reutter Cross, pp. 117 – 118, Q&A 399-402: JRA Vol V, Tab 26, pp 216-217.
[213] Toshiba Factum at para 54; *Microsoft, supra* note 1 at para 39.

c. Restitutionary Recovery Does Not Require Individualized Harm

116. Acceptance of the standard proposed by the defendants would also violate basic principles of restitutionary law, one of the causes of action advanced in the pleadings. "Restitution law is not concerned by the possibility of the plaintiff obtaining a windfall precisely because it is not founded on the concept of compensation for loss."[214] Issues of deprivation and enrichment may therefore be considered on a class-wide basis.[215] In *Alberta v Elder Advocates of Alberta Society*, McLachlin C.J. concluded that the question of unjust enrichment did not require individual assessment to ground potential liability to the class, even though the pleadings recognized the possibility that "very limited exceptions" of class members did not suffer deprivation.[216] The question of whether disgorgement is an appropriate remedy also does not require a determination of the loss suffered by each class member.[217]

4. <u>There is No Unfairness to Defendants</u>

117. The hypothetical possibility that some unharmed class members may ultimately be compensated is of no concern to the defendants because it creates no additional liability for them. The possibility of the inclusion of class members with zero damages in calculating an average overcharge does not raise the defendants' overall liability. This issue would only be relevant to other class members. As Rothstein J. concluded in *Sun-Rype*, to the extent that there is any conflict between class members as to how an aggregate amount of damages is to be distributed, this is not a concern of the defendants.[218]

118. Second, there is no merit to the defendants' suggestion that the Court of Appeal's decision has the effect of relieving plaintiffs of the "unenviable" evidentiary task of tracing price overcharges through multiple levels of the distribution chain.[219] Plaintiffs must still establish liability to class members (who are necessarily BC residents). This will still require complex

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[214] *Microsoft, supra* note 1 at para 22, citing *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 RCS 3 at para 47, quoting *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994), 182 CLR 51 (HCA), at p 71.
[215] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 [*Elder Advocates*] at para 100; See also *Alberta v Elder Advocates*, 2018 ABQB 37 at para 25.
[216] *Elder Advocates, supra* note 215 at paras 81 and 100.
[217] *Hodge v Neinstein*, 2017 ONCA 494 at para 127, leave to appeal to SCC refused, 37739 (7 December 2017).
[218] *Sun-Rype, supra* note 174 at para 20.
[219] *Microsoft, supra* note 1 at para 45; Toshiba Factum at para 92.

expert evidence on the pass-through of overcharges through the various levels of the distribution chain. As Dr. Reutter explains, this is a multi-step economic analysis involving multiple econometric and statistical models.[220]

119. Finally, the standard applied by the courts below does not relieve the plaintiff of his burden of showing a causal link between the defendants' allegedly illegal actions and the harm suffered by class members, including umbrella purchasers. The plaintiff's claim is that umbrella purchasers paid more for ODDs and ODD Products as a result of the defendants' actions in violation of the *Competition Act* and the common law.[221] It is a theory of harm based on a causal link.

120. This causal relationship wholly distinguishes the securities class action decisions the defendants rely on.[222] Unlike the fraud on the market theory, the plaintiff's proposed methodology does not depend on any presumption of harm. [223] Rather, the causal link is an empirical question that will be investigated through an econometric analysis, which is what the plaintiff proposes to do here.[224]

121. Below, Savage J.A. recognized that imposing the defendants' proposed standard would undermine the purposes of class action proceedings – judicial economy, access to justice and behaviour modification – by denying potentially viable claims at an early stage. The experience in the US of refining the class definition to more accurately reflect those persons actually injured simply does not translate here. It requires extensive data that is only available post-certification.

122. Such an approach would allow defendants to defeat certification simply because of a hypothetical possibility that the class includes some persons who did not suffer any harm. Absent individual actions (which are often not economically feasible),[225] the criminal wrongdoers would be able to retain their unlawful gains and their victims would be without a remedy. This is a

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[220] Reutter #1 at Exhibit "B", paras 80-89: JRA Vol III, Tab 17, pp 155-162.
[221] Third Amended Notice of Civil Claim at para 92: JRA Vol II, Tab 12, p 44; Certification Reasons at para 178: JRA Vol I, Tab 1, pp 54-55.
[222] Toshiba Factum at paras 70-75.
[223] *Carom v Brex-X Minerals Ltd*, 1998 CarswellOnt 4285 at para 13: AR at Tab 2.
[224] Reutter #1 at Exhibit "B", para 102: JRA Vol III, Tab 17, p 166.
[225] *AIC Limited, supra* note 49 at para 27; *Crosslink, supra* note 191 at para 113, leave to appeal *ref'd* 2014 ONSC 4529; *Microsoft BCSC, supra* note 188 at para 183 rev'd 2011 BCCA 186 aff'd *Microsoft, supra* note 1.

result contrary to restitutionary principles, the goals of the *Competition Act*, the purposes of the *CPA*, and this Court's 2013 trilogy. It cannot be correct.

5. There are No Palpable and Overriding Errors in the Certification Judge's Findings on Commonality of Harm

123. The defendants have failed to establish that Masuhara J.'s analysis of Dr. Reutter's methodology contains any overriding and palpable error. His review of Dr. Reutter's analysis was detailed, lengthy, and included an examination of the critiques made by the defendants' expert. He found that Dr. Reutter's proposed methods were plausible and that his approaches to assessing class-wide impact, overcharge and pass-through rates to indirect purchasers met the standard set by this Court in *Microsoft*.[226] As the Court of Appeal concluded, Masuhara J. did not improperly invoke the aggregate damages provisions of the *CPA* to establish liability. He separately considered whether there was a methodology capable of showing harm and recognized that aggregate awards may only be made after liability is established.[227] There is no reason to disturb his findings on commonality.

a. Dr. Reutter Provides a Methodology for Establishing Harm to All Class Members

124. Dr. Reutter's evidence, which the certification judge accepted as being unshaken, is that his proposed methodology is capable of proving harm to all class members.[228] This evidence answers the defendants' argument that *Microsoft* requires a methodology that shows all class members were harmed or one that separates those that were from those that were not. [229] Even if this is the standard (which the plaintiff denies), Dr. Reutter's evidence meets this requirement.

125. The defendants attempt to cast doubt on this by rearguing factual issues the certification judge decided and by inviting this Court to draw conclusions on the merits, which this Court has repeatedly cautioned against.[230] For instance, the defendants point to Dr. Reutter's acknowledgment on cross-examination that "if you average zero with some other numbers you get something other than zero", as an acknowledgement that his methodology cannot show class-

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[226] Certification Reasons at para 179: JRA Vol I, Tab 1, p 55.
[227] Certification Reasons at para 182: JRA Vol I, Tab 1, pp 55-56.
[228] Certification Reasons at para 152: JRA Vol I, Tab 1, p 229.
[229] Toshiba Factum at para 63.
[230] *Microsoft, supra* note 1 at para 102-105.

wide harm.[231] This is not an admission about limitations on the plaintiff's ability to prove class-wide harm. Just before, Dr. Reutter explained that "from an economic standpoint," he did not accept that there could be a subset of unharmed class members "if there was, in fact, a conspiracy that fixed the price at the upstream and then that was, in fact, passed through."[232]

126. The defendants rely on speculation about the possible effects of various market circumstances (such as a "standards war") to suggest that the "uncontested" evidence is that harm to many class members is unlikely.[233] This evidence is not uncontested. Dr. Reutter explained that these issues raise merits questions that require data that is unavailable to the plaintiff until after certification.[234] In contrast, the defendants' expert came to his conclusions without having done any empirical investigation or having seen any discovery documents.[235] Certification is not the time to answer these merit questions.

127. Dr. Reutter's evidence, which the certification judge accepted, is that the econometric analysis he proposes can be performed at the level of subgroups, if necessary to do so after discovery.[236] It can isolate and exclude class members who purchased particular ODDs or ODD Products during certain time periods.[237] It is unreasonable to expect plaintiffs to anticipate and exclude particular subgroups of class members at certification based on no real empirical data or discovery document. Based on information and empirical data collected through discovery, the methodology can account for the hypothetical scenarios posited by the defendants. Therefore, disputes between experts about their likely implications can properly be resolved at the merits stage of the proceedings, based on evidence, not speculation.[238]

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[231] Toshiba Factum at para 87.
[232] Reutter Cross at pp 117-118, Q&A 399-405: JRA Vol V, Tab 26, pp 216-217.
[233] Toshiba Factum at para 90.
[234] Reutter #2 at Exhibit "A", paras 22 and 24: JRA Vol IV, Tab 22, pp 90-91.
[235] See Transcript of the cross-examination of Dr. James Levinsohn conducted on November 7, 2014 at p 28, Q&A 105-106: JRA Vol V, Tab 25, p 127.
[236] Certification Reasons at para 174: JRA Vol I, Tab 1, p 54.
[237] Reutter Cross at pp 121-122, Q&A 416: JRA Vol V, Tab 26, pp 220-221; and Reutter #2 at Exhibit "A", paras 30-31: JRA Vol IV, Tab 22, p 94.
[238] *Microsoft, supra* note 1 at para 102.

b. Dr. Reutter's Methodology is Grounded in the Facts and is Not Purely Theoretical

128. The defendants unfairly characterize Dr. Reutter's analysis of harm. Through a repeated refrain, they assert that his methodology falls short because it is not grounded in the facts and is based on general economic theories. These criticisms are inaccurate and contradict Masuhara J.'s findings. Dr. Reutter's conclusions are based on his extensive research of the market (which included an analysis of key market characteristics, such as product homogeneity and available economic substitutes).[239] Further, Dr. Reutter's investigation into the availability of the data necessary to apply the methodology was thorough.[240] His analysis on the question of fact of harm was distinct from his proposed aggregate damages model.

129. The defendants also incorrectly characterize Dr. Reutter's evidence as failing to address umbrella purchasers. Dr. Reutter explained the economic principles that suggest the alleged conspiracy would have led both defendant and non-defendant ODD manufacturers to raise prices to a similar extent.[241] Dr. Reutter proposes to empirically verify this theory.[242] A similar analysis by Dr. Reutter was recently accepted by the Ontario Court of Appeal in *Shah*.[243]

130. Dr. Reutter's proposed methodologies for assessing overcharge and pass-through are consistent with methodologies approved in other certified price-fixing cases, including *Microsoft*.[244] The methodology proposed in *Microsoft* similarly employed a regression analysis "to ascertain the extent of passing on in order to establish loss at the indirect-purchaser level." [245]

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[239] Reutter #1 at Exhibit "B" at paras 13-67: JRA Vol I, Tab 17, pp 123-148.
[240] Certification Reasons at para 177: JRA Vol I, Tab 1, p 55. At para 76 of their factum, the defendants quote *Microsoft* as requiring there to " be some evidence of the data to which the methodology is to be applied." This is inaccurate, the paragraph requires there to "some evidence *of the availability* of the data to which the methodology is to be applied" (emphasis added).
[241] Reutter Report #1 at Exhibit "B", para 102: JRA Vol III, Tab 17, p 166.
[242] Reutter Report #1 at Exhibit "B", para 102: JRA Vol III, Tab 17, p 166.
[243] *Shah, supra* note 131 at paras 83-92.
[244] *Pro-Sys, supra* at note 50, at para 68; *Fanshawe College v LG Philips LCD Co. et al,* 2011 ONSC 2484 at para 37; *Irving Paper Ltd v Atofina Chemicals Inc.,* [2009] 99 OR (3d) 358 at paras 125 and 143; *Crosslink, supra* note 191 at paras 109 and 110; *Fairhurst, supra* note 100 at paras 61-64; *Shah, supra* note , 131, at para 85-92; *Fanshawe College v Hitachi, Ltd et al.,* 2016 ONSC 5118 at para 69-78.
[245] *Microsoft, supra* note 1 at para 124.

131. In effect, the defendants' arguments about the sufficiency of Masuhara J.'s analysis are an attempt to introduce a certification standard rejected in *Microsoft*. There, the Court rejected "the American approach of making factual determinations at the certification stage on a preponderance of the evidence".[246] At certification, "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finally calibrated assessments of evidentiary weight".[247]

E. Conclusion

132. For the reasons set out above, the appeal should be dismissed. Even if the defendants are successful on some or all of their positions, they have not established that the case is not properly certified. On the first issue, the class would still have a claim under s. 36 of the *Competition Act*. On the second issue, the class would still include non-umbrella purchasers. On the third issue, questions concerning the existence of a conspiracy still raise common issues that would avoid duplication of fact-finding and legal analysis.[248] As the Ontario Court of Appeal held in *2038724 Ontario Ltd v Quizno's Canada Restaurant Corp.* the common issue of whether the defendants breached a criminal offence provision of the *Competition Act* is a "substantial ingredient" of a s. 36 cause of action.[249] On this basis, the Court certified aggregate damages as a common issue.[250]

PART IV - SUBMISSIONS AS TO COSTS

133. The plaintiff requests its costs in this Court. Under s. 37(1) of the *CPA*, costs are not payable for the certification motion or the appeal to the Court of Appeal.

PART V - ORDER SOUGHT

134. The plaintiff seeks an order that the appeal be dismissed with costs in this Court.

DATED at Vancouver, BC this 23rd day of October, 2018.

Counsel for the plaintiff/respondent,
David Jones, Linda Visser and Katie Duke

[246] *Microsoft, supra* note 1 at para 101-102.
[247] *Microsoft, supra* note 1 at para 102.
[248] *Ford v F. Hoffmann-La Roche Ltd* (2005), 7 4 OR (3d) 758 (SCJ), at paras. 34-36.
[249] 2010 ONCA 466 at para 44.
[250] *Ibid* at para 55.

PART VI - TABLE OF AUTHORITIES

AUTHORITY	Paragraph(s) Referenced
JURISPRUDENCE	
2038724 Ontario Ltd v Quizno's Canada Restaurant Corp, 2010 ONCA 466, 100 OR (3d) 721	132
A.I. Enterprises Ltd v Bram Enterprises Ltd, 2014 SCC 12, [2014] 1 SCR 177	51 and 57
AIC Limited v Fisher, 2013 SCC 69, [2013] 3 SCR 949	36 and 122
Airia Brands v Air Canada, 2015 ONSC 5352	55
Alberta v Elder Advocates of Alberta Society, 2011 SCC 24, [2011] 2 SCR 261	116
Apotex Inc v Hoffmann-La Roche Ltd, (2000), 195 DLR (4th) 244, 2000 CanLII 16984 (ON CA)	55
Associated Gen. Contractors of California, Inc. v California State Council of Carpenters (1983), 459 US 519	82
Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42, [2002] 2 SCR 559	71
Benhaim v St-Germain, 2016 SCC 48, [2016] 2 SCR 352	38
British Columbia Human Rights Tribunal v Schrenk, 2017 SCC 62, [2017] 2 SCR 795	71 and 74
Canada (Attorney General) v Hislop, 2007 SCC 10, [2007] 1 SCR 429	54
Canada (Commissioner of Competition) v Superior Propane Inc., 2003 FCA 53, [2003] 3 FC 529	78
Canadian Imperial Bank of Commerce v Green, 2015 SCC 60, [2015] 3 SCR 801	46
Carom v Brex-X Minerals Ltd, 1998 CarswellOnt 4285	120
Cement LaFarge v B.C. Lightweight Aggregate, [1983] 1 SCR 452; [1983] 145 DLR (3d) 385	54 and 57
Chadha v Bayer Inc. (2003), 63 OR (3d) 22, 2003 CanLII 35843 (ON CA)	98

AUTHORITY	Paragraph(s) Referenced
Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd (1994), 182 CLR 51 (HCA)	116
Crosslink v BASF Canada, 2014 ONSC 1682	99, 122 and 130
Crosslink v BASF Canada, 2014 ONSC 4529	122
Dale v The Toronto Real Estate Board, 2012 ONSC 512	55
Deloitte & Touche v Livent Inc (Receiver of), 2017 SCC 63, [2017] 2 SCR 855	79, 85 and 87
Direct Lumber Co. v Western Plywood Co., [1962] SCR 646	52 and 53
Elder Advocates of Alberta Society v Alberta, 2018 ABQB 37	116
Fairhurst v Anglo American PLC, 2014 BCSC 2270, [2014] 247 ACWS (3d) 510	55 and 130
Fanshawe College of Applied Arts and Technology v AU Optronics Corporation, 2016 ONCA 621, [2016] 132 OR (3d) 81	55, 56 and 68
Fanshawe College v Hitachi, Ltd et al., 2016 ONSC 5118	130
Fanshawe College v Hitachi, Ltd et al., 2017 ONSC 2791	99
Fanshawe College v LG Philips LCD Co. et al, 2011 ONSC 2484	130
Ford v F. Hoffmann-La Roche Ltd (2005), 74 OR (3d) 758, 2005 CanLII 8751 (ON SC)	132
Gagnon et al. v Foundation Maritime Ltd, [1961] SCR 435	51
Gendron v Supply & Services Union of PSAC, Local 50057, [1990] 1 SCR 1298	59 and 64-66
General Motors of Canada Ltd v City National Leasing, [1989] 1 SCR 641	45, 61 and 66
Goodyear Tire &Rubber Co. of Canada v T. Eaton Co, [1956] SCR 610	59
Hodge v Neinstein, 2017 ONCA 494, [2017] 136 OR (3d) 81; leave to appeal to SCC refused, 37739 (7 December 2017)	116
Hollick v Toronto (City), 2001 SCC 68, [2001] 3 SCR 158	47

AUTHORITY	Paragraph(s) Referenced
Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235	38
Hryniak v Mauldin, 2014 SCC 7, [2014] 1 SCR 87	38
Illinois Brick Co. v. Illinois (1977), 431 U.S. 720	83
In re Linerboard Antitrust Litigation, 305 F.3d 145 (3rd Cir. 2002)	98
In re Processed Egg Products Antitrust Litigation, (2018) United States Court of Appeals, Third Circuit, 881 F 3d 262	82 and 83
In re Uranium Antitrust Litigation (1993), United States Court of Appeals, Third Circuit, 552 F Supp 518	84
Infineon Technologies AG v Option consommateurs, 2013 SCC 59, [2013] 3 SCR 600	40, 58, 75, 91, 112-113 and 115
International Brotherhood of Teamsters v Therien, [1960] SCR 265	51
Irving Paper Ltd v Atofina Chemicals Inc., [2009] 99 O.R. (3d) 358	130
Kingstreet Investments Ltd v New Brunswick (Finance), 2007 SCC 1, [2007] 1 SCR 3	116
Kone AG and Others v OBB-Infrastruktur AG, Case C-557/12 (5 June 2014), ECLI:EU:C:2014:1317	79 and 81
Mark Fishing Co. Ltd et al. v United Fishermen & Allied Workers' Union et al (1973) 38 DLR (3d) 316, 1973 CanLII 1315 (SCC)	51
Mark Fishing Co. v United Fishermen & Allied Workers' Union (1972), 24 DLR (3d) 585, 1972 CanLII 1016 (BC CA)	51
Markson v MBNA Canada Bank, 2007 ONCA 334, [2007] 85 OR (3d) 321	98
Merck Frosst Canada Ltd v Wuttunee, 2009 SKCA 43, [2009] 5 WWR 228	102
NCC et al. v Puliese et al., [1979] 2 SCR 104	62
Odhavji Estate v Woodhouse, 2003 SCC 69, [2003] 3 SCR 263	63
Orpen v Roberts, [1925] SCR 364	62 and 63

AUTHORITY	Paragraph(s) Referenced
Palsgraf v Long Island Railroad Co, 248 NY 339 (NY App Ct, 1928)	111
Panasonic Corporation c. Option consommateurs, 2017 QCCA 1442	70
Parry Sound (District) Social Services Administration Board v OPSEU, Local 324, 2003 SCC 42, [2003] 2 SCR 157	59
Pro-Sys Consultants Ltd v Infineon Technologies AG, 2009 BCCA 503	36 and 130
Pro-Sys Consultants Ltd v Microsoft Corporation, 2011 BCCA 186	122
Pro -Sys Consultants Ltd v Microsoft Corporation, 2013 SCC 57, [2013] 3 SCR 477	cited throughout
Pro-Sys Consultants Ltd v Microsoft Corporation, 2014 BCSC 1280	55
Pro-Sys v Microsoft, 2010 BCSC 285	99 and 122
R v Imperial Tobacco Canada Ltd, 2011 SCC 42, [2011] 3 SCR 45	37 and 88
R v Maxzone Auto Parts (Canada) Corp, 2012 FC 1117, [2014] 1 FCR 871	42
R v Saskatchewan Wheat Pool, [1983] 1 SCR 205	63
Rawluk v Rawluk, [1990] 1 SCR 70	59
Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27	71
Rumley v British Columbia, 2001 SCC 69, [2001] 3 SCR 184	104-106
Shah v LG Chem Ltd, 2018 ONCA 819	70, 72, 75, 80, 86-87 and 129-130
Sun-Rype Products Ltd v Archer Daniels Midland Company, 2010 BCSC 922	100
Sun -Rype Products Ltd v Archer Daniels Midland Company, 2013 SCC 58, [2013] 3 SCR 545	91, 100-101 and 117
Taylor v 1103919 Alberta Ltd, 2015 ABCA 201, [2015] 19 Alta LR (6th) 407	78
Transport Oil Ltd v Imperial Oil Ltd and Cities Service Oil Co. Ltd, [1935] OR 215, 1935 CanLII 129 (ON CA)	52

AUTHORITY	Paragraph(s) Referenced
Verizon Communications Inc. v Law Offices of Curtis v Trinko LLP (2004), 540 US 398	43
Vivendi Canada Inc. v Dell'Aniello, 2014 SCC 1, [2014] 1 SCR 3	105 and 106
Watson v Bank of America Corporation, 2014 BCSC 532	99
Watson v Bank of America Corporation, 2015 BCCA 362	56, 65 and 99
Western Canadian Shopping Centres Inc. v Dutton, 2001 SCC 46, [2001] 2 SCR 534	104
Westfair Foods Ltd v Lippens Inc.(1989), 61 Man R (2d) 282, 1989 CanLII 5257 (MB CA)	55 and 61
LEGISLATION	
Act for the Prevention and Suppression of Combinations formed in Restraint of Trade in 1889, S.C. 1889, c. 41	41
An Act to Amend the Combines Investigation Act and the Bank Act and to Repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, S.C. 1975 c 76	110
Class Proceedings Act, RSBC 1996, c 50, ss 4, 8, 10, 27, 37	cited throughout
Competition Act, RSC, 1985, c C-34, , ss 1.1, 36, 45, 62	cited throughout
Statute of Limitations, RSPEI 1988, c S-7, s. 2(1)(g)	65
The Limitation of Actions Act, CCSM c L150, s. 2(1)(n)	65
SECONDARY SOURCES	
Blair, Roger D., Christine P. Durrance & Wenche Wang, "The *Kone* Decision: Economic Logic and Damage Estimation" (2016) 61:3 393 Antitrust Bull 393	73 and 78
Blair, Roger D., Virginia G. Maurer, "Umbrella Pricing and Antitrust Standing: An Economic Analysis" (1982) Utah L Rev 763	83

AUTHORITY	Paragraph(s) Referenced
Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada – First Stage: Bill C-227, November, 1973* (Ottawa: Information Canada, 1973)	76
Government of Canada, Competition Bureau, "Merger Enforcement Guidelines", *Merger Enforcement Guidelines*, Enforcement Guidelines (October 6, 2011) at ss. 6.19-6.20.	78
OECD, "Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation" (2005)	43
OECD, "Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels" (1998)	43
Peckman, John "Building Antitrust With Trust" (Remarks delivered at the Canadian Bar Association Spring Conference, Toronto, 10 May 2018).	42
Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, April 16, 1975, p. 34:12	67
Rutherford, Douglas & J.S. Tyhurst, "Competition Law and the Constitution: 1889-1989 and Into the Twenty-First Century" in R.S. Khemani & W.T. Stanbury eds, *Historical Perspectives on Canadian Competition Policy* (Halifax: The Institute for Research on Public Policy, 1991) 253 at 254-255	41
Sansom, Mark, Anna Morfey & Patrick Teague, "Recent Developments in Private Antitrust Damages Litigation in Europe, (2015) 29 Antitrust 33	81
Senate Standing Committee on Banking Trade and Commerce, *First Proceedings on "The Advance Study of Proposed Legislation Respecting the Combines Investigation Act, Competition in Canada or Any Matter Related Thereto"*, 29 Parl, 2nd Sess, (May 1, 1974)	53
Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th (Toronto: Lexis Nexis Canada, 2014) at §17.5	59
Treaty of the Functioning of the European Union, 2008/C 115/01 art101	81
Trebilcock, Michael et. al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press Incorporated, 2002)	110