PRICE-FIXING ACTIONS AFTER *PRO-SYS V MICROSOFT*: WORRYING IMPLICATIONS OF THE SUPREME COURT'S DECISION[1]

Paul-Erik Veel[2] & David Quayat[3]

In Pro-Sys Consultants Ltd. v Microsoft Corporation and its companion cases, the Supreme Court of Canada recognized the right of indirect purchasers to advance claims for losses arising from price-fixing conspiracies. The Supreme Court's decision, while settling a long-standing doctrinal debate in Canadian law, gives rise to a number of additional problems. These problems flow from the fact that the Supreme Court's decision allows purchasers to advance claims for the amount of the overcharge that they actually paid without any deduction for amounts passed on to downstream purchasers, while also capping the total recovery of both direct purchasers and indirect purchasers to the total amount of the overcharge that resulted from the price-fixing conspiracy. The combination of these rules may create disincentives to reaching settlements, particularly where parallel class proceedings are underway in multiple jurisdictions. These rules will also generate problems of apportionment of damages as between plaintiffs in different proceedings.

Dans la décision Pro Sys Consultants Ltd. c. Microsoft Corporation et les affaires qui s'y rapportent, la Cour suprême du Canada a reconnu le droit d'acheteurs indirects à déposer des plaintes en raison de pertes causées par des complots ourdis pour la fixation des prix. La décision de la Cour suprême, alors qu'elle met fin à un débat doctrinal de longue date en droit canadien, crée un certain nombre de problèmes supplémentaires. Ils découlent du fait que la décision de la Cour suprême permet aux acheteurs de déposer des plaintes pour le montant de la majoration payée sans déduction au titre des montants répercutés sur les acheteur en aval, tout en imposant un plafond pour le recouvrement total attribué aux acheteurs directs et indirects; plafond égal au montant total de la majoration résultant du complot pour la fixation des prix. La combinaison de ces règles pourrait dissuader les parties de trouver un terrain d'entente, particulièrement lorsque des recours collectifs parallèles sont intentés dans des ressorts multiples. Ces règles créeront en outre des problèmes de répartition des dommages-intérêts entre les plaignants parties à des instances différentes.

I. Introduction

The viability of a claim by indirect purchasers for price-fixing has been one of the most hotly contested questions in price-fixing law, if not competition law more generally, for decades. The problem is easy to articulate: where two or more suppliers of a product conspire to raise the price of that product, who can sue for losses suffered as a result of having had to pay higher prices? Do only the persons who directly purchased that product from those suppliers have a valid claim? Or can other persons who paid a higher price to purchase downstream products from those direct purchasers—commonly referred to as indirect purchasers—also advance a claim against the suppliers who conspired to raise prices?

In a trilogy of decisions released in November 2013, the Supreme Court of Canada unanimously provided a definitive answer to this question as a matter of Canadian law: indirect purchasers can indeed advance a cause of action for losses suffered as a result of a conspiracy to fix prices.[4] This article addresses the reasoning and impact of the Supreme Court's decisions in that trilogy of cases, focusing in particular on the Court's lead decision, *Pro-Sys Consultants Ltd. v Microsoft Corporation*.

The purpose of this Article is not to retread well-worn ground. The arguments for and against the appropriateness of claims by indirect purchasers have been amply explored by academics, judges, and practitioners. Rather, this Article will move past the basic debate and will address the reasoning and rules crafted by the Supreme Court in *Pro-Sys* and its companion cases. As set out below, even if one accepts that indirect purchasers ought to have a cause of action as a matter of Canadian law, that in no way commits one to supporting the reasoning or result in *Pro-Sys*. Rather, *Pro-Sys* has created significant additional problems that parties and the courts will now have to grapple with.

This Article proceeds as follows. Part II briefly sets out the evolution of the legal treatment of claims by indirect purchasers under both American and Canadian law prior to the *Pro-Sys* decision. Part III summarizes the Supreme Court's decisions in *Pro-Sys* and its companion cases. Part IV explores in detail the problems inherent in, and difficulties that will flow from, the Supreme Court's decisions.

II. The Indirect Purchaser Action Prior to *Pro-Sys*

The debate over the viability of indirect purchaser actions has been raging for more than forty years, first in the United States and more recently in Canada. The *Pro-Sys* decision arises out of that context. Consequently, it is important to first outline the background for that decision in both the United States and Canada.

1. United States

The American approach to actions by indirect purchasers was shaped, first, by two seminal cases from the Supreme Court that had the effect of prohibiting indirect purchaser actions under federal law, and second, by the backlash to those decisions.

The first case that critically shaped modern federal law in this area was *Hanover Shoe, Inc. v United Shoe Machinery Corp*.[5] Hanover Shoe had brought a private action against United Shoe Machinery Corp. for alleged monopolization of the shoe machine industry. Liability was easily established, as Hanover Shoe relied on a final judgment in a similar antitrust suit that had been brought by the federal government. However, the quantum of damages was hotly contested.

Among the damages issues that were contested was the question of whether Hanover Shoe was entitled to recover damages for the entirety of the overcharge that it had paid as a result of United's monopolization of the market, or whether United was entitled to deduct from Hanover's damages the portion of the overcharge that Hanover had passed on to its customers. Both the District Court and the Court of Appeals held that Hanover Shoe was entitled to recover the entirety of overcharge, without allowing for the fact that the overcharge may have been passed on.

On further appeal, the United States Supreme Court affirmed that conclusion.[6] The Court's decision to reject the passing on defence was based on a number of distinct policy considerations. First, the Supreme Court held that, given both the myriad economic considerations that go into price-setting as well as practical difficulties of proof, the task of establishing the applicability of the passing-on defence "would normally prove insurmountable."[7] The Supreme Court further expressed

concerns about trial efficacy, noting that allowing such a defence "would often require additional long and complicated proceedings involving massive evidence and complicated theories."[8]

Second, the Supreme Court also held that allowing a defence of passing on would reduce the effectiveness of the deterrent effect of antitrust laws, surmising that the ultimate consumers to whom any overcharge was passed on would have less of an incentive to bring a claim than did the direct purchasers.[9]

Hanover Shoe was followed nine years later by the Supreme Court's decision in *Illinois Brick Co. v Illinois*.[10] *Illinois Brick* remains the seminal US case on the issue of whether indirect purchasers have a cause of action under federal antitrust law. In that case, the state of Illinois was the purchaser of certain buildings that had been recently manufactured. Illinois Brick was a manufacturer of concrete blocks that had thereafter sold them to masonry contractors. Those contractors ultimately incorporated them into buildings that Illinois had purchased. Illinois alleged that Illinois Brick Co. had conspired with its competitors to keep prices of these inputs high. Illinois had not purchased any bricks directly from the defendants, but rather was claiming solely as an indirect purchaser.

The matter ultimately reached the United States Supreme Court. The majority of the Court held that indirect purchasers do not have standing under federal antitrust law to sue for damages. In reaching this conclusion, the Court relied on a number of different considerations to deny standing to indirect purchasers to pursue a claim in those circumstances.

First, the Supreme Court reasoned that its earlier decision in Hanover Shoe required it to reject the viability of a claim by indirect purchasers. The Court held that just as *Hanover Shoe* had rejected "defensive" passing-on, *Hanover Shoe* similarly mandated that "offensive" passing-on, allowing an indirect purchaser to bring a claim, had to be rejected. The Court explicitly rejected the position of the United States, which had participated in the proceeding as *amicus curiae*, that *Hanover Shoe* did not preclude indirect purchaser suits. The Court's rejection of such an asymmetry between defensive and offensive passing on was based on a number of concerns. Most notably, the Court expressed serious

concerns that such an asymmetry could lead to multiple liability for defendants:

> First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount.[11]

Second, the Court also opined that the reasoning expressed in *Hanover Shoe* against the use of defensive passing on applied equally to the use of offensive passing on. The Supreme Court reiterated the evidentiary difficulties relating to passing on, noting that proving the amount by which an overcharge was passed on to one indirect purchaser, and subsequently potentially passed on to another indirect purchaser further down the manufacturing or distribution chain, would be formidable.

Third, the Supreme Court again concluded, as it had noted in *Hanover Shoe*, that from a deterrence perspective, direct purchasers were better suited to bring a claim for damages against potential price-fixers.[12] The Supreme Court opined that indirect purchasers might only have a remote interest in prosecuting the claim.

Fourth, the Supreme Court noted that allowing indirect purchaser claims could lead to extremely complicated proceedings. If indirect purchasers were allowed to claim, there would be a strong argument that all potential indirect purchasers would have to be joined as necessary parties in price-fixing claims. The Court noted a host of procedural and practical problems that could arise if all parties needed to be joined in each case.[13]

The Supreme Court also reaffirmed its earlier holding in *Hanover Shoe* that a direct purchaser who has been harmed by a price-fixing conspiracy has standing to recover the entire amount of the overcharge notwithstanding that some of the overcharge might have been passed

on to purchasers down the production and distribution chains. As such, the fact that indirect purchasers did not have standing to assert such claims did not mean that there was not a party who could assert the claim for the entirety of the damages caused. Rather, it falls to the direct purchaser to assert the entirety of such a claim.

In summary, following *Illinois Brick*, under US federal antitrust law, an indirect purchaser has no standing to sue, while the direct purchaser can recover the entire amount of the overcharge. The defendant cannot reduce its liability to direct purchasers claiming that any portion of the cost was passed on to subsequent indirect purchasers.

The *Illinois Brick* rule has been very contentious in both the academy and the antitrust bar. Many have vigorously defended a rule that limits the right of recovery to direct purchasers. The rule has been defended on the theory that direct purchasers typically have greater incentives, information, and resources to bring claims against suppliers than do indirect purchasers.[14] Additionally, others have justified the rule on the practical difficulties with indirect purchaser actions, noting the evidentiary difficulties in establishing the quantum of any loss actually passed to indirect purchasers.[15]

By contrast, other authors have noted that preventing indirect purchasers from suing conflicts with the goals of both compensation and deterrence. Some have suggested that indirect purchasers, in fact, have a greater incentive to bring claims for price-fixing than do direct purchasers, on the basis that direct purchasers may be unwilling to disrupt relationships with suppliers.[16] Others have argued, not unreasonably, that the rule prohibiting claims by indirect purchasers directly undermines the compensatory function of antitrust law by denying recovery to a set of persons affected by misconduct.[17] Some have also questioned whether the difficulties of calculating the pass-through of the overcharge and the corresponding loss by indirect purchasers are actually as complicated as courts appear to assume.[18]

Subsequent to the Court's decision in *Illinois Brick*, a number of U.S. states have enacted laws that grant indirect purchasers the right to bring claims against suppliers who fixed prices.[19] The content of those laws differs between states. In some states, the Attorney General of the state is required to bring such actions on behalf of consumers, while

in others the actions can be brought by affected consumers, typically through class actions.[20] This situation has led in many cases to the simultaneous claims under both federal and state laws by direct and indirect purchasers, respectively.[21]

The current hodgepodge of state and federal approaches to these issues has been criticized. Many authors have noted that such rules may lead to overdeterrence and overcompensation: direct purchasers can claim under federal law for the entirety of an overcharge, while indirect purchasers can also claim under state laws for any portion of the overcharge passed on to them.[22]

A number of solutions have been proposed to the current morass. In its 2007 report, the Antitrust Modernization Commission called on Congress to repeal the *Illinois Brick* and *Hanover Shoe* rules in federal antitrust law, so as to avoid duplicative claims and recovery.[23] Some academics have also called for this.[24] Others have instead called for mandatory consolidation of all actions relating to any particular instance of price-fixing.[25] Still others have suggested that the difficulties can be overcome by the judicial creation of new exceptions to the *Illinois Brick* rule.[26]

Most tellingly, notwithstanding continuing debate in the United States over the appropriateness of indirect purchaser class actions, there is some consensus that the current legal situation is worse than many alternatives. For example, the Antitrust Modernization Commission was almost evenly split on the question of whether, if starting from a clean slate, antitrust law would be best served by recognizing only indirect purchaser claims or whether both direct and indirect purchaser claims should be recognized.[27] However, in light of the current legal situation, nine out of twelve Commissioners supported overruling both *Illinois Brick* and *Hanover Shoe*, and only one of the Commissioners expressed the view that the current situation could be ameliorated by limited procedural changes.[28]

2. The Canadian Landscape

The debate over the viability of an action by indirect purchasers is much more recent in Canada. Prior to *Pro-Sys*, there were no definitive statements by Canadian courts that indirect purchaser actions

either were or were not permissible. While some indirect purchaser cases were allowed to proceed at preliminary stages of class proceedings, courts were reluctant to reach any definitive conclusions as to whether indirect purchasers had a viable claim. In such cases, courts often noted that such issues were better resolved at a later stage of the proceedings.

Many early decisions relating to claims by indirect purchasers were decisions involving class action lawsuits in which, prior to certification, the parties had settled their dispute and a motion was brought for certification for the purpose of settlement. Courts typically allowed such matters to be certified and settled.[29] However, some courts did express the view that had the certification motion been contested, the plaintiff might have had difficulties establishing that the action could be certified as a class proceeding.[30] Of those cases that had proceeded to a contested hearing, the results were initially strongly against certification of claims by indirect purchasers.[31]

Importantly, decisions holding that claims by indirect purchasers could not be certified as class actions were not based on the conclusion that indirect purchasers could not, as a matter of law, establish a cause of action. Rather, those cases turned largely on the evidentiary challenges in proving loss and damages. Based on those difficulties, courts concluded that liability could not be established as a common issue and, in turn, that a class action was not the preferable procedure. Such decisions typically did not grapple with the fundamental question of whether indirect purchasers had a cause of action, instead resolving the matter on narrower grounds relating to certification.

The leading decision on the issue prior to *Pro-Sys* was the decision of the Ontario Court of Appeal in *Chadha v Bayer Inc.*[32] The representative plaintiffs in *Chadha* were indirect purchasers of iron oxide-coloured bricks and paving stones that were alleged to have been the subject of a price-fixing conspiracy. The plaintiffs purchased new homes with the bricks and paving stones in them from a home developer who bought them from the manufacturer. While the Competition Bureau had initially investigated the alleged conspiracy, it had abandoned its investigation by the time the Court of Appeal rendered its decision.

The Superior Court in *Chadha* had certified the action, holding that

it was not plain and obvious that an indirect purchaser had no cause of action.[33] The Divisional Court overturned the certification on the basis that, since damages had to be proved individually and not on a class-wide basis, a class action was not the preferable procedure.[34]

On behalf of a unanimous Court of Appeal, Justice Feldman upheld the refusal to certify, largely based on the complexities of proving the extent to which different players in the chain of purchase bear the higher price caused by the conspiracy.[35] Finding *Illinois Brick* to be persuasive, the Court of Appeal observed that there were many variables affecting the price of the homes at issue, and that it was unclear how one could prove that the increase in price resulting from the alleged conspiracy flowed all the way through the chain of purchases to indirect purchasers.[36] However, while the decision has often been read broadly, the narrow basis for that decision was that the plaintiffs had failed to lead expert evidence that provided a method that could be used at trial to prove that all end purchasers overpaid for homes.[37] As such, the Court explicitly left open the possibility of such actions in the future.

In 2007, two major and unrelated developments transferred the legal landscape for indirect purchaser actions. Importantly, neither development stemmed from or directly related to indirect purchaser actions.[38]

First, beginning in 2007, the Ontario Court of Appeal signalled an increased receptiveness to certification of cases involving complex evidentiary challenges in proving causation and loss. That year, the Ontario Court of Appeal rendered two decisions addressing these issues: *Markson v Canada Bank*[39] and *Cassano v Toronto-Dominion Bank*.[40] While neither of these cases dealt with the issue of claims by indirect purchasers, they signalled a considerable shift in the general approach in Ontario to the evidentiary challenges associated with assessing causation and damages in class actions. After *Markson* and *Cassano*, the degree of difficulty or expense involved in calculating individual class members' damages would no longer constitute a defence to certification. Courts would instead allow actions to be certified as class actions where the plaintiffs could provide some evidence of a plausible methodology to establish class-wide harm. As class-wide harm will typically be easier for a plaintiff to establish at certification than individual harm for specific purchasers,[41] these cases signalled

that courts would interpret the *Class Proceedings Act* broadly to ensure that otherwise meritorious claims were not frustrated by the complexities of determining how much was owed to whom.

The relaxed evidentiary standards set out in *Markson* and *Cassano* were applied in a number of subsequent decisions. One clear example of their application is the 2009 decision of the Ontario Superior Court of Justice in *Irving Paper Ltd. v Atofina Chemicals Inc*.[42] That case involved a proposed class proceeding on behalf of both direct and indirect purchasers of hydrogen peroxide and products containing hydrogen peroxide. The alleged conspiracy had been investigated in Europe and the US, with the European Commission concluding that the defendants had participated in a cartel. Certain of the defendants had pleaded guilty to price-fixing in the US. After surveying the case law at length, Justice Rady certified the action, finding a common issue in respect of the existence and scope of any conspiracy to fix prices and holding that it was not necessary that every member of the class have suffered damages.[43]

The effect of *Markson*, *Cassano* and the cases that followed was not that courts now concluded that indirect purchasers did have a recognizable claim under Canadian law. Rather, the effect of those decisions was to remove a significant procedural and evidentiary barrier to those cases being certified as class proceedings. That barrier having been removed, courts would ultimately have to contend more directly with the question of whether indirect purchasers had a cause of action at all, instead of deferring the question by concluding that a class of purchasers could not prove their claim on a common basis in any particular case.

The second major development that affected indirect purchaser actions was the Supreme Court's 2007 decision in *Kingstreet Investments Ltd. v New Brunswick (Finance)*.[44] In this case, nightclubs in New Brunswick sued to recover a tax that they alleged had been unconstitutionally collected by the provincial government. The Court of Queen's Bench agreed with the nightclubs that the tax was unconstitutional, but denied any recovery to the nightclubs on the basis that they had passed on the tax burden to their customers in the form of higher prices.[45] On appeal to the New Brunswick Court of Appeal, the Court allowed the nightclubs' appeal, effectively rejected

the passing on defence, and allowed recovery of the unconstitutionally collected taxes.[46]

The Province then appealed to the Supreme Court of Canada. The Supreme Court sided with the Court of Appeal, holding that the defence of passing on was not available to the Province. In the course of rejecting the availability of the defence of passing on, the Supreme Court specifically adverted to the difficulties of proof in cases where the passing on defence was invoked. The Supreme Court relied on the United States Supreme Court's decision in *Hanover Shoe* on this point:

> In addition to being contrary to the basic principles of restitution law, the defence of passing on has also been criticized for being economically misconceived and for creating serious difficulties of proof. In *British Columbia v Canadian Forest Products Ltd.*, [2004] 2 SCR 74, 2004 SCC 38, LeBel J., writing in dissent but not on this point, commented on the inherent difficulties in a commercial marketplace of proving that the loss was not passed on to consumers. LeBel J. noted that every commercial entity could be accused of passing on all or part of any damages suffered by it, by its own rates or charges to its customer. This is because it is difficult to determine what effect a change in a company's prices will have on its total sales. Unless the elasticity of demand is very low, the plaintiff is bound to suffer a loss, either because of reduced sales or because of reduced profit per sale. Where elasticity is low, and it can be demonstrated that the tax was passed on through higher prices that did not affect profits per sale or the volume of sales, it would be impossible to demonstrate that the plaintiff could not or would not have raised its prices had the tax not been imposed, thereby increasing its profits even further. LeBel J. referred to these various figures as "virtually unascertainable" (para 205, citing White J. in *Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 392 US 481 (1968), at p 493). LeBel J. ultimately concluded that "[t]he passing on defence would, in effect, result in an argument that no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages but was still solvent had obviously found a way to pass the loss on" (para 206, citing Ground J. in *Law Society of Upper Canada v Ernst & Young* (2002), 59 OR (3d) 214 (SCJ), at para 40).[47]

While the Supreme Court's decision was far removed from the context of indirect purchaser claims, the reasoning underlying the Supreme Court's rejection of the passing on defence with respect to an unconstitutional tax appeared to be equally applicable to the realm of indirect purchaser class actions. Indeed, *Kingstreet* appeared to be Canada's *Hanover Shoe*, setting the stage for a subsequent rejection of claims by indirect purchasers. Some commentators noted the difficulties that indirect purchasers would face following *Kingstreet*.[48] It was assumed by many that just as passing on could not be invoked defensively, it similarly could not be invoked offensively by indirect purchasers.

III. The Supreme Court's Decisions in *Pro-Sys Consultants, Sun-Rype Products Ltd.*, and *Option Consommateurs*

On October 31, 2013, the Supreme Court of Canada released decisions in three related matters: *Pro-Sys v Microsoft*; *Sun-Rype v Archer Daniels Midland*; and I*nfineon Technologies AG v Option Consommateurs*. In those decisions, the Supreme Court unanimously held that both direct and indirect purchasers were able to assert causes of action for losses caused by price-fixing conspiracies.

1. The Three Cases Before the Court

Pro-Sys v Microsoft

In *Pro-Sys*, the representative plaintiffs commenced a class action against Microsoft alleging that Microsoft had engaged in unlawful conduct relating to its PC operating systems and application software. Pro-Sys claimed that, as a result of Microsoft's conduct, class members paid and continue to pay higher prices for Microsoft operating systems and applications than they would have paid absent unlawful conduct. The proposed class consisted solely of British Columbia consumers who acquired Microsoft software for their own use and not for the purpose of further selling or leasing. Moreover, the class was limited to only include consumers who acquired such products from resellers rather than from Microsoft directly. As such, the proposed class consisted solely of indirect purchasers of Microsoft operating systems and applications.

Following a number of initial motions as to whether the claim raised a cause of action,[49] Justice Myers of the British Columbia Supreme Court certified the action pursuant to British Columbia's class proceedings statute.[50] Microsoft appealed the decision to the British Columbia Court of Appeal. In a 2-1 decision, the majority of the British Columbia Court of Appeal overturned the motion judge's decision, set aside the certification order and dismissed the action.[51] The majority decision, written by Justice Lowry, found that it was plain and obvious that indirect purchasers had no cause of action. The Court did not address the other certification requirement in section 4(1) of the *Class Proceedings Act*. In dissent, Justice Donald would have upheld the certification order, finding that indirect purchaser actions were permitted in Canada.[52]

Sun-Rype v Archer-Daniels Midland

In *Sun-Rype Products Limited v Archer-Daniels Midland Company*, the representative plaintiffs alleged that the defendant manufacturers engaged in an illegal conspiracy to fix the price of high fructose corn syrup thereby resulting in consumers having to overpay for a number of products, including soft drinks and baked goods. The plaintiffs included both a direct purchaser class as well as an indirect purchaser class.

Both the direct and indirect purchaser classes were certified by Justice Rice of the British Columbia Supreme Court.[53] Sun-Rype appealed that decision to the British Columbia Court of Appeal. The Court of Appeal heard the appeal in *Sun-Rype* at the same time as the appeal in *Pro-Sys v Microsoft*.[54] The Court split in the same way as it did in *Pro-Sys v Microsoft*.[55] Justice Lowry, with Justice Frankel concurring, held that it was plain and obvious that indirect purchasers do not have a cause of action. Consequently, the appeal was allowed with respect to indirect purchasers. Justice Donald in dissent would again have certified both the direct and indirect purchaser claims.

Infineon Technologies v Option consommateurs

The third decision released by the Court was in *Infineon Technologies AG v Option consommateurs*. That case arose under Quebec law and

raises distinct legal issues.[56] While a brief synopsis will be provided below, this article does not focus on that decision.

In *Option consommateurs*, the plaintiffs sought to bring a class action against the manufacturers of dynamic random-access memory (DRAM) chips. The defendants manufactured and sold DRAM chips to original equipment manufacturers (OEMs), such as Dell. Those OEMs then inserted various DRAM chips into electronic products. Those manufacturers in turn sold their products, which included DRAM chips, either to other intermediaries in the distribution chain or directly to consumers. The defendants in that case admitted having participated in an international conspiracy to fix the prices of DRAM chips sold to OEMs. The defendants were subject to extensive fines in both the United States and Europe.

Option consommateurs applied to the Superior Court to bring a class action on behalf of both direct purchasers and indirect purchasers. The motion judge dismissed the certification motion on the basis that the Quebec Court did not have jurisdiction to hear the action, as no damage had been suffered in Quebec.[57] In the alternative, the motion judge held that the plaintiffs had not met all of the necessary conditions for proceeding as a class action.

The plaintiffs appealed to the Quebec Court of Appeal. The Court of Appeal overturned the motion judge's decision and authorized the class action.[58] The Court of Appeal unanimously held that the Quebec Courts had jurisdiction over the claim and that the requirements for certification were met.

2. The Supreme Court's Decisions

The appeals in all three of these cases were heard together by the Supreme Court. The Court's lead decision was *Pro-Sys*, which was written by Justice Rothstein on behalf of a unanimous Supreme Court.

In considering whether indirect purchasers had a cause of action, the Court first addressed Microsoft's submission that the Court's decision in *Kingstreet* barred indirect purchasers from asserting a cause of action against conspirators. Microsoft had contended that because a wrongdoer could not rely on the fact that the plaintiff had passed

on some of its losses to another party to limit its liability, the party to whom those losses had been passed on similarly could not assert a cause of action for those losses.[59] *Pro-Sys* took a very different position, contending instead that the prohibition on the defence of passing on articulated in *Kingstreet* was limited to the circumstances of that case, namely, the recovery of *ultra vires* taxes.[60]

The Court rejected both of these positions. The Court held that the general prohibition on a defendant relying on the defence of passing on applied in all contexts.[61] The implication of this conclusion was that a defendant in a price-fixing action could not rely on the defence of passing on to limit a claim by a direct purchaser for the entirety of an overcharge. However, the Court then proceeded to hold that the rejection of passing on as a defence did not preclude the use of offensive passing on by indirect purchasers. In reaching this conclusion, the Court considered and rejected a number of arguments advanced by Microsoft against the recognition of offensive passing on.

Microsoft had argued that allowing for offensive passing on would potentially result in multiple or double recovery, as both direct purchasers and indirect purchasers could assert claims for the same harm. The Court noted that this "concern cannot be lightly dismissed."[62] However, the Court ultimately rejected this concern, holding that "[p]ractically, the risk of duplicate or multiple recoveries can be managed by the courts."[63]

The Court found that the risk of double recovery only arose where there were multiple suits brought by both direct and indirect purchasers, either sequentially or simultaneously. With respect to the possibility of sequential litigation leading to multiple recoveries, the Court noted that the two year limitation period set out in section 36(4)(a) of the *Competition Act* made it unlikely that such problems could arise.[64]

With respect to the potential for double recovery where multiple actions were pending simultaneously, the Court held that "it will be open to the defendant to bring evidence of this risk before the trial judge and ask the trial judge to modify any award of damages accordingly."[65] In other words, the Court held that trial judges had the discretion to reduce a claim for damages where there was a risk of double recovery

that was beyond the court's control. The Court further held that trial judges also had the ability to take into account pending proceedings in other jurisdictions and could "deny the claim or modify the damage award in accordance with an award sought or granted in the other jurisdiction in order to prevent overlapping recovery."[66]

The Court also considered the evidentiary complexities associated with claims by indirect purchasers. The Court accepted that it could indeed be difficult in any particular case by indirect purchasers to establish that they have suffered loss, and that complex economic evidence might be required. However, the Court concluded that this rationale was not itself sufficient to bar indirect purchaser actions altogether, and instead called for these issues to be considered on a case-by-case basis.[67]

The Court also relied on the American experience in support of its conclusion that claims by indirect purchasers should be permitted. The Court concluded that while *Illinois Brick* remained valid at the federal level, "its subsequent repeal at the state level in many jurisdictions and the report to Congress recommending its reversal demonstrate that its rationale is under question."[68] The Court further opined that recent US doctrinal commentary supported overturning the *Illinois Brick* rule.

In the result, the Supreme Court in *Pro-Sys* overturned the British Columbia Court of Appeal and ordered certification of the proceeding as a class action. The Court also upheld the decision of the Quebec Court of Appeal to certify the proceeding as a class action in *Option consommateurs*.[69] The Court did uphold the British Columbia Court of Appeal's decision not to certify the *Sun-Rype* matter, on the narrower grounds that there was no identifiable class.[70]

3. Claims by Direct and Indirect Purchasers Following *Pro-Sys*

Pro-Sys articulated the following rules for price-fixing actions where claims are asserted by both direct and indirect purchasers:

1. Both direct and indirect purchasers have causes of action against suppliers for damage they suffered as a result of a conspiracy by suppliers to raise prices;

2. A defendant cannot avoid or reduce a claim by a plaintiff on the

basis that that plaintiff passed on some or all of an overcharge to an indirect purchaser further down the production and distribution chain. The implication of this rule is that each purchaser down the production and distribution chain can claim (though not necessarily recover) the full value of the overcharge that that producer had to pay (which would include any overcharges that were in fact passed on); and

3. Direct and indirect purchasers cannot collectively recover more than the total of the overcharge.

In adopting these rules, the Supreme Court followed a different course than most of the options that have been considered to deal with indirect purchaser actions. Most commentators have at least implicitly treated the rules in *Hanover Shoe* and *Illinois Brick* as a package, and have advocated in favour of either adopting or rejecting both; that is, either: 1) direct purchasers can recover for the entirety of the overcharge and indirect purchasers have no claim; 2) or both direct purchasers and indirect purchasers can only claim and recover for the losses they in fact suffered, taking into account the fact that some of the overcharge was passed on. In *Pro-Sys*, the Supreme Court implicitly rejected that dichotomy, choosing in effect to apply *Hanover Shoe* but not *Illinois Brick*.

However, the Supreme Court also avoided the current situation prevailing throughout much of the United States, where direct purchasers and indirect purchasers can each claim and recover for the very same loss. Rather, the Supreme Court avoided this situation, by allowing both claims to proceed, but by requiring judges to cap total damages at the total of the overcharge.

The rules set out by the Supreme Court create a divergence between the amounts that plaintiffs can claim and the amounts they can recover. This implication of the Supreme Court's decision is best set out more formally as follows.

Consider a case in which a party to an overcharging conspiracy sells a product to a direct purchaser (DP), which is in turn sold to an indirect purchaser (IP1), and thereafter to consumers (IP2). The total amount of the overcharge (O_{Total}) is equal to the overcharge paid by the direct purchaser. That overcharge is equal to difference between the

price paid by the direct purchasers for the overcharged product (P^{c}_{DP}) and the price that the direct purchaser would have paid in a competitive market (P^{nc}_{DP}).

However, the actual economic damage suffered by the direct purchaser is equal to the total overcharge, less the amount of the overcharge that was passed on to the indirect purchaser who purchased the product from the direct purchaser. The amount of the overcharge that was passed on to the indirect purchaser is equal to the difference between the price paid by the indirect purchasers to the direct purchasers for the overcharged product (P^{c}_{ID1}) and the price that the indirect purchaser would have paid in a competitive market (P^{nc}_{ID2}).

The same reasoning applies, mutatis mutandis, for each subsequent level. Consequently, the actual economic damage suffered by each purchaser is, as follows:

	Actual Economic Harm Suffered by Party		
Direct purchasers	$[P^{c}_{DP}\text{-}P^{nc}_{DP}]$ - (the overcharge paid by the direct purchaser)	$[P^{c}_{IP1}\text{-}P^{nc}_{IP1}]$ (the overcharge passed on to the first indirect purchasers)	$=O_{DP}$
First indirect purchasers (e.g. downstream manufacturer)	$[P^{c}_{IP1}\text{-}P^{nc}_{IP1}]$ - (the overcharge paid by the first indirect purchasers)	$[P^{c}_{IP2}\text{-}P^{nc}_{IP2}]$ (the overcharge passed on to the second indirect purchasers)	$= O_{IP1}$
Second indirect purchasers (e.g. consumers)	$[P^{c}_{IP2}\text{-}P^{nc}_{IP2}]$ (the overcharge paid by the second indirect purchasers)		$= O_{IP2}$

The total overcharge in the above example is equivalent to $O_{Total} = O_{DP} + O_{IP1} + O_{IP2}$. The actual economic damage suffered by the each of parties set out above is equal to the overcharge they ultimately had to pay, as represented by O_{DP}, O_{IP1} and O_{IP2}, respectively.

However, under *Pro-Sys*, each plaintiff can claim the total overcharge paid by that plaintiff, without any reduction for the portion of the overcharge that was passed on to a subsequent indirect purchaser. Consequently, in the above example, the direct purchasers and the first indirect purchasers can claim the total of the amount in the first set of square brackets in the above table, without any reduction for the amount passed-on set out in the second set of square brackets.

As such, pursuant to the *Pro-Sys*, the actual amounts claimed by each of the parties are as follows:

	Claim that Party can Advance	**Actual Economic Harm Suffered by Party**
Direct purchasers	$O_{DP} + O_{IP1} + O_{IP2}$	O_{DP}
First indirect purchasers (e.g. downstream manufacturer)	$O_{IP1} + O_{IP2}$	O_{IP1}
Second indirect purchasers (e.g. consumers)	O_{IP2}	O_{IP2}

The Supreme Court's decision leads to a difference between the amounts that the parties can claim and the amounts that the parties can ultimately recover. In the above example, the total amount that plaintiffs could claim is $O_{DP} + 2O_{IP1} + 3O_{IP2}$, while the total recovery for all plaintiffs is limited to $O_{Total} = O_{DP} + O_{IP1} + O_{IP2}$.

The situation becomes more complicated as the production and distribution chains grow longer. All else being equal, the addition of another layer creates additional claims, without increasing the total of damages that all parties can jointly recover.[71]

The Supreme Court did not provide guidance as to how courts should allocate damages in order to avoid overcompensation to plaintiffs and overpayments by defendants. Rather, the Supreme Court simply stated that trial judges would sort out these issues.

IV. Problems with the Supreme Court's decisions

Having set out the Supreme Court's decision in the previous section, this section now explores the implications of—and potential difficulties—that will arise from rules articulated by the Supreme Court in *Pro-Sys*.

As noted above, this article will not address or explore in any detail the problems with indirect purchaser actions *per se*. These issues have been addressed extensively by judges and commentators, and will not be addressed here.[72] Rather, this article will focus in particular on the unique rule adopted by the Supreme Court in *Pro-Sys* for dealing with claims by both direct and indirect purchasers.

In the simplest case envisaged by the Supreme Court—that is, where the direct purchasers and all indirect purchasers assert claims against conspirators in a single proceeding and that proceeding proceeds to trial—it is likely that a trial judge could sort out the damages issues in order to ensure that total recovery remains no more than the total amount of the overcharge. In those circumstances, it seems likely that a trial judge would award each party damages equal to the actual economic harm that they suffered.[73]

Unfortunately, the stylized example envisaged by the Supreme Court is unlikely to occur in practice. Rather, in practice, there are likely to be two complicating factors. First, the reality of overcharge actions is that the vast majority of such actions settle rather than proceed to trial. Second, in many circumstances, plaintiffs are likely to commence proceedings in different jurisdictions. Each of these considerations gives rise to significant problems.

1. The settlement dynamics created by the Court's decisions

Overcharge actions, like most disputes and like most class actions in particular, rarely proceed to trial. In many such cases, there has already been a criminal conviction (typically after a guilty plea), if not in Canada, then in another jurisdiction. In such circumstances, where liability is very likely to be established at trial, all parties will typically want to avoid the time and expense of extensive litigation.

To that end, parties will routinely seek to settle such claims. Such claims will typically be settled at some discount on the value of the actual claims to reflect the residual risk that always exists in litigation, the costs of proceeding through to trial and the fact that monies will be paid out much sooner than they would have been had the parties proceeded to trial. Being able to settle such claims at a discount ensures that defendants actually have an incentive to settle. The incentive to settle a claim for the entirety of a claim's value will typically be fairly limited (particularly in cases where the defendant has already suffered the reputational hit that follows from pleading guilty to the conspiracy).

From a social perspective, it is obvious that settlement of such claims is generally desirable. Courts actively encourage parties to settle litigation. Settlement preserves scarce judicial resources, reduces transaction costs, ensures that plaintiffs actually receive some compensation, and removes risk for both plaintiffs and defendants. Consequently, it is trite policy that the law ought to encourage the settlement of overcharge claims.[74] A fundamental problem with the rules articulated in *Pro-Sys* is that they make it more difficult for parties to settle overcharge claims.

The difficulties can be seen by considering any circumstance in which some plaintiffs in the production and distribution chain wish to settle claims with a defendant, while other plaintiffs do not. Such circumstances could theoretically arise in one of three scenarios:

1. Where a class action is commenced in one jurisdiction that includes both direct and one or more layers of indirect purchasers, and only some of them wish to settle – This scenario is uncommon in practice, particularly given that all purchasers are usually represented by the same class counsel, at least in early stages of litigation;

2. Where separate proceedings are commenced in the same jurisdiction by direct purchasers and one or more layers of indirect purchasers, and only some of them wish to settle – This scenario is also uncommon in practice. Plaintiffs' counsel typically commence class proceedings on behalf of all aggrieved parties with viable claims, in order to maximize the value of the claim. The likelihood of parallel class proceedings with different purchaser classes in different proceedings is therefore low. This scenario

could also arise where a plaintiff with a large claim opts out of a class action and chooses to pursue a defendant individually, though that too is relatively rare; and

3. Where separate proceedings are commenced in different jurisdictions on behalf of all direct and indirect purchasers within that jurisdiction – This scenario is far more common than the first two. It is not uncommon for the substantially similar class actions to proceed in different provinces on behalf of residents of those provinces, with one class action also including residents of all other provinces. For example, plaintiffs' lawyers might commence proceedings in British Columbia on behalf of all direct and indirect purchasers resident there, in Quebec on behalf of all direct and indirect purchasers resident there, and in Ontario on behalf of all Canadian direct and indirect purchasers, except for those resident in British Columbia or Quebec. Some of those proceedings may settle at different times than others, or some may be contested while others settle. Where the production, distribution and consumption of the same product occur in different provinces, different plaintiffs in the same distribution chain may be part of class actions in different provinces.

In any of these circumstances, the rules in *Pro-Sys* may create impediments to successful settlement. For example, taking the third circumstance set out above,[75] suppose that class actions are commenced in British Columbia on behalf of all direct and indirect purchasers resident there, and in Ontario on behalf of all direct and indirect purchasers resident elsewhere across Canada. Suppose also that all of the direct purchasers and first indirect purchaser distributors are located in British Columbia, such that the British Columbia class action includes both direct purchasers who sold to indirect purchaser distributors, the indirect purchaser distributors who sold to others in Canada, and British Columbia consumers. Suppose that, by contrast, the Ontario class action consists primarily of consumers from across the rest of the country who purchased products from the indirect purchaser distributors that are included in the British Columbia class action.

Suppose then that the Ontario class action, which consists primarily of consumers, and a defendant wish to settle the claims asserted in that class action. The consumer class, in light of the risks and cost

of further litigation, could be prepared to settle the claims for half of the actual economic damage that they suffered (that is, $0.5 * O_{IP2}$, in the language of the above example). Suppose also that the defendant would be prepared to settle with the consumer class on those terms in order to eliminate its liability for that aspect of the overcharge. This is a desirable settlement that courts should encourage.

Unfortunately, under the rules set out in *Pro-Sys*, the defendant has no economic rationale to settle on those terms with the consumer class in the Ontario class action. The reason for this is that if the defendant pays out $0.5 * O_{IP2}$ to the consumer class, the defendant will continue to be liable to the direct purchaser and the first indirect purchaser in the British Columbia class action for the balance of the uncompensated economic harm suffered by the consumer class. While the settlement will preclude such plaintiffs from receiving the total of the claims that they could have asserted (in order to ensure that total compensation does not exceed O_{Total}), the direct purchasers could continue to assert a claim for $O_{DP} + O_{IP1} + 0.5 * O_{IP2}$, while the first indirect purchasers could continue to assert a claim for $O_{IP1} + 0.5 * O_{IP2}$.

Put simply, the Supreme Court's rules in *Pro-Sys* create a possibility of liability whack-a-mole for potential defendants: as soon as a defendant resolves claims with one plaintiff, any remaining liability that that defendant might have had to that plaintiff may become recoverable by other plaintiffs elsewhere in the distribution chain. In those circumstances, settlement with a single set of plaintiffs may not provide any reprieve for the defendant, as it would continue to be liable to the remaining sets of plaintiffs for the balance of the overcharge. In those circumstances, the defendant has no incentive to settle with that set of plaintiffs.

In theory, a defendant could avoid this problem by settling sequentially down the production chain (that is, settling first with the direct purchasers, then with the first indirect purchasers, then with the second indirect purchasers). This is because the direct purchasers are able to assert a claim that no other plaintiff is able to assert, namely, O_{DP} (the portion of the overcharge absorbed and not passed on to an indirect purchaser). Consequently, the defendant always has an incentive to settle with the direct purchaser for less than O_{DP}, as such a settlement conclusively eliminates a unique liability to which a defendant

is exposed.[76] In more concrete terms, in the example set out above, the defendants could try to first settle the British Columbia class proceeding that includes the direct and first indirect purchasers, and thereafter to settle the Ontario consumer class action.

The problem with being limited to this particular sequential settlement strategy is two-fold. First, such a limitation necessarily decreases the flexibility that parties would otherwise have to settle the matter. An intransigent plaintiff or plaintiff's counsel in one province could effectively preclude the settlement of the matter, even if a consumer class was willing to settle the matter.

Second, in many circumstances, the settlements that a defendant will have an incentive to reach with a direct purchaser may be much smaller than those that the direct purchaser will be willing to take. As set out above, the only circumstances in which the defendant will have an incentive to settle with a direct purchaser is when the value of the settlement is less than O_{DP}. This is because the only liability that the plaintiff can extinguish by settling with the direct purchasers is the liability for O_{DP}. Any portion of the total overcharge that is greater than O_{DP} can continue to be asserted by indirect purchasers. Consequently, the defendant has no ability to eliminate those liabilities through a settlement with the direct purchasers, and the defendant therefore has no incentive to settle a matter with direct purchasers for greater than O_DP if other claims remain outstanding.

However, direct purchasers may not have an incentive to settle their claims at an early stage for that amount. Direct purchasers have the largest claim to assert, as they can claim for $O_{TOTAL} = O_{DP} + O_{IP1} + O_{IP2}$ (that is, the entirety of the overcharge, without any reduction for the portion of the overcharge that was passed on). In cases where the amount of the overcharge passed on was minimal and the economic damage actually suffered by the direct purchasers is a large proportion of the total overcharge, settlements may be possible. However, where the vast majority of the overcharge is passed on by the direct purchasers to subsequent indirect purchasers, direct purchasers may not have much incentive to settle their claims for less than their actual damages.

To take a concrete example, suppose that the total overcharge charged to a direct purchaser was $1 per unit, and suppose that the

direct purchaser was able to pass on $0.90 of the overcharge to the first indirect purchaser. While the direct purchaser can maintain a claim against the defendants for $1 per unit, a defendant would only have an incentive to settle a claim with a direct purchaser for less than $0.10 per unit (which is the portion of the liability which is exclusive to the direct purchaser). In such circumstances, it seems unlikely that the parties would be able to settle as between themselves, thereby precluding the defendants from trying to settle with the first indirect purchasers.

These problems may be avoided or overcome in the context of class actions, where court approval is necessary for settlement.[77] One way to avoid this problem would be for the court to order that a payment by a defendant to one set of plaintiffs for a fraction of those plaintiffs' actual economic harm extinguishes the entirety of that claim that any plaintiff could assert. For example, assume that the total overcharge was $1 per unit, and that the total portion of that overcharged paid by consumers was $0.30 per unit. It seems plausible that a court could order, in the context of settlement, that a payment by the defendant to consumers for 50% of the overcharge they paid ($0.15 per unit) extinguishes the entirety of those consumers' claim ($0.30 per unit). Consequently, the defendant would thereafter only be liable to the remaining plaintiffs for a maximum of $0.70 per unit. This solution would be the counterpart to the *Pierringer* agreements and bar orders often seen in class proceedings with multiple defendants, where only some settle.

While such a solution might be available in some cases, it seems likely to be unworkable in many situations. The effect of such an order would be to extinguish a portion of the claims that some or all of the remaining plaintiffs could assert without those plaintiffs receiving any compensation. It seems unlikely that the court could make such an order without the consent of those plaintiffs or an extensive adjudication. It would otherwise be novel for a court to extinguish each plaintiff's claims in that way.[78] While there is some authority for plaintiffs' claims being extinguished in this way in certain contexts—for example, in class actions that also relate to the *Companies' Creditors Arrangement Act*[79]—the authority of the courts to extinguish claims in the circumstances set out above is not yet established.

In some cases, the remaining plaintiffs might consent to such an order, understanding that it would ultimately facilitate settlement of

all claims. Moreover, the remaining plaintiffs might not have a genuine interest in opposing such an order, as the portion of the claim being barred would often be a claim for a portion of the overcharge that the remaining plaintiffs had not actually incurred.

However, even if such orders are legally possible and plaintiffs were prepared to consent to orders precluding them from claiming for economic losses they did not actually suffer, a significant problem lies in the fact that it is difficult to know with certainty the amount of the overcharge passed on to each plaintiff and, in turn, the actual economic harm suffered by each plaintiff. For example, the non-settling plaintiffs might assert that the settling plaintiffs and the defendants have overstated the settling plaintiff's actual claim. Returning to the example above, the non-settling plaintiffs might assert that, rather than having collectively suffered only $0.70 per unit of overcharge, they have in fact suffered $0.85 per unit of overcharge. In those circumstances, the non-settling plaintiffs would undoubtedly have good reason to oppose an order that limited them to a claim of $0.70 per unit. Where such disputes arise and cannot be resolved, settlement approval hearings would have to, in effect, become mini-trials on complicated economic data.

In practical terms, it seems likely that in most cases, the only way for a defendant to actually resolve a matter without running into these problems would be to simultaneously settle with all plaintiffs. This outcome may also make it more difficult to reach settlements. In many cases, it may be more difficult to settle a matter simultaneously with several sets of plaintiffs rather than one set of plaintiffs.

Additionally, where different sets of plaintiffs have different views about the actual economic harm that each has suffered, settlement will be even less likely. For example, it may be that each set of plaintiffs is willing to settle for 50 percent of the actual economic damage they have suffered. However, if parties overestimate their own actual economic damage, the total cost of settling for 50 percent of each plaintiff's assessment of their own economic harm would typically exceed 50 percent of the total overcharge.

In addition to the impediments to settlement that the *Pro-Sys* rules create, those same rules also create the possibility for the opposite

problem, namely strategic settlements. As observers have noted, in many circumstances, a direct purchaser plaintiff may have strong commercial relationships with a defendant. As such, a defendant and a direct purchaser plaintiff might have an incentive to settle claims for the entirety of the direct purchaser's claim, that is, the entirety of the overcharge. Such agreement might even tacitly be made on the basis that the direct purchaser would provide advantageous commercial terms to the defendant in the future.

A payment by a defendant to a direct purchaser for the entirety of the direct purchaser's claims would represent payment for the entirety of the overcharge, as the direct purchaser has a claim for the entirety of the overcharge without any deduction for amounts actually passed on. Under the rules articulated in *Pro-Sys* that bar double compensation, such a settlement would extinguish the entirety of claims by the indirect purchasers as well. While the intention of *Pro-Sys* is presumably to allow indirect purchasers to recover for losses actually incurred, the effect of the decision does not actually ensure that that will happen.

In order to resolve this problem, courts could recognize that indirect purchasers can advance a claim, presumably in unjust enrichment, for amounts recovered by the direct purchasers representing the losses actually incurred by those indirect purchasers. This would, in effect, be the corollary of a claim for contribution and indemnity as between co-defendants. While such a development is possible, it would be a novel and substantial development.

The possibility of strategic settlements of the type described above appears relatively remote at the present time, and it may be that the risk is more of a theoretical one than a practical one. However, the Court's decision in *Pro-Sys* does give rise to this possibility, and clever lawyers and bold parties could undoubtedly find some way to try to use it to their advantage.

In general terms, the rules established in *Pro-Sys* create a dynamic game, where the actual value of the claims of each of the plaintiffs depends upon actions taken by each of the other plaintiffs and the defendants. A smaller settlement by one plaintiff increases the value of the claims available to the remaining plaintiffs, and vice versa. This can give rise to undesirable strategic behaviour on the part of both

plaintiffs and defendants, hindering parties from reaching what would otherwise be desirable settlements.

2. Additional complexities with multiple Canadian proceedings

The previous section considered the unusual settlement dynamics, and the difficulties that can follow, to which the rules in *Pro-Sys* give rise. As described above, those difficulties can arise in any circumstance where one set of plaintiffs in a production and distribution chain wishes to settle, but others do not.

However, the problems to which the rules in *Pro-Sys* give rise go beyond difficulties in settlement. Rather, the *Pro-Sys* rules generate additional complications where not all potential plaintiffs' claims in Canada are asserted in the same proceeding. Difficulties can arise in two distinct circumstances: first, where some plaintiffs in the distribution chain have commenced proceedings, while others have not; and second, where different plaintiffs have commenced proceedings in two different courts.

Serious problems could arise where some plaintiffs in the distribution chain have commenced proceedings, but others have not. For the reasons set out above, it is relatively unlikely that this would occur within one province, as class counsel typically try to include all potential plaintiffs within the proposed class. However, as above, these circumstances could occur where a proceeding is commenced within one jurisdiction that includes plaintiffs resident within that jurisdiction, but no proceeding is commenced in another jurisdiction. Consider a modified form of the example set out above: suppose a class proceeding has been commenced in British Columbia on behalf of the direct purchasers, indirect purchaser distributors, and consumers in that class, while no class proceeding has yet been commenced in Ontario on behalf of a national class of consumers.

Where the British Columbia plaintiffs have commenced an action, and the possibility exists of a separate entity or class commencing an action in Ontario, a defendant might understandably be reluctant to settle a proceeding with only the British Columbia plaintiffs, due to the same issues discussed above. If both the British Columbia direct purchaser, first indirect purchasers and the defendant are prepared to

settle the matter for 50 percent of the total overcharge, such a settlement might appear to be in the interests of all parties to the existing proceeding. However, where the prospect exists that a national consumer class action (for consumers other than those in British Columbia) might subsequently be commenced to claim for the remaining balance of the overcharge, the defendant might have little incentive to resolve the matter with the direct purchasers and first indirect purchasers in British Columbia.

The Supreme Court explicitly addressed this issue in *Pro-Sys*. The Court noted that claims for overcharge are subject to a two-year limitation period. Consequently, the Court reasoned that the likelihood that new claims might be subsequently asserted was relatively small. Although the Court's reasoning on this issue was aimed at the problem of avoiding over-compensation for plaintiffs as a whole, the same reasoning applies to the settlement problem addressed above. Where the limitation period is only two years long, given how long class actions can take to proceed, a defendant could reasonably wait two years until the limitation period had expired to then try to settle the matter with all plaintiffs who had commenced actions (subject to the problems described above).

Unfortunately, the Court's reasoning on this issue is deficient, as the Court misinterpreted the applicable limitation period, at least for statutory claims under the *Competition Act*. Under section 36(4)(a) of the Competition Act, the limitation period is two years from the date of the later of: (i) a day on which the conduct was engaged in, or (ii) the day on which any criminal proceedings relating thereto were finally disposed of.[80]

In practical terms, the possibility of litigation threatens defendants to actions under section 36 of the *Competition Act* for much longer than the usual two year limitation period. Rather, where conduct is made publicly known other than through a resolution of Canadian criminal proceedings (for example, through a guilty plea in criminal proceedings in a foreign jurisdiction, or through the commencement of a class proceeding in the United States), a Canadian plaintiff could commence proceedings for an overcharge much more than two years in advance of the expiry of the applicable limitation period.[81]

Because of the settlement dynamics described above, a defendant could reasonably want to delay any resolution of the plaintiff's claims until the applicable limitation period had expired. Unfortunately, because of section 36(4)(a) of the *Competition Act*, such a limitation period might not expire for several years until after the commencement of the proceeding by one plaintiff. In those circumstances, the effect of the Court's decision in *Pro-Sys* is to provide defendants with an understandable incentive to avoid expeditiously resolving matters with some plaintiffs, but instead to delay any settlement for a substantial period of time. This clearly undesirable incentive necessarily flows from the rules articulated in *Pro-Sys*.[82]

Distinct but equally vexing problems arise where different actions are commenced in different courts and one of those actions proceeds through to trial. Consider again the example of a class action in British Columbia that includes direct and indirect purchasers located there, while a class action in Ontario consists exclusively of consumers.

In those circumstances, the British Columbia plaintiffs would assert an entitlement to the entirety of the overcharge, while the consumers in the Ontario action would assert an entitlement to the actual overcharge they paid. Under the rules set out in *Pro-Sys*, the parties in both proceedings could not recover the entirety of their claims, as that would result in double recovery. In order to avoid double recovery in those circumstances, courts could employ one of the following four rules, none of which is satisfactory.

First, courts could adopt the principle that a plaintiff who obtains judgment first receives the entirety of their claim, and the plaintiff who obtains judgment second is limited to recovering an amount of funds such that the total recovery does not exceed the total overcharge. Continuing with the example above, in the event that the British Columbia plaintiffs obtained judgment first, this outcome would mean that the direct purchaser, the indirect purchaser distributor, and British Columbia consumers would recover the entirety of the overcharge to be distributed between them, while the national consumer class (excluding British Columbia consumers) would recover no damages whatsoever. This is clearly not a desirable outcome, and it is unlikely to be the approach that courts would adopt.

Second, courts could grant judgment to the first plaintiff to proceed to trial for the entirety of that plaintiff's claim, and in turn recognize a cause of action by other plaintiffs to claim against the first successful plaintiffs for any inability on those other plaintiffs to claim damages for the losses they actually suffered as a result of the judgment obtained by the first plaintiffs. As noted above, such an option would be a novel legal development. It would also increase the volume and complexity of litigation, as each claim might require multiple lawsuits to resolve: that is, first between the first plaintiffs and the defendant, then between other plaintiffs and the defendant for any aspect of the claim for which the first plaintiff was not compensated, as well as between the plaintiffs. Such proceedings would give rise to potential issues of *res judicata* between the various proceedings. This outcome is also undesirable, and this too seems unlikely to be the outcome to which courts default.

Third, the court could provide the plaintiffs who obtain judgment first in an amount that is discounted as compared to their actual entitlement, reflecting the fact that there is another action pending by different plaintiffs in the production and distribution chain. For example, if the British Columbia direct purchaser and indirect purchaser distributor plaintiffs obtained judgment while a national consumer class action was still pending in Ontario, the British Columbia Court might decide not to award the plaintiffs damages in respect of the claims asserted by the national consumer class in Ontario, on the basis that the action by the latter is still pending.

This outcome poses difficulties, as it requires the court in the British Columbia action to adjudicate on what consumers might receive in the Ontario action—effectively usurping the role of the trial judge in the forum where the consumers have chosen to litigate this action. This outcome could also either undercompensate or overcompensate the British Columbia direct purchaser and indirect purchaser distributor plaintiffs relative to their actual claims, depending on how the Ontario action proceeds.

Fourth, the courts in the two jurisdictions could try to coordinate their proceedings such that, in the event that each court determines that the defendants are liable to the plaintiffs in each proceeding, the court holds a joint proceeding to determine the apportionment of damages as between the respective plaintiffs. Such a solution would be

novel, but not completely unprecedented; such coordinated proceedings have been held, for example, between American and Canadian courts in cross-border insolvency matters.[83]

However, such coordination is not without significant downfalls or difficulties. For example, if one action is proceeding more quickly than another, the more expedient action could be delayed substantially in order to ensure that the damages hearings proceed simultaneously, thereby prejudicing the plaintiff(s) in the more rapid action. Additionally, this course of action cannot fully eliminate the risk that the two courts might reach different conclusion as to how damages are to be apportioned as between the plaintiffs. Such differences could be because of different evidentiary rules, differences in substantive law, or simply differences in the different courts' assessments of the relevant evidence.[84] In the event of such a conflict, there is no obvious mechanism for resolving it.

3. Where some of the purchasers in the chain claim for the overcharge in the United States, the problems become more complex

The modern reality of liberalized international trade flows means that, in many if not most cases, not all of direct and indirect purchasers of a product will be located within the same jurisdiction. For example, a conspirator might sell an input to a direct purchaser located in North Dakota, who then re-sells that input (as incorporated into an intermediate product) to a downstream indirect purchaser located in Manitoba, who thereafter sells the product to consumers all across Canada. These multi-jurisdictional production and distribution chains give rise to further problems under the framework set out in *Pro-Sys*.

It is impossible to exhaustively categorize here all the potential legal problems that can arise. The specific issues will depend on, among other things, the particular American statute(s) under which American plaintiffs assert claims, the number of levels of indirect purchasers and their locations, and the extent to which the overcharge is passed on through the manufacturing and distribution chain. However, even the simplest example—that of a direct purchaser who operates and was overcharged in the United States, and subsequently passed on a portion of that overcharge to Canadian consumers—is sufficient to highlight

some of the problems that will arise under the legal framework articulated in *Pro-Sys*.

As set out above, under American federal antitrust law, a direct purchaser is entitled to recover the entirety of an overcharge, without the defendant being able to avail themselves of a defence of passing on. In this respect, American federal antitrust law is no different than the framework set out in *Pro-Sys*. However, under American federal antitrust law, unlike in *Pro-Sys*, there is no bar which limits the defendant to paying out the total overcharge. Consequently, while the Supreme Court in *Pro-Sys* essentially directed trial judges to reduce damage awards to ensure that defendants do not pay out twice in respect of the same overcharge, there is no such rule in American federal antitrust law.

This asymmetry creates a perverse incentive on the part of defendants to Canadian proceedings to delay those proceedings until after the resolution of American proceedings. Consider, for example, the case of an American direct purchaser who, as a result of a conspiracy, is overcharged $1 per unit, and who subsequently passes on $0.50 of that overcharge to Canadian indirect purchasers. Under American federal antitrust law, the American direct purchaser can assert a claim for the entire $1 per unit of the overcharge, while the Canadian indirect purchasers can assert a claim for the $0.50 of the overcharge that they have actually paid.

If the American direct purchaser action proceeds to trial first, and the direct purchaser is successful and recovers the entirety of the overcharge, Canadian indirect purchaser is, under the rule set out in *Pro-Sys*, precluded from any recovery at all. Any further recovery would expose the defendant to disgorging the overcharge twice, which is prohibited under *Pro-Sys*.

By contrast, if the Canadian indirect purchaser action proceeds to trial first, the Canadian court is left to either award damages to the indirect purchasers commensurate with the harm they have suffered, or to discount their damages award to reflect the fact that an American direct purchaser action is outstanding. Both of those alternatives are problematic for the reasons discussed above. However, in this scenario,

there is at least the risk that defendants will be required to disgorge the overcharge twice.

In sum, if the American action proceeds before the Canadian action, a defendant can reasonably expect to avoid having to pay out the overcharge more than once. By contrast, if the Canadian action proceeds first, the defendant faces a risk of having to pay the overcharge more than once. As such, it is less risky for a defendant to Canadian proceedings to attempt to delay the proceedings until all American proceedings are resolved, so that the defendant can confidently know its maximum liability in the Canadian proceedings (that is, the total overcharge, less any amounts paid out to either direct or indirect purchasers in the same distribution chain in settlements or judgments in American proceedings). The incentives created by *Pro-Sys* lead to a rational basis for defendants to Canadian proceedings to drag their heels. Where a quick settlement of a Canadian action might otherwise be in all parties' best interests, *Pro-Sys* provides an incentive to do exactly the opposite. This course of action delays any recovery for Canadian indirect purchasers and likely increases the total costs of the proceeding.

V. Conclusion

Pro-Sys has resolved, at least for the time being, the debate as to whether indirect purchasers have a viable claim against alleged conspirators for price-fixing. It appears, at least at first glance, that plaintiffs' counsel have been successful. The doors have been unambiguously opened to such claims. However, in resolving the basic question of whether indirect purchasers have a cause of action against price-fixers, the Supreme Court articulated a series of legal rules that are very likely to give rise to additional problems in the future.

From the plaintiff's perspective, under the rules set out in *Pro-Sys*, the quantum of damages that any potential plaintiff could hope to recover is dependent not only on the harm that that plaintiff has suffered, but also on the decisions and actions of other potential plaintiffs. By contrast, defendants may face overlapping claims for the same damages from a series of plaintiffs. For the reasons described above, these rules may lead to undesirable consequences from a policy perspective.

It is critical that the judges, the bar, and the academy move past

the basic question as to whether indirect purchasers have a cause of action, and instead focus on how claims by direct and indirect purchasers will proceed in practice. While the fundamental question of whether indirect purchasers can claim may be resolved, this area of law is not yet fully settled.

Endnotes

[1.] The views and opinions contained in this article are those of the authors, and do not represent the views of the authors' employer or clients. The authors wish to thank Scott Rollwagen for his insightful comments on an earlier draft of this article, and Chris Kinnear-Hunter for his invaluable research assistance. Any errors remain those of the authors alone.

[2] Paul-Erik Veel is a lawyer at Lenczner Slaght Royce Smith Griffin LLP and an Adjunct Professor at the University of Toronto Faculty of Law. He has a broad litigation practice, including class actions and competition litigation.

[3] David Quayat is a lawyer at Lenczner Slaght Royce Smith Griffin LLP. His commercial litigation practice includes class actions and competition litigation.

[4] The three decisions released by the Court simultaneously on this issue are *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 [Pro-Sys SCC], *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype SCC*], and *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 [*Option consommateurs SCC*].

[5] 392 US 481 (1968).

[6] *Ibid* at 489:

> "If, in the face of the overcharge, the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should, and his property has been illegally diminished, for, had the price paid been lower, his profits would have been higher. It is also clear that, if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."

[7] *Ibid* at 493.

[8] *Ibid*.

[9] *Ibid* at 494.

[10] 431 US 720 (1977).

[11] *Ibid* at 730.

[12] *Ibid* at 734-35.
[13] *Ibid* at 739-40.
[14] See e.g. William M Landes & Richard A Posner, "Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick" (1979), 46 U Chicago L Rev 602; George J Benston, "Indirect Purchasers' Standing to Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals to Change the Illinois Brick Rule" (1986) 55 Antitrust LJ 213.
[15] See e.g. William M Landes & Richard A Posner, "Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick" (1979), 46 U Chicago L Rev 602.
[16] See e.g. K J O'Connor, "Is the Illinois Brick Wall Crumbling?" (2001) 15:3 Antitrust 34; A Thimmesch, "Beyond Treble Damages: Hanover Shoe and Direct Purchaser Suits After Comes v. Microsoft Corp." (2005) 90 Iowa L Rev 1649.
[17] See e.g. CC Van Cott, "Standing at the Fringe: Antitrust Damages and the Fringe Producer" (1983) 35 Stan L Rev 763; Jonathan T Tomlin & Dane J Giali, "Federalism and the Indirect Purchaser Mess" (2002) 11 Geo Mason L Rev 157; Andrew I Gavil, "Thinking Outside the Illinois Brick Box: A Proposal for Reform" (2009) 76 Antitrust LJ 167.
[18] See e.g. Robert G Harris & Lawrence A Sullivan, "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis" (1979) 128 U Pa L Rev 269.
[19] See US, Antitrust Modernization Commission, *Report and Recommendations* (2007), online: <http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf> [*Antitrust Modernization Report*]. The validity of such statutes was upheld by the Supreme Court in *California v ARC America Corp.*, 490 US 93 (1989) where the Supreme Court held that federal antitrust law that precluded indirect purchaser class actions did not pre-empt state laws that allow such actions.
[20] Edward D Cavanagh, "Illinois Brick: A. Look Back and a Look Ahead" (2004) 17 Loy Consumer L Rev 1.
[21] For commentary on the state of the law on these issues in the United States, see e.g. Daniel R Karon, "'Your Honor, Tear Down that Illinois Brick Wall!' The National Movement Toward Indirect Purchaser Standing and Consumer Justice" (2004) 30 Wm Mitchell L Rev 1351. The creation of new causes of action under state law has not been without procedural difficulties. For example, in some cases, jurisdictional issues may prevent indirect purchser plaintiffs from claiming against an out of state conspirator. See Stephen Blecha, "Chipping Away at the Illinois Brick Wall: The Use of Calder Jurisdiction in State Indirect Purchaser Litigation" (2012) U Ill L Rev 879.
[22] Tomlin & Giali, *supra* note 17.
[23] *Antitrust Modernization Report, supra* note 19.
[24] Michael Jacobs, "Symposium: Lessons from the Pharmaceutical Antitrust Litigation: Indirect Purchasers, Antitrust Standing, and Antitrust Federalism" (1998) 42 St Louis ULJ 59 at 85.

[25] Barak D Richman & Christopher R Murray, "Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule" (2007) 81 S Cal L Rev 69.
Congress attempted to address some of these issues through the *Class Action Fairness Act of 2005*, Pub L No 109-2, 119 Stat 4 [*CAFA*], which allows for consolidation of various state and federal proceedings in federal courts in certain circumstances. However, the *CAFA* only allows for consolidation of pretrial motions; consolidated trials in federal court remain impossible. Consequently, the Antitrust Modernization Commission rejected the *CAFA* as an adequate solution to the problem of duplicative litigation by direct and indirect purchasers: see *Antitrust Modernization Report, supra* note 19 at 266.
[26] Matthew M Duffy, "Chipping Away at the Illinois Brick Wall: Expanding Exceptions to the Indirect Purchaser Rule" (2012) 87 Notre Dame L Rev 1709.
[27] *Antitrust Modernization Report, supra* note 19 at 266.
[28] *Ibid* at 270.
[29] See e. g. *Vitapharm Canada Ltd. v F. Hoffman-LaRoche Ltd.*, [2000] OJ No 4594 (SCJ). In that case, the plaintiffs advanced a class action involving wholesale and retail purchasers affected by a world-wide conspiracy to increase the price of vitamins and vitamin-related products. A number of the corporate defendants had already pleaded guilty to conspiracy charges in the United States and Canada. In 2005, the plaintiffs in *Vitapharm* moved for certification against the settling defendants. The Superior Court of Justice approved the settlement.
[30] See e.g. *Bona Food Ltd. v Ajinomoto U.S.A. Inc.*, 2004 CanLII 17525 (Ont Sup Ct). *Bona Food* involved allegations of price-fixing in the context of MSG and nucleotides and included direct and indirect purchasers in the class. While Justice Cullity approved the settlement, he noted the difficulties that indirect purchasers might face, noting as follows: "If certification had been contested in this case, the plaintiffs may well have encountered difficulty in persuading the court that the requirement in section 5(1)(d) [of the Class Proceedings Act] was satisfied, and in particular, that a manageable procedure could be established for proving loss on an individual basis if this were found not to be amenable to a trial of common issues."
[31] See e.g. *Price v Panasonic*, [2002] OJ No 2362 (Ont Sup Ct); *Harmegnies v Toyota Canada*, [2007] JQ No 1072 (Que Sup Ct); *Steele v Toyota Canada Inc.*, 2008 BCSC 1063; *Axiom Plastics Inc. v E.I. DuPont Canada Co.* (2007), 87 OR (3d) 352 (Ont Sup Ct).
[32] (2003), 63 OR (3d) 22 (CA) [*Chadha CA*].
[33] *Chadha v Bayer Inc.* (1999), 45 OR (3d) 29 (Ont Sup Ct). Justice Sharpe's decision to certify the proceeding as a class action followed an earlier decision in which he had dismissed the bulk of a motion by the defendants that the pleadings did not disclose a cause of action. See *Chadha v Bayer Inc.* (1998), 82 CPR (3d) 202 (Ont Sup Ct).
[34] *Chadha v Bayer Inc.* (2001), 54 OR (3d) 520 (Div Ct).
[35] *Chadha CA, supra* note 32.

[36] *Ibid* at paras 43-52, 66-67.
[37] *Ibid* at para 30.
[38] For an insightful overview of the changes in how courts approached competition class actions during this period, see Brian Radnoff, "A Brave New World: Certification of Competition Class Actions" (2010) 7:4 Class Action 486.
[39] 2007 ONCA 334 [*Markson*].
[40] 2007 ONCA 781 [*Cassano*].
[41] Radnoff, *supra* note 38 at 490.
[42] [2009] OJ 4021, 99 OR (3d) 358.
[43] *Ibid* at paras 116-18.
[44] [2007] 1 SCR 3, 2007 SCC 1 [*Kingstreet SCC*].
[45] *Kingstreet Investments v PNB*, 2004 NBQB 84.
[46] *Kingstreet Investments Ltd. and 501638 N.B. Ltd. v The Province of New Brunswick as represented by the Department of Finance and New Brunswick Liquor Corporation,* 2005 NBCA 56.
[47] *Kingstreet SCC, supra* note 44 at para 40.
[48] See e.g. W Michael G Osborne, "The Loss Stops Here: Should Indirect Purchasers be able to Sue for Price Fixing Losses?" (2012) 25:1 Can Comp L Rev 50 at 71.
[49] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2006 BCSC 1047; *Pro-Sys Consultants Ltd. v Microsoft Corporation (No. 2)*, 2006 BCSC 1738.
[50] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2010 BCSC 285.
[51] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2011 BCCA 186 [*Pro-Sys BCCA*].
[52] For insightful commentary on the lower court decisions in each of these matters, see Osborne, *supra* note 48.
[53] *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2010 BCSC 922.
[54] *Pro-Sys BCCA, supra* note 51 at para 2.
[55] *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2011 BCCA 187.
[56] While most common law provinces share reasonably similar class proceedings regimes, Quebec's class action legislation is somewhat different and raises distinct considerations.
[57] O*ption Consommateurs c Infineon Technologies, a.g.*, 2008 QCCS 2781
[58] *Option Consommateurs c Infineon Technologies, a.g.*, 2011 QCCA 2116
[59] *Pro-Sys SCC, supra* note 4 at para 17.
[60] *Ibid* at para 24.
[61] *Ibid* at paras 24-29.
[62] *Ibid* at para 37.
[63] *Ibid.*
[64] *Pro-Sys SCC, supra* note 4 at para 38.
[65] *Ibid* at para 39.
[66] *Ibid* at para 40.
[67] *Ibid* at para 45.
[68] *Ibid* at para 60.

[69] *Option consommateurs SCC, supra* note 4.

[70] *Sun-Rype SCC, supra* note 4. The difficulty in that case was that indirect purchasers could not identify whether the products they had consumed did in fact contain high fructose corn syrup. As such, individuals could not, based on the class definition put forward, self-identify whether they were part of the class or not.

[71] Formally, in any situation where there are n purchasers, with purchaser zero being the direct purchaser and purchasers 1 through *n* being indirect purchasers one through n, the total damages that can be recovered jointly among all purchasers is equal to $O_{Total} = \sum_{i=0}^{n} O_i$. The aggregate of claims that all purchasers can advance equals $\sum_{i=0}^{n}(1+i)O_i$.
Two points can be readily inferred from these expressions. First, all else being equal, damages that can be claimed increase directly with the total number of indirect purchasers. Second, all else being equal, damages that can be claimed increase directly as the proportion of the total economic brunt of the overcharge born by downstream purchasers increases. It is unusual that the total amount of claims that can be advanced would vary based on factors other than the quantum of harm actually suffered.

[72] American commentary on this issue is extensive, and many of the articles addressing these issues have been referred to in the footnotes above. For Canadian commentary on these issues, see e.g. John P Brown, "Class Action Certification and Indirect Purchasers in Canada" (2003) 28 Int'l Legal Practitioner 12; Osborne, *supra* note 48; Jean-Marc Leclerc & David Sterns, "The Case for Permitting Indirect Purchaser Claims in Canada: A Critical Analysis of *Pro-Sys Consultants and Sun-Rype*" (2012) 25:1 Can Comp L Rev 96.

[73] The outcome in those circumstances would resemble the outcome that would have been reached had the Court explicitly allowed the defence of passing on and limited a direct purchaser's claim to his actual economic harm. As such, the Supreme Court's rule can be reframed as recognizing the defence of passing on, except in circumstances where the party to whom the costs were passed on is not also asserting a cause of action. In other words, the rule in *Pro-Sys* can be seen as the Supreme Court limiting the application of *Kingstreet* and accepting the defence of passing on in certain circumstances, without explicitly doing so.

[74] That legislatures and courts adopt a public policy of encouraging litigants to settle disputes is beyond doubt: see e.g. *Sable Offshore Energy Inc. v Ameron International Corp*., 2013 SCC 37 at para 11. Various mechanisms contained in procedural rules are designed specifically to encourage settlement. Examples of these include requirements to mediate and the imposition of adverse cost consequences for a party who fails to accept a reasonable offer to settle. See *Rules of Civil Procedure*, RRO 1990, Reg 194, ss 24.1, 49.

[75] The same considerations described below also apply to the two other

circumstances described above. However, given that they are less likely to occur in practice, the focus of the consideration will be on the third scenario.
[76] In turn, once the defendant has settled with that direct purchaser, the defendant thereafter has an incentive to settle with the first indirect purchaser for less than O_{IP1}, and so on.
[77] *Class Proceedings Act*, SO 1992, ss 29(2)-(3). In order to approve a settlement, the Court must find that the settlement is fair, reasonable, and in the best interests of the class. See e.g. *Kidd v The Canada Life Assurance Company*, 2014 ONSC 457 at paras 51-56.
[78] Such an order seems at first glance to be similar to similar types of orders that courts already made. For example, in the context of class proceedings, where the plaintiff settles with some but not all defendants, and where non-settling defendants also seek contribution and indemnity from settling defendants, it is common for the settling defendant to seek and obtain a "bar order" that precludes any parties from advancing claims against them in respect of their own cause of action. The effect of such an order is to bar the non-settling defendants' claims for contribution and indemnity without the non-settling defendants' consent. However, in those circumstances, courts typically expect a plaintiff to agree to limit its claim against the non-settling defendants to their several liability, rather than their joint liability. As such, the non-settling defendants whose claims for contribution and indemnity are barred are not substantively prejudiced. See generally *Ontario New Home Warranty Program v Chevron Chemical Company* (1999), 46 OR (3d) 130 (Ont Sup Ct); *Osmun v Cadbury Adams Canada Inc.*, 2010 ONSC 2643, aff'd 2012 ONCA 841.
[79] See *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36; *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078, leave to appeal dismissed, *a Plan of Compromise or Arrangement of Sino-Forest Corporation*, 2013 ONCA 456.
[80] *Competition Act*, RSC 1985, c C-34, s 36(4)(a).
[81] See e.g. discussion at *Bérubé v Makita Power Tools Canada Ltd.*, 40 CPR (3d) 108 (FC TD) at para 29.
[82] The situation is further complicated by the fact that plaintiffs to overcharge claims typically assert claims both under s. 36 of the *Competition Act* and for the common law tort of conspiracy. This was the case in *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57. In such circumstances, different limitation periods may apply, as the limitation period in s. 36 of the *Competition Act* would apply to the *Competition Act* claim, while the applicable provincial limitation period would apply to the conspiracy claims.
[83] See e.g *Re Nortel Networks Corporation* (2009), 50 CBR (5th) 77; *Re Nortel Newtorks Corporation*, 2011 ONSC 3805 at para 3.
[84] In practical terms, across common law Canadian provinces, there is limited risk of divergent results due to differences in substance or procedure, as class actions regimes are relatively similar and the cause of action is grounded in the *Competition Act*, a federal statute.