COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Godfrey v. Sony Corporation,* 2017 BCCA 302

Date: 20170818
Docket: CA43711

Between:

Neil Godfrey

Respondent
(Plaintiff)

And

Sony Corporation, Sony Optiarc, Inc., Sony Optiarc America Inc., Sony of Canada Ltd., Sony Electronics, Inc., NEC Corporation, NEC Canada Inc., Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd., Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., Samsung Electronics America, Inc., Hitachi-LG Data Storage, Inc., Hitachi-LG Data Storage Korea, Inc., Hitachi Ltd., LG Electronics, Inc., LG Electronics Canada, LG Electronics USA, Inc., Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., Philips Electronics Ltd., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., BenQ Corporation, BenQ America Corporation and BenQ Canada Corp., Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd., and Pioneer Electronics of Canada Inc.

Appellants
(Defendants)

And

TEAC Corporation, TEAC America, Inc., TEAC Canada, Ltd., and Quanta Storage, Inc., and Quanta Storage America, Inc.

(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated May 13, 2016 (*Godfrey v. Sony Corporation*, 2016 BCSC 844, Vancouver Registry S106462).

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Place and Date of Hearing:	Vancouver, British Columbia June 7, 2017
Place and Date of Judgment:	Vancouver, British Columbia August 18, 2017

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman

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Summary:

The plaintiff initiated class action proceedings alleging that the defendant companies participated in a price-fixing cartel that raised the price British Columbians paid for optical disc drives and products containing such devices between 2004 and 2010. The proposed class was a hybrid class consisting of both direct and indirect purchasers, as well as purchasers of products that were not manufactured or supplied by the defendants ("Umbrella Purchasers"). The plaintiff advanced five causes of action: breach of s. 45 of the Competition Act, the tort of civil conspiracy, the unlawful means tort, unjust enrichment, and waiver of tort. With certain exceptions, the certification judge conditionally certified the action as a class proceeding. The defendants appealed on the grounds that the judge erred by recasting the "commonality of harm" standard for indirect purchasers, by holding that a breach of the Competition Act could supply the "unlawfulness" element for various common law causes of action, and by holding that Umbrella Purchasers could assert causes of action against them. A subset of defendants (the "Pioneer Defendants") further submitted that the judge erred in failing to find that the claim against them was statute-barred.

Held: appeal dismissed.

***Pioneer Defendants' Appeal**: The judge did not err in his analysis. While a limitation period argument can be considered at the certification stage in exceptional circumstances, it generally should not. It would not be appropriate to do so here, as the limitation period issue was bound up in the facts. Further, it was not "plain and obvious" that neither the discoverability rule nor the doctrine of fraudulent concealment could be relied upon to toll the limitation period.*

***Main Appeal**: The judge did not err in his analysis.*

> *(1) **Commonality of Harm**: To have loss certified as a common issue, the plaintiff's proposed methodology must offer a reasonable prospect of establishing that overcharges have been passed through to the indirect purchaser level, not necessarily that each and every class member suffered harm. The judge did not err in concluding that standard was met.*
>
> *(2) **Breach of Competition Act as Supplying "Unlawfulness Element"**: This court's decision in Watson v. Bank of America Corporation is dispositive of the issue: A breach of the Competition Act may supply the "unlawfulness" element for various common law causes of action. It is not open to this division to reconsider and overturn that decision.*
>
> *(3) **Umbrella Purchasers**: Neither the spectre of indeterminate liability nor the other concerns raised by the defendants provide a basis for denying the Umbrella Purchasers certification. Further, the judge did not err in concluding that Mr. Godfrey would be an appropriate representative of the Umbrella Purchasers or in accepting the plaintiff's litigation plan.*

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. INTRODUCTION

[1] This appeal concerns a proposed class action alleging that the defendants (appellants in this appeal) participated in a global, criminal price-fixing cartel that raised the price British Columbians paid for optical disc drives and products containing such devices. Mr. Godfrey, on behalf of the class, alleges five causes of action: breach of s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34; the tort of civil conspiracy; the unlawful means tort; unjust enrichment; and waiver of tort. Mr. Justice Masuhara in the court below conditionally certified the class action proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]: *Godfrey v. Sony Corporation*, 2016 BCSC 844.

[2] The defendants challenge the certification on three principal grounds, alleging that the judge erred in law: (1) by recasting the standard of commonality at certification for indirect purchasers; (2) by holding that a breach of s. 45 of the *Competition Act* could supply the "unlawfulness" element for various common law causes of action; and (3) by holding that "Umbrella Purchasers" could assert various causes of action against the defendants. A subset of the defendants appeal on the basis that the judge erred in law by failing to find that the action against them was statute-barred by virtue of the limitation period contained in s. 36(4) of the *Competition Act*. The defendants ask that the order for certification be set aside.

[3] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

[4] In describing the proposed class action, it is useful to define the key terms and concepts that will be referred to:

- **Optical Disc Drives** ("**ODDs**"): Memory storage devices that use laser light or electromagnetic waves to read and/or record data on optical discs.
- **ODD Products**: Computers and videogame consoles (containing ODDs) and ODDs designed to be attached externally to devices such as computers.

- **Direct Purchasers**: Class members who purchased an ODD or ODD Product manufactured or supplied by a defendant from that defendant.
- **Indirect Purchasers**: Class members who purchased an ODD or ODD Product manufactured or supplied by a defendant from a non-defendant.
- **Umbrella Purchasers**: Class members who purchased from a non-defendant an ODD or ODD Product that was not manufactured or supplied by a defendant.

[5] The proposed class action is brought on behalf of all B.C. residents who purchased ODDs or ODD Products between January 1, 2004 and January 1, 2010. This is a "hybrid" class comprising both Direct Purchasers and Indirect Purchasers of ODDs and ODD Products. It also includes purchasers of ODDs and ODD Products that were not manufactured or supplied by the defendants, but instead by other manufacturers or suppliers who were not part of the alleged cartel. Such purchasers are called "Umbrella Purchasers".

[6] The rationale for the inclusion of Umbrella Purchasers is that it is alleged the cartel's price-fixing scheme "moved the market", creating an "umbrella" of supra-competitive prices. The theory is that the conspiracy to artificially raise or maintain ODD prices set a market pricing norm that led other manufacturers and suppliers in the industry that were not part of the conspiracy to set their prices higher than they otherwise would have under competitive conditions. This is said to have caused consequential harm to Umbrella Purchasers by virtue of the inflated prices they paid for non-defendant ODDs or ODD Products.

[7] The representative plaintiff, Mr. Neil Godfrey, is a businessman resident in Whistler, who deposes that he purchased ODD Products (a laptop and a gaming console) during the class period. The defendants – 42 in total – are manufacturers, marketers, distributors, and/or sellers of ODDs and ODD Products to customers in Canada, either directly or indirectly through affiliates or independent distributors and retailers. A subset of defendants – Pioneer Corporation; Pioneer North America, Inc.; Pioneer Electronics (USA) Inc.; Pioneer High Fidelity Taiwan Co., Ltd.; and Pioneer Electronics of Canada Inc. (together, the "Pioneer Defendants") – raise limitation issues.

[8] Although the plaintiff commenced the main action on September 27, 2010, the action against the Pioneer Defendants (which was consolidated with the main action in the court below) was not commenced until August 16, 2013, more than three-and-a-half years after the end date of the class period. The Pioneer Defendants maintain that the claim against them is statute-barred because it was commenced after the expiry of the two-year limitation period contained in s. 36(4) of the *Competition Act*.

III. CERTIFICATION REASONS

[9] The judge embarked on a five-part analysis reflecting the requirements for certification set out in s. 4(1) of the *CPA*:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[10] I will summarize the main parts of that analysis that are germane to this appeal.

(1) Do the Pleadings Disclose a Cause of Action?

[11] Citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and *Hollick v. Toronto (City)*, 2001 SCC 68, the judge acknowledged that the cause of action requirement in s. 4(1)(a) is satisfied unless, assuming the pleaded facts are true, it is plain and obvious that the claim cannot succeed. He noted that five causes of action were included in the plaintiff's proposed notice of civil claim:

1) breach of s. 45 of the *Competition Act*;

2) the tort of civil conspiracy;

3) the unlawful means tort;

4) unjust enrichment; and

5) waiver of tort.

[12] The lion's share of the s. 4(1)(a) analysis addressed the alleged breach of s. 45 of the *Competition Act*. Section 36 of the *Competition Act* provides in part:

> 36.(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, …
>
> …
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> …
>
> (4) No action may be brought under subsection (1),
>
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (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,
>
> whichever is the later;
>
> …

[13] To succeed in a claim under s. 36(1), Mr. Godfrey had to plead that the defendants breached a provision of Part VI ("Offences in Relation to Competition") and that he and the other class members suffered loss or damage as a result. Mr. Godfrey alleged breach of s. 45(1), which during the class period provided:

> Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence ….

[14] The plaintiff's notice of civil claim alleged that the defendants had secretly entered into a conspiracy by which they agreed to increase or maintain the prices of ODDs and ODD Products during the class period, and that the class members had suffered harm as a result by having to pay artificially high non-competitive prices. The judge was satisfied that Mr. Godfrey had pleaded the elements of a breach of s. 45(1), as well as the elements entitling him and the other class members to relief under s. 36(1).

[15] The judge then turned to the argument advanced by the Pioneer Defendants that because the action against them was commenced after the expiry of the two-year limitation period contained in s. 36(4) of the *Competition Act*, the claim was bound to fail as against them. As the plaintiff's allegations were limited to the proposed class period, which ended January 1, 2010, the Pioneer Defendants maintained that the limitation period expired (at the latest) on January 1, 2012. The action against them, however, was not commenced until August 16, 2013.

[16] The judge rejected the Pioneer Defendants' submission on this point. First, while acknowledging that the authorities on whether limitation defences could be considered in a certification application were mixed, the judge took it to be "well-established that limitation defences are affirmative defences that do not arise until pleaded", citing this court's decision in *Jensen v. Ross*, 2014 BCCA 173. He acknowledged the British Columbia Supreme Court's decision in *Watson v. Bank of America Corporation*, 2014 BCSC 532 [*Watson BCSC*], rev'd in part 2015 BCCA 362 [*Watson BCCA*], in which a cross-application was brought under Rule 9-5 of the *Supreme Court Civil Rules*, B.C.

Reg. 168/2009, to strike a claim in a proposed class action alleging breach of s. 61 of the *Competition Act*.

[17] In *Watson BCSC*, Bauman C.J.S.C. (as he then was) struck the claim as "bound to fail" because s. 61 had been repealed more than two years before the claim was filed. No application under Rule 9-5 had been made in the present case. Accordingly, the judge concluded that the pleadings disclosed a cause of action against the Pioneer Defendants, and the limitation defence could not be considered at the certification stage.

[18] In the alternative, even if he was wrong in his conclusion that the Pioneer Defendants' limitation period arguments could not be considered at the certification stage, the judge found that it was not plain and obvious that the claim against them was statute-barred. This was because it was not plain and obvious that neither the "discoverability rule" nor the "doctrine of fraudulent concealment" could apply to toll the limitation period.

[19] The judge considered the potential applicability of the discoverability rule, the judge-made rule of construction providing that a cause of action arises for the purposes of a statutory limitation period only when the material facts on which it is based have been, or ought to have been, discovered by the plaintiff in the exercise of reasonable diligence. Mr. Godfrey had pleaded that the defendants communicated secretly and had taken steps to conceal the alleged conspiracy; the question was whether the discoverability rule could toll the running of the limitation clock until the conspiracy was, or ought to have been, discovered.

[20] The judge acknowledged that the text itself suggested that the limitation period would run from the occurrence of the prohibited conduct without regard to the injured party's knowledge. He noted, however, that the text was not necessarily determinative, citing the "modern principle" of statutory interpretation embraced in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. He then reviewed the case law, noting that the courts have reached differing conclusions as to whether the discoverability rule can

apply to s. 36(4). Given this apparent inconsistency, it was not plain and obvious that the rule could not apply.

[21] The judge then turned to the potential applicability of the doctrine of fraudulent concealment, the equitable principle that suspends the running of the limitation period until the injured party ought reasonably to have discovered the cause of action. This doctrine is aimed at preventing unscrupulous defendants from using a limitation period provision as an instrument of fraud.

[22] The judge noted that Mr. Godfrey had pleaded that the defendants had taken steps to conceal their alleged conspiracy. Although the plaintiff had not pleaded a special relationship, the judge did not see this omission as being fatal to his claim, citing this court's decision in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278 [*Sun-Rype BCCA*], leave to appeal ref'd [2008] S.C.C.A. No. 416, as authority for the proposition that a purely commercial relationship could suffice for equitable fraud. Accordingly, he concluded it was not plain and obvious that the doctrine of fraudulent concealment could not toll the limitation period under s. 36(4).

[23] Having found it was not plain and obvious that the action against the Pioneer Defendants was statute-barred, the judge turned to the question of whether the Umbrella Purchasers had a cause of action against the defendants under the *Competition Act*. In concluding that they did, Masuhara J. declined to follow *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148 [*Shah SCJ*], rev'd in part 2017 ONSC 2586 [*Shah Div. Ct.*], a case involving alleged price fixing in the lithium-ion battery industry.

[24] In *Shah SCJ*, Mr. Justice Perell held it was plain and obvious that the umbrella purchasers in that case had no cause of action under the *Competition Act*. The judge in the present case, by contrast, held that the language of s. 36 affording a cause of action to "[a]ny person who has suffered loss or damage" as a result of conduct contrary to Part VI was capable of extending to umbrella purchasers.

[25] The judge offered four points on which he differed with Perell J.'s reasons in *Shah SCJ*:

1) Although he acknowledged that allowing the Umbrella Purchasers' claim would be inconsistent with restitutionary law, he took the view that restitutionary law did not determine the scope of *Competition Act* claims, as s. 36 focuses on compensating for losses rather than restoring wrongful gains.

2) He rejected the notion that the spectre of indeterminate liability militated against allowing the Umbrella Purchasers' claim, as the policy rationales in favour of limiting a duty of care in the negligence context were not applicable to price-fixing cases under the *Competition Act*, and the exposure cartel members would face as a result of potential liability to Umbrella Purchasers was not such as to be impermissibly indeterminate.

3) Although he acknowledged that the Umbrella Purchasers' claim could expose the defendants to liability for the pricing decisions of non-defendants, he stated that such decisions are not truly independent, as according to umbrella theory they are made in reference to market prices distorted by the cartel.

4) He concluded that allowing the Umbrella Purchasers to advance their claim would further the goals of the *Competition Act*, including compensation, deterrence, and behaviour modification.

[26] Accordingly, the judge held that the Umbrella Purchasers could advance a cause of action under the *Competition Act*. He went on to find that their claim had been properly pleaded.

[27] The judge then examined whether a breach of the *Competition Act* could supply the "unlawful" element of civil causes of action such as the plaintiff's claims in civil conspiracy, the unlawful means tort, unjust enrichment, and waiver of tort. In particular, he considered two decisions of this court: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36, leave to appeal ref'd [2014] S.C.C.A. No. 125, and *Watson BCCA*.

[28] In *Wakelam*, the Court held that there was "nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI". (Para. 90.)

[29] In *Watson BCCA*, the Court rejected the notion that "the scheme for civil redress in s. 36 of the *Act* is a replacement for an action in common law for unlawful means conspiracy" and concluded that "a claim for unlawful means conspiracy relying upon breach of the *Competition Act*, is a viable pleading". (Para. 58.) Applying *Wakelam*, the Court held that the claim for restitution based solely on a breach of the *Competition Act* could not succeed, as s. 36 provided "the sole route to recovery". (Para. 59.)

[30] The judge reasoned in the case at bar that "[t]o the extent (if any) that there is conflict between *Wakelam* and [*Watson BCCA*]", he was bound to follow the more recent decision in *Watson BCCA*. He concluded that a breach of s. 45 of the *Competition Act* could form the foundation for the plaintiff's other causes of action.

[31] The judge then proceeded to address the plaintiff's four remaining claims, his treatment of which can be summarized as follows:

1) **Civil Conspiracy**: The pleadings disclosed a cause of action in civil conspiracy (both predominant purpose conspiracy and unlawful means conspiracy).

2) **Unlawful Means Tort**: The unlawful means tort claim was not properly pleaded and therefore was not certified, although it was left open to the plaintiff to apply to further amend his pleadings and to have the claim certified.

3) **Unjust Enrichment**: The pleadings disclosed an action in unjust enrichment. However, no unjust enrichment claim could be advanced by the Umbrella Purchasers because any deprivation they suffered would have enriched non-defendants, rather than defendants.

4) **Waiver of Tort**: The pleadings disclosed an action in waiver of tort. Again, however, the Umbrella Purchasers could advance no such claim, as the defendants could not have received a monetary benefit attributable to the Umbrella Purchasers' loss.

(2) Is There an Identifiable Class?

[32] With respect to the "identifiable class" analysis under s. 4(1)(b) of the *CPA*, the judge found the class definition was vague because it was unclear whether the references in the notice of application to "computers, videogame consoles, and external ODDs" and similar qualifiers were intended to limit the class or instead merely to provide examples of ODDs and ODD Products. Nonetheless, the judge granted certification on the condition that the class definition be suitably amended.

(3) Do the Claims Raise Common Issues and Do the Common Issues Predominate Over Individual Issues?

[33] The most contentious issue on the s. 4(1)(c) analysis was whether the plaintiff had proposed a viable methodology for determining "commonality of harm". The defendants maintained that loss was not common to all Indirect Purchasers because some intermediaries in the supply chain may not have passed on overcharges for various reasons, such as, for example, in order to secure greater market share.

[34] An economist, Dr. Reutter, produced an expert report on whether the issues of loss, gain, and aggregate damage were capable of resolution on a common basis. Specifically, he opined on two matters:

1) whether *all* the class members would have been affected by the alleged conspiracy; and

2) whether methods were available to estimate any overcharge resulting from the alleged conspiracy, as well as aggregate damages.

Dr. Reutter answered both questions in the affirmative. He was satisfied that the alleged price-fixing scheme would have caused the price of ODDs sold to Direct Purchasers to increase across the market. Given the competitive nature of the computer market, he

opined that these price increases would have been passed through to *all* Indirect Purchasers.

[35] Some of the defendants retained their own expert economist, Dr. Levinsohn, to evaluate Dr. Reutter's report and proposed methodology. Dr. Levinsohn opined that it would not be possible to determine the fact of injury for the class members using Dr. Reutter's proposed methodology. He expressed his opinion that "the alleged conspiracy would not have injured all (or nearly all) proposed class members". (Levinsohn Report at para. 19.) This followed from his opinion that the proposed class covered "thousands of highly differentiated ODDs and ODD products, sold through multiple pricing mechanisms, at multiple levels of supply chains, into multiple markets characterized by different competitive dynamics, and that reached members of the proposed class through multinational, multilevel supply chains", and that Dr. Reutter's methodology ignored "the facts of the case and the realities of the relevant industries, markets, and products". (Para. 22.) Crucially, Dr. Levinsohn opined that Dr. Reutter had not "propose[d] a method that could identify the proposed class members who would have been injured separately from the proposed class members who would not have been injured". (Para. 23.)

[36] Relying on Dr. Levinsohn's report, the defendants' principal submission regarding common issues was that the proposed methodology for determining class members' losses was incapable of establishing that *every* class member suffered financial harm: it therefore could not establish commonality of harm. The methodology, which would employ econometric and statistical methods based on multiple regression analysis, would merely yield an average overcharge and average pass-through.

[37] The defendants submitted that establishing average overcharge or pass-through failed to satisfy the commonality requirement from *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*], which on the defendants' interpretation required that the methodology be able to demonstrate that *every* class member suffered harm; otherwise, class members as a group would be able to prove claims its individual members could not.

[38] The judge rejected this argument. The defendants had misread *Microsoft*; all it requires is that the methodology establish that "the overcharges have been passed on to the indirect-purchaser level in the distribution chain". (*Microsoft* at para. 115; emphasis added by the chambers judge.) After adopting the reasoning and conclusions of Perell J. in *Shah SCJ* on this point, the judge wrote:

> The plaintiff must show that the defendants took part in a conspiracy, that they sometimes or always overcharged direct purchasers, and that at least some direct purchasers passed on these overcharges. That is sufficient to establish the fact of the defendants' liability. The methodology need not go further and show that every single member of the class suffered a financial loss.
>
> [At para. 168; emphasis added.]

The judge found further support for this interpretation of *Microsoft* in the provisions of the *CPA* permitting the distribution of aggregate damages awards even where some class members have suffered no loss.

[39] The defendants raised various other objections to Dr. Reutter's proposed methodology, but each of these objections was rejected by the judge, whose treatment of them does not feature centrally on appeal. He concluded that Mr. Godfrey had shown some basis in fact that the proposed loss- and gain-related issues were common.

[40] In summary, the judge certified all of the common issues proposed by the plaintiff in relation to the non-Umbrella Purchasers, with the exception of those relating to the unlawful means tort. In relation to the Umbrella Purchasers, he certified the common issues advanced except those relating to the unlawful means tort, restitutionary law (unjust enrichment and waiver of tort), and aggregate damages. He further concluded that the issue of whether a punitive damages award would be merited could be assessed on a class-wide basis, but that the quantum of such damages could not be assessed until after the assessment of compensatory damages for both Umbrella Purchasers and non-Umbrella Purchasers (either at the common issues trial or following individual trials). He reached a similar conclusion with respect to pre-judgment interest.

(4) Is a Class Proceeding the Preferable Procedure?

[41] The judge was satisfied that a class proceeding was the preferable procedure for the fair and efficient resolution of the common issues. That conclusion is not challenged on appeal.

(5) Is There an Appropriate Representative Plaintiff?

[42] Mr. Godfrey was found to have met the requirements for being a representative plaintiff. It was acknowledged that separate representation could be required if problems arose. The judge also concluded that a satisfactory litigation plan had been put forward. Litigation plans may be adapted and evolve to account for complexity. Although argument on these matters was limited, both these conclusions are challenged on appeal.

Conclusion

[43] In the result, the judge certified the action as a class action proceeding on the condition that the class definition be suitably amended. He further ordered that a subclass be established for the non-Umbrella Purchasers.

IV. ISSUES

[44] The defendants submit that the judge committed the following three errors of law:

1) recasting the standard of commonality at certification for indirect purchasers to permit the class to prove claims its members could not (i.e., removing the requirement that the plaintiff demonstrate each class member suffered harm);

2) holding that a breach of s. 45 of the *Competition Act* may furnish the "unlawfulness" element for various common law causes of action; and

3) holding that the Umbrella Purchasers may assert various causes of action against the defendants.

[45] The Pioneer Defendants adopt these submissions and further contend that the judge erred by holding that it is not plain and obvious that the claim against the Pioneer Defendants is not statute-barred by s. 36(4) of the *Competition Act*. They advance three

specific arguments in support of this assertion. They maintain that the judge erred in law by:

1) holding that a limitation period defence cannot be considered under s. 4(1)(a) of the *CPA*;

2) holding that it is not plain and obvious that the discoverability rule can never apply to toll the limitation period in s. 36(4) of the *Competition Act*; and

3) holding that it is not plain and obvious that the doctrine of fraudulent concealment cannot toll the limitation period in this case.

[46] The defendants ask that the certification order be set aside. The Pioneer Defendants also seek a declaration that the claim under s. 36 of the *Competition Act* against them cannot be certified as a common issue because it is statute-barred.

[47] After addressing the standard of review, in the analysis that follows I will first address the three grounds of appeal raised by the Pioneer Defendants (the "Pioneer Defendants' Appeal"). I will then deal with the three issues raised by the defendants as a group (the "Main Appeal").

V. ANALYSIS

Standard of Review

[48] In *Campbell v. Flexwatt Corp.* (1997), 98 B.C.A.C. 22, leave to appeal ref'd [1998] S.C.C.A. No. 13, Mr. Justice Cumming emphasized that appellate courts must not interfere lightly with the terms of a certification order issued by a chambers judge:

> [25] I preface my discussion of the issues with a note of caution. Appellate courts are always slow to interfere with discretion properly exercised. This course should be particularly so in considering the terms of a certification order. The Legislature enacted the *Class Proceedings Act* on 1 August 1995 to make available in this province a procedure for the fair resolution of meritorious claims that are uneconomical to pursue in an individual proceeding, or, if pursued individually, have the potential to overwhelm the courts' resources. Class proceedings are an efficient response to market demand only if they can resolve disputes fairly. Trial court judges must be free to make the new procedure work for plaintiffs and defendants. Many of the arguments made by counsel for the appellants, focused on fairness to the defendants and third parties, can be made to the chambers judge charged with managing the action as it proceeds. In

> considering those arguments, I will be keeping in mind the ability of the chambers judge to vary his order from time to time as the action proceeds and the need arises, whether from concern about fairness or efficacy; he may even decertify the proceeding. I shall also keep in mind that this court will interfere with the exercise of discretion only when persuaded that the chambers judge erred in principle or was clearly wrong. … Of course, whether to certify a class proceeding is not a matter of discretion, strictly speaking, because s. 4(1) of the *Act* mandates certification if the criteria are met. The discretion resides in the assessment of the circumstances.
>
> [Emphasis added.]

[49] While an action "must" be certified under s. 4(1) of the *CPA* if all of the statutory criteria are satisfied, the judge is given a measure of discretion in assessing the statutory criteria. Absent an error of law, this court will not interfere with that exercise of judicial discretion unless the chambers judge erred in principle or was clearly wrong. These principles were affirmed in *Hoy v. Medtronic, Inc.*, 2003 BCCA 316 at para. 38, and *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 at paras. 22-3, leave to appeal ref'd [2012] S.C.C.A. No. 336.

[50] While this general principle of deference applies with respect to the exercise of discretion in a chambers judge's assessment of the s. 4(1) criteria, the standard of review on any particular issue will vary depending on the nature of the question being considered. It is therefore necessary to identify the applicable standard of review with respect to each issue raised on appeal.

[51] Throughout this analysis, it remains the case that, in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, questions of law are subject to the standard of correctness, while questions of fact or mixed fact and law are, in the absence of an extricable question of law, subject to the deferential standard of palpable and overriding error.

[52] Pleadings will be found to disclose a cause of action under s. 4(1)(a) of the *CPA* unless it is "plain and obvious" that, despite assuming all facts pleaded to be true, the claim nonetheless cannot succeed: *Microsoft* at para. 63; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 20; *Hollick* at para. 25; *Hunt* at 980; *Watson BCCA* at para. 10; *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 at para. 15, leave to appeal ref'd [2012] S.C.C.A. No. 398.

[53] The "plain and obvious" standard recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 45, and *Hunt* at 974-5, citing *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094 at 1102 (C.A.). This analysis is performed based on the pleadings alone: *Watson BCCA* at para. 10.

[54] The law concerning the standard of review to be applied to a chambers judge's decision under s. 4(1)(a) was recently summarized in *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240. In *Sherry*, the Court observed that recent decisions have suggested that "an appellate court must defer to a conclusion reached under s. 4(1)(a) of the *Class Proceedings Act* in the absence of an error of law or principle, or the failure of the judge below to consider or weigh all relevant factors". (Para. 54.) The Court further noted another line of case law providing that the question of whether a pleading discloses a cause of action is a question of law, thus subject to the standard of correctness. (Para. 55.) The Court stated that these two lines of authority may be reconciled on the basis that the exercise of discretion may raise an extricable question of law and that, in any event, "both standards contemplate appellate intervention where an error of law or principle is found". (Para. 55.)

[55] In reviewing the chambers judge's decision, this court must keep in mind the guidance offered by the Supreme Court of Canada in *Microsoft*:

> [99] The starting point in determining the standard of proof to be applied to [the certification requirements in ss. 4(1)(b) to 4(1)(e) of the *CPA*] is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: "... the class representative must show some basis in fact for each of the certification requirements set out in ... the *Act*, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50).
>
> …

> [102] … The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).
>
> [103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> [104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.
>
> [105] Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).
>
> [Emphasis added.]

Pioneer Defendants' Appeal

(i) Consideration of Limitation Period at Certification Stage

[56] The Pioneer Defendants' first submission is that the judge erred in law by concluding that a limitation period defence cannot be considered under s. 4(1)(a) of the *CPA*. They rely primarily on *Watson BCSC*. There Chief Justice Bauman struck a claim as "bound to fail" because s. 61 of the *Competition Act* had been repealed more than two years before the claim was filed. He wrote:

> [126] If, as [*Fuoco Estate v. British Columbia*, 2001 BCCA 325] indicates, it is not impossible to rely on a limitation period to strike pleadings, I think it is appropriate in response to a pleading that is based entirely on a repealed statutory cause of action where the limitation period has clearly expired before the claim is filed. It is plain and obvious that such a claim would fail, and little would be gained from requiring a statement of defence or a trial, as no evidentiary findings would be necessary. This is in contrast with the usual issues surrounding limitation periods discussed above.
>
> [127] … Accordingly, the plaintiff's s. 61 claim, while properly pled, must be struck.

This court in *Watson BCCA* did not expressly consider whether limitation periods could be considered under Rule 9-5 or under s. 4(1)(a) of the *CPA*.

[57] The Pioneer Defendants maintain that *Watson BCSC* recognizes an exception to the general rule that limitation period defences cannot be considered on pleadings motions: such defences may be considered in "exceptional circumstances", they say. They add that because the test is the same under Rule 9-5 and s. 4(1)(a) – whether it is plain and obvious that the pleadings disclose no cause of action – it follows that if a limitation period issue can be considered in "exceptional circumstances" under Rule 9-5, the same exception must apply to s. 4(1)(a).

[58] Mr. Godfrey's response is two-fold. First, he says, limitation period issues do not arise until pleaded in defence. Here, the Pioneer Defendants have not pleaded such a defence. Like the Pioneer Defendants, Mr. Godfrey also relies on *Fuoco Estate v. British Columbia*, 2001 BCCA 325, and *Watson BCSC*, though for a different proposition: that limitation period issues do not arise until pleaded in defence. Second, Mr. Godfrey submits, the limitation period defence here is so bound up in the facts that it must be left to a later stage of the process; it would be premature to decide the limitation period issue at the certification stage.

[59] Turning to the analysis of these arguments, in my view the determination of whether a limitation period defence can properly be considered under s. 4(1)(a) raises a question of law and is therefore subject to the standard of correctness.

[60] In *Fuoco Estate*, Mr. Justice Low wrote that although he would not state categorically that a limitation period argument could not properly arise under what is now Rule 9-5, a notice of claim does not raise limitation issues:

> [15] Counsel have been unable to direct us to any cases in which Rule 19(24)(a) ["Striking Pleadings", now Rule 9-5(1)(a)], standing alone, has been used to resolve a limitation issue. That may be because statements of claim do not raise limitation issues, as is the case here. The statutory limitation is a defence pleading. It is an issue that does not arise until it is pleaded in defence. It has to be remembered that although the events which gave rise to this action had their genesis in 1974, and although it is pleaded that the agreement expired in 1975, it is also pleaded that there has been a continuous breach and trespass since 1975. I do not wish to state categorically that a limitation argument cannot properly arise under Rule 19(24)(a). But in the circumstances that exist here, in particular the allegation of an ongoing breach of contract, I am of the opinion that the limitation issue cannot properly be dealt with under Rule 19(24)(a).

[61] This statement was relied upon in two subsequent decisions that bear upon this appeal. Chief Justice Bauman in *Watson BCSC* cited *Fuoco Estate* for the proposition that it is "not impossible to rely on a limitation period to strike pleadings" and went on to strike a claim based entirely on a provision that had been repealed more than two years before the claim was filed. Clearly this was exceptional and "in contrast with the usual issues surrounding limitation periods". (Para. 126.)

[62] Subsequently, in *Jensen v. Ross*, 2014 BCCA 173, Goepel J.A. for the Court expressed the view that a limitation period issue does not arise until pleaded in defence:

> [42] There are numerous cases which have held that Rule 9-5 is not the appropriate mechanism to determine a limitation issue. …
>
> [43] In [*Fuoco Estate*] this Court noted at para. 15:
>
> > [15] Counsel have been unable to direct us to any cases in which Rule 19(24)(a), standing alone, has been used to resolve a limitation issue. That may be because statements of claim do not raise limitation issues, as is the case here. The statutory limitations is a defence pleading. It is an issue that does not arise until it is pleaded in defence. ...
>
> [44] Those words resonate in this case. The notice of civil claim, in and of itself, does not raise a limitation issue. The limitation issue only arises if it is pleaded in defence. Even then, the issue cannot be resolved in an evidentiary vacuum.

[63] In the class action context, courts have expressed a concern that considering limitation period arguments at the certification stage may be premature. The reasoning

in *MacQueen v. Sydney Steel Corporation*, 2011 NSSC 484, rev'd on other grounds 2013 NSCA 143, leave to appeal ref'd [2014] S.C.C.A. No. 51, is apt:

> [73] The defendants urged me to consider application of limitation periods as part of the determination whether to certify a class action. Canada suggested that I follow *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235, and refuse to include claims outside a limitation period as common issues, because in order to have valid claims individuals would have to establish postponement of limitation. In my view, it is premature to address limitation periods at the certification stage in this proceeding. Courts should assume all facts pleaded to be true and read claims generously at the certification stage – in this case the plaintiffs have pleaded suspension of limitation periods based upon discoverability and equitable fraud. Prescription is a defence or response to a claim, generally raised in a pleading made by defendants; in this case, despite plaintiffs' request that they do so, the defendants have declined to file a pleading pending resolution of certification. Accordingly, limitation is not an issue presently before the court. If pleaded by defendants, it may become a substantial defence to be evaluated at a common issues trial, or to be resolved after conclusion of a common issues trial when issues, such as discoverability, are addressed for individual claims. This approach is consistent with that adopted by other courts, including the Ontario Court of Appeal in Cloud, *supra*, and the British Columbia Supreme Court in *Pausche v. British Columbia Hydro & Power Authority*, 2000 BCSC 1556, [2000] B.C.J. No. 2125, aff'd 2002 BCCA 62, [2002] B.C.J. No. 196 (B.C.C.A.).
>
> [Emphasis added.]

[64] *Crosslink v. BASF Canada*, 2014 ONSC 1682 (S.C.J.), leave to appeal to Div. Ct. ref'd 2014 ONSC 4529, is also instructive. Madam Justice Rady wrote:

> [84] It must be remembered that affirmative defences must be pleaded (Rule 25.07(4)) and therefore a limitation period must be pleaded: *S. (W.E.) v. P. (M.M.)* (2000), O.R. (3d) 70 (C.A.); leave to appeal refused 149 O.A.C. 397 (S.C.C.). As already noted, no statement of defence has yet been delivered.
>
> [85] There may also well be an issue respecting discoverability that makes a determination of the limitation at this stage premature. See *Chadha v. Bayer Inc.*, [1998] O.J. No. 6419 (S.C.J.); reversed on other grounds (2003), 63 O.R. (3d) 22 (C.A.); *Eli Lilly and Co. v. Apotex Inc.*, 2005 FCA 361. One of the proposed common issues is whether the defendants took steps to conceal the conspiracy.
>
> [86] Finally, I question whether it is even appropriate to deal with a limitation argument at certification, particularly in the absence of a cross motion under Rule 20 or 21. Moreover, is the certification judge able to determine that the limitation period applicable to the proposed plaintiff should also apply to the entire class. These are questions raised but unanswered in *Lipson v. Cassels, Brock & Blackwell*, 2013 ONCA 165.
>
> [Emphasis added.]

[65] I also note the observations of Donald J.A. in his dissenting reasons in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186 [*Microsoft BCCA*], rev'd *Microsoft*. Mr. Justice Donald remarked that where limitation issues are "bound up in the facts", they should be "left to a later stage of the process"; to consider such issues at the certification stage would be "premature". (Para. 61.) This aspect of Donald J.A.'s reasons was not expressly considered by the majority in that decision or in the Supreme Court of Canada's subsequent decision.

[66] On the other hand, while the decisions above question the wisdom of considering limitation period arguments at the certification stage, other courts have, as the judge noted at para. 45 of his reasons, been willing to embark upon an analysis of the limitation period at this early stage: see e.g., *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at paras. 635-50, aff'd 2012 ONCA 867, leave to appeal ref'd [2013] S.C.C.A. No. 47; *Coulson v. Citigroup Global Markets Inc.*, 2010 ONSC 1596, aff'd 2012 ONCA 108.

[67] I accept that a limitation period argument can be considered at the certification stage, in exceptional circumstances, but generally should not. In my view, whether or not a limitation period argument *can* be considered at the certification stage, it would not be appropriate to do so here. The limitation period issue in this case is intimately connected with the facts of the alleged conspiracy.

[68] For the reasons I discuss hereafter, the discoverability rule and the doctrine of fraudulent concealment are matters that may have intervened to toll the limitation period in s. 36(4), thereby preserving an action that would otherwise have been brought out of time. In my view, the certification stage is not designed to deal with these sorts of complex, fact-based issues in a case of this kind; such matters must be reserved for trial. Simply put, the limitation period issue here is bound up in the facts.

(ii) The Discoverability Rule

[69] The Pioneer Defendants' second submission is that the judge erred in law by holding that it is not plain and obvious that the discoverability rule can never apply to toll the limitation period in s. 36(4) of the *Competition Act*. They argue that the event

triggering the running of the limitation clock in s. 36(4) is the conduct (i.e., the conspiracy) itself, without regard to the injured party's knowledge of that conduct, and therefore the discoverability rule cannot apply.

[70] The Pioneer Defendants point to the "*Fehr* test" for determining whether the discoverability rule applies to a given statutory provision. This test, which was articulated by the Manitoba Court of Appeal in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200, and later adopted by the Supreme Court of Canada in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para. 37, and *Ryan v. Moore*, 2005 SCC 38 at para. 23, provides as follows:

> … the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [At 206.]

[71] Justice Bastarache for the Court in *Ryan* cautioned that while discoverability has been qualified as a "general rule", "it must not be applied systematically without a thorough balancing of competing interests". (Para. 23.) He continued:

> [24] … the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action ….

[72] The case law on whether the discoverability rule can be applied to s. 36(4) is divergent. One line of cases suggests the rule cannot apply to s. 36(4). In *Laboratoires Servier, Adir, Oril Industries, Servier Canada Inc. v. Apotex Inc.*, 2008 FC 825, aff'd 2009 FCA 222, leave to appeal ref'd [2009] S.C.C.A. No. 403, the Federal Court agreed that it was "likely a correct view of the law" to say that "since the statutory limitation period in s. 36(4) expressly runs from a specific date independent of knowledge, the discoverability principle cannot apply". (Para. 488.)

[73] A similar conclusion was reached by Mr. Justice Russell in *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996 at paras. 28-33, aff'd 2012 FCA 48. On appeal in *Garford*, the Federal Court of Appeal upheld Russell J.'s conclusion on the basis that his findings of fact precluded any argument based on discoverability, "assuming without deciding … it is legally available". (Para. 16.) Russell J.'s reasons in *Garford* were later cited in *Fairview Donut* at para. 646, though the Superior Court in *Fairview Donut* declined to provide further commentary, instead holding that "[e]ven if the discoverability rule applies", the claims were nonetheless statute-barred. (Paras. 647, 650.)

[74] Another series of authorities casts doubt upon the notion that the discoverability rule cannot apply to s. 36(4). In *Crosslink*, Madam Justice Rady observed in the context of a s. 36 claim that "[t]here may also well be an issue respecting discoverability that makes a determination of the limitation at this stage premature". (Para. 85.)

[75] In *Sandhu v. HSBC Finance Mortgages Inc.*, 2014 BCSC 2041, rev'd on other grounds 2016 BCCA 301, the Court suggested that "the Plaintiffs may be in a position to argue that the limitation period [under s. 36(4) of the *Competition Act*] was extended by virtue of the discoverability of the alleged breach". (Para. 68.)

[76] The most detailed treatment of the issue to date can be found in *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation*, 2016 ONCA 621, decided after Masuhara J. issued his reasons in the case at bar. Hourigan J.A., for the Court, wrote:

> *(ii) Did the motion judge err in finding that the discoverability principle applies to the limitation period found in s. 36(4)(a)(i) of the Competition Act?*
>
> No. Subsection 36(4)(a)(i) is subject to the discoverability principle. A statutory limitation period will generally be subject to the discoverability principle when the running of the limitation period is linked either to the plaintiff's knowledge about an event or to an event related to the plaintiff's cause of action. The limitation period in s. 36(4)(a)(i) is triggered by an event related to the underlying cause of action – specifically, conduct contrary to Part VI of the *Competition Act*. Therefore, it is subject to discoverability.
>
> [Para. 18; emphasis added.]

[77] In *Fanshawe*, the Ontario Court of Appeal engaged in an extended analysis of the precise issue now before this court. Hourigan J.A. distinguished two cases where courts found the limitation period in issue was not subject to discoverability:

> [38] I begin by discussing [*Ryan v. Moore*] and *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 (C.A.) … where courts found that the limitation period in issue was not subject to discoverability.
>
> [39] *Ryan* considered the limitation period in s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, which linked the limitation period to the granting of letters of probate or the death of a defendant. In *Waschkowski*, this court considered s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23, which linked the limitation period to the death of a deceased.
>
> [40] In both cases, the courts noted that the event that triggered the running of the limitation period at issue – the issuing of letters probate or the death of the defendant – did not affect the plaintiff's cause of action and the plaintiff's knowledge of the event at issue was irrelevant to their cause of action: *Ryan*, at para. 32; *Waschkowski*, at para. 8. In contrast, the "conduct" mentioned in s. 36(4)(a)(i) is not unrelated to the claimant's cause of action; rather, it is the basis for the plaintiff's claim.
>
> [Emphasis added.]

[78] Mr. Justice Hourigan also considered cases where courts found limitation periods were subject to discoverability, and compared the limitation periods at issue there with s. 36(4)(1)(a) of the *Competition Act*:

> [41] I turn now to a consideration of *Peixeiro* and of *Grenier v. Canadian General Insurance Company* (1999), 43 O.R. (3d) 715 (C.A.), two cases where courts found that the limitation period in issue was subject to discoverability.
>
> [42] In *Peixeiro*, the limitation period is similar to the one at issue in the present case. There, the Supreme Court considered what was s. 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, which provided that any action for damages caused by a motor vehicle accident had to be brought within "two years from the time when the damages were sustained." The court concluded that the discoverability principle applied. Major J.'s comments, at para. 38, are instructive:
>
> > The appellant submitted here that the general rule of discoverability was ousted because the legislature used the words "damages were sustained", rather than the date "when the cause of action arose". It is unlikely that by using the words "damages were sustained", the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge. It would require clearer language to displace the general rule of discoverability. The use of the phrase "damages were sustained" rather than "cause of action arose", in the context of the *HTA*, is a distinction without a difference. The discoverability rule has been applied by this Court even to statutes of limitation in which plain construction of the

> language used would appear to exclude the operation of the rule. [*Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2] dealt in part with s. 739 of the *Municipal Act*, R.S.B.C. 1960, c. 255, which required that notice should be given within two months "from and after the date on which [the] damage was sustained". However, this Court applied the discoverability rule even with respect to this section. [Citation omitted.]

[43] Subsection 36(4)(a)(i) links the limitation period to conduct that gives rise to any damage or loss. In that way, it is similar to the former s. 206 of the *Highway Traffic Act*, which linked the limitation period to damages caused by a motor vehicle accident.

[44] Also instructive is this court's decision in *Grenier* in which the issue was whether the discoverability principle applied to the old s. 258(2) of the *Insurance Act*, R.S.O. 1990, c. I.8, which provided as follows: "No action shall be brought against an insurer under subsection (1) after the expiration of one year from the final determination of the action against the insured, including appeals if any." At p. 722, Morden A.C.J.O. concluded that the discoverability principle applied:

> With respect, I do not think that the triggering event in s. 258(2) of the *Insurance Act* – the final determination of the action against the insured – is the same as that in *Fehr*. It is a constituent element of the cause of action which is created by s. 258(1) – a judgment against a person insured by a motor vehicle liability policy. Under the discoverability rule this triggering event does not come into existence until the plaintiff has, or reasonably should have, knowledge not only that he or she has *a* judgment but, also, that it is a judgment against an insured person. [Emphasis in original.]

[45] Similarly, in this case, the term "conduct" in s. 36(4)(a)(i) of the *Competition Act* refers to the conduct giving rise to damages mentioned in s. 36(1) and is, therefore, also a constituent element of the cause of action subject to the limitation period. To use Bastarache J.'s language from *Ryan*, quoted above, the triggering event is related to the accrual of the cause of action. Applying the rationale from *Grenier*, s. 36(4)(a)(i) too is subject to the discoverability principle.

[46] Also, in *Peixeiro*, at para. 39, Major J. stated the following:

> In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration.

In my view, that applies in the present case as well, particularly given that secrecy and deception are invariably elements of anti-competition agreements.

[47] I note that s. 36(4)(a)(ii) provides an alternative date for the limitation period (i.e. the day on which any criminal proceedings relating to the conduct at issue were disposed of). That alternate event is arguably not connected to a plaintiff's cause of action or knowledge – at the very least it is clearly not a constituent element of the cause of action provided in s. 36 of the *Competition Act*. As such, it imposes a limitation period that is probably not subject to discoverability. One could argue that this produces an anomalous result in that

> the discoverability principle would apply to s. 36(4)(a)(i) but not to s. 36(4)(a)(ii). However, I do not think such an outcome would be anomalous. There is no rule that suggests that both limitation periods in s. 36(4)(a) must operate in the same way.
>
> [48] I agree with the statements of Sharpe J. in *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202 (Ont. Gen. Div.) about s. 36(4)(a)(i) and (ii). In concluding that it was not beyond doubt that the discoverability principle did not apply to s. 36(4)(a)(i), he noted, at p. 206, that "Parliament has hardly provided potential defendants with an iron-clad assurance that they may not be sued more [than] two years after the cessation of their conduct as the limitation period could start to run again in the event of criminal proceedings."
>
> [49] I also agree with the submission of Fanshawe that any other interpretation has the potential to render the remedy nugatory by depriving victims of the chance to make a claim when the conspirators' concealment has been particularly effective.
>
> [Emphasis added.]

[79] The Pioneer Defendants argue that *Fanshawe* was wrongly decided. They maintain that if the reasoning in *Fanshawe* were to have been applied in *Fehr*, the case would have been decided differently. They say the Ontario Court of Appeal in *Fanshawe* has, in effect, mistakenly interpreted *Ryan* as modifying (and expanding) the *Fehr* test.

[80] Specifically, they say the Court in *Fanshawe* modified and expanded the *Fehr* test by relying on the final portion of the passage from *Ryan* that reads: "The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action". (Para. 24; emphasis added.)

[81] The Pioneer Defendants assert that these words – "or the basis of the cause of action" – do not form part of the *Fehr* test and were not the basis upon which *Ryan* was decided, nor is there anything to suggest the Court in *Ryan* intended to expand the test. In other words, the Pioneer Defendants suggest that the Court in *Fanshawe* treated *Ryan* as "tacking on" a new element to the *Fehr* test that did not form part of the test when it was first articulated. They argue the Supreme Court of Canada would not change the test without providing a clear and explicit signal that it intended to do so.

[82] The Pioneer Defendants further submit that the Supreme Court of Canada's decision in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, is analogous

to the case at bar. In *Green*, the limitation period at issue was contained in the secondary market liability provisions of the Ontario *Securities Act*, R.S.O. 1990, c. S.5. Section 138.3 provided shareholders with a cause of action where the company makes written or oral public statements that are misleading, or where the company fails to make timely disclosure. The limitation period set out in s. 138.14 stipulated, however, that an action could be brought only within three years after the date of the alleged misrepresentation or failure to make timely disclosure. So, with respect to written statements, the limitation clock began running on the date the document containing the misrepresentation was released; for public statements, the date on which the statement containing the misrepresentation was made; and for failure to make timely disclosure, the date on which disclosure ought to have been made.

[83] In *Green*, the legislation made no reference to shareholder knowledge; the legislative history revealed that it was expressly designed to run without regard to the plaintiff's knowledge of the facts giving rise to the cause of action. (Para. 66.) Justice Côté, dissenting in part, wrote that the limitation clock began running "regardless of knowledge on the plaintiff's part". She acknowledged that the scheme was "exacting and even harsh", but that it was structured in this manner so as to "balance the interests of plaintiffs, defendants and long-term shareholders". (Para. 79.) The majority's reasons did not address this point.

[84] The Pioneer Defendants maintain that the limitation period in the present case is, in effect, the same as that in *Green* insofar as the irrelevance of the prospective plaintiff's knowledge is concerned: both fall into the second category outlined in *Fehr* (i.e., those limitation periods that run "from an event which clearly occurs without regard to the injured party's knowledge" (p. 206)), and thus knowledge is irrelevant to the running of the limitation period. They submit the judge erred in having recourse to other principles of statutory interpretation in the face of what the *Fehr* test demanded, and that *Green* as a "complete answer" to the Ontario Court of Appeal's decision in *Fanshawe*.

[85] The Pioneer Defendants also point to two Alberta decisions – *Engel v. da Costa*, 2008 ABCA 152, leave to appeal ref'd [2008] S.C.C.A. No. 284, and *Rivard v. Alberta (Human Rights Commission)*, 2014 ABQB 392 – where courts similarly declined to apply the discoverability rule. In *Engel*, the Court held that discoverability could not toll a limitation period for filing complaints against the police that required the police chief to "dismiss any complaint that is made more than one year after the events on which it is based occurred". In *Rivard*, the Court also held discoverability could not toll a limitation period requiring that a complaint to the Alberta Human Rights Commission "be made within one year after the alleged contravention of the Act occurs".

[86] The Pioneer Defendants add that for this court to apply the discoverability rule to s. 36(4) in the face of what the *Fehr* test dictates would be not an exercise in statutory interpretation, but rather an amendment to the statute. The Supreme Court in *Ryan* cautioned against amending when it spoke of "impermissible incursion[s] into the legislative process". (Para. 34.) Further, they say, "If the legislation is unfair, or results in an injustice, it is the duty of the legislature and not the Courts to correct it": *Czyz v. Langenhahn*, 1998 ABCA 112 at para. 5, leave to appeal ref'd [1998] S.C.C.A. No. 293.

[87] Finally, the Pioneer Defendants take it to be significant that the s. 36(4) limitation is "baked into" s. 36. It therefore does not take away existing rights but instead provides an internal limitation on the cause of action set out in s. 36.

[88] Turning to the analysis, I am of the view that the question of whether the discoverability rule can apply to s. 36(4) of the *Competition Act* is a question of law subject to the standard of correctness.

[89] In my respectful view, I do not find the Pioneer Defendants' core critique of *Fanshawe* – namely, that *Fanshawe* was incorrectly decided because the Court mistakenly read *Ryan* as expanding the *Fehr* test – to be persuasive. Whether or not the Supreme Court somehow broadened the scope of the discoverability rule in *Ryan* by stating that the rule can apply where the limitation period is explicitly linked to the injured party's knowledge *or to the basis of the cause of action*, both "branches", if they can be so described, are recognized and accepted in Canadian common law. I do not

think it open to this court to call into question the Supreme Court's unequivocal statement in *Ryan*, that the rule can apply where the limitation period is linked to "the basis of the cause of action", nor can the Ontario Court of Appeal's decision in *Fanshawe* be faulted for following that jurisprudence.

[90] The question becomes whether the Court's reasoning in *Fanshawe* should be adopted here. *Fanshawe* is not binding on this court; however, it is persuasive authority on the discoverability issue before us. I see no reason to depart from the Court's reasoning in *Fanshawe*. In my view, while the limitation period in s. 36(4) does not refer explicitly to the knowledge possessed by the injured party, it is linked to the basis of the cause of action – here being conduct that is contrary to Part VI and that has caused the person to suffer loss or damage – and is therefore subject to the discoverability rule. I am content to adopt the reasoning in *Fanshawe* and to emphasize three points below.

[91] First, quite apart from *Ryan*, the Supreme Court jurisprudence makes clear that a statute need not refer explicitly to the knowledge of the injured party in order for the discoverability rule to apply. *Peixeiro* provides a compelling example. In that case, Major J. observed that "[t]he discoverability rule has been applied by this court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule". (Para. 38.)

[92] The limitation period in *Peixeiro* referred to the time at which "damages were sustained". There was no mention of "knowledge" on the part of the injured party. Nonetheless, the Court concluded that the discoverability rule could apply because the reference to the time at which "damages were sustained" was, for the purposes of the discoverability rule, effectively no different from a reference to the time at which "the cause of action arose", which the Court viewed as sufficient to trigger the rule. I find it significant that the limitation period in the case at bar is linked to the time at which conduct that is contrary to Part VI of the *Competition Act*, and that has caused a person to "[suffer] loss or damage", takes place. This link is analogous to that discussed in *Peixeiro*, and it suggests the text must be read as being subject to the discoverability rule.

[93] Second, in interpreting the text of s. 36(4), the "thorough balancing of competing interests" urged in *Ryan* ought not to be overlooked. It would be unfair to require an injured party to bring a cause of action before that party could reasonably have discovered that it had such a cause of action, particularly in the context of alleged conspiracies which, by their very nature, are cloaked in secrecy (see *Fanshawe* at para. 46). In my view, it cannot be said that Parliament intended to accord such little weight to the interests of injured plaintiffs in the context of alleged conspiracies so as to exclude the availability of the discoverability rule in s. 36(4).

[94] Third, although there is a competing line of case law suggesting that the discoverability rule cannot apply vis-à-vis the limitation period in s. 36(4), it cannot be said this line of cases makes it "plain and obvious" that the rule cannot apply and therefore the claim must be struck. The "plain and obvious" test is the standard to be applied on a s. 4(1)(a) analysis, and it sets a high threshold for the refusal of certification. In my view, that threshold has not been met here.

[95] As I have found the Ontario Court of Appeal's analysis in *Fanshawe* to be persuasive authority on the discoverability rule issue before this court, it is unnecessary to refer to the other cases cited by the Pioneer Defendants such as *Green*, *Engel*, and *Rivard*. It follows that I would not accede to the Pioneer Defendants' submission that it is plain and obvious that the discoverability rule can never apply to toll the limitation period in s. 36(4).

(iii) Fraudulent Concealment

[96] The Pioneer Defendants' third submission is that the judge erred in law by holding that it is not plain and obvious that the doctrine of fraudulent concealment cannot toll the limitation period in this case. They say that fraudulent concealment requires a "special relationship", and none has been pleaded.

[97] In *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), the Ontario Court of Appeal described the doctrine of fraudulent concealment in the following terms:

> [28] Unlike the discoverability rule … the common law doctrine of fraudulent concealment is not a rule of construction. It is an equitable principle aimed at preventing a limitation period from operating "as an instrument of injustice" (see [*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6] at para. 66). When applicable, it will "take a case out of the effect of statute of limitation" and suspend the running of the limitation clock until such time as the injured party can reasonably discover the cause of action … (see *M. (K.)*, *supra*, at paras. 65 and 66). Its underlying rationale is grounded in the well-established principle, reiterated in *Goldin (Trustee of) v. Bennett and Co.* (2003), 65 O.R. (3d) 691, [2003] O.J. No. 2778 (C.A.), at para. 35, that equity will not permit a statute to be used as an instrument of fraud.
>
> [29] In other words, unlike the discoverability rule, the doctrine of fraudulent concealment is not dependent upon the particular wording of the limitation provision. When applied, there is no risk that the limitation provision will be construed in a manner not intended by the legislature. Fraudulent concealment is concerned with the operation of the provision, not its interpretation. Stated succinctly, it is aimed at preventing unscrupulous defendants who stand in a special relationship with the injured party from using a limitation provision as an instrument of fraud.
>
> [Emphasis added.]

[98] The Pioneer Defendants submit that the chambers judge erred in relying on *Sun-Rype BCCA* for the notion that the failure to plead a "special relationship" was not necessarily fatal, as a purely commercial relationship may suffice. They maintain that although this court in *Sun-Rype BCCA* recognized that a "special relationship" was not essential for a claim in *equitable fraud* (see para. 99), that conclusion could not (and should not) be extended to the context of alleged *fraudulent concealment*. Indeed, they argue, using the concept of equitable fraud to expand the doctrine of fraudulent concealment in order to toll the s. 36(4) limitation period would be inconsistent with this court's decision *Wakelam*, which held that restitutionary remedies are not available for breaches of the *Competition Act*.

[99] In any case, the Pioneer Defendants say that fraudulent concealment is an "extreme doctrine" that ought not to be invoked lightly. They assert that Mr. Godfrey has not pleaded the sort of "egregious" conduct that would be required for a finding of fraudulent concealment. They point to the Ontario Superior Court's decision in *Fairview*

Donut, a case in which the certification judge concluded that fraudulent concealment could not extend the s. 36(4) limitation period because the alleged misconduct did not rise to the level of wrongdoing committed by the physician in *Giroux*. They add that mere concealment cannot, on its own, toll the limitation period under s. 36(4), as the cause of action is based on conduct that, by its very nature, is carried out in secret.

[100] In response, Mr. Godfrey maintains that the judge was correct in concluding it was not plain and obvious that the doctrine of fraudulent concealment could not toll the limitation period in s. 36(4). Price-fixing agreements are analogous to fraud and theft, as noted in *Canada v. Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117 at paras. 54-6. It would be unconscionable for the court to "reward" defendants for succeeding in keeping their wrongful conduct secret. Mr. Godfrey bristles at the Pioneer Defendants' suggestion that there are no "egregious facts pleaded, beyond mere concealment of a price fixing conspiracy".

[101] The Pioneer Defendants' third ground of appeal turns on whether it is essential to plead a special relationship in order to invoke the fraudulent concealment doctrine. This is a question of law subject to the standard of correctness.

[102] The Pioneer Defendants' argument that equitable fraud cannot be sufficient to invoke the doctrine of fraudulent concealment is at odds with *Guerin v. The Queen*, [1984] 2 S.C.R. 335, where Dickson J. (as he then was) clarified:

> The fraudulent concealment necessary to toll or suspend the operation of [a limitation period] need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association et al*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient. [At 390.]

[103] Once it is accepted that equitable fraud can suffice to invoke the doctrine of fraudulent concealment, the question is whether a purely commercial relationship can satisfy the requirement for a special relationship in support of an allegation of equitable fraud. In my view it can. In *Sun-Rype BCCA*, this court took the view that the pleading of a special relationship was not essential for a claim in equitable fraud and that a purely commercial relationship may suffice:

> [99] … We are not persuaded that a plea in equitable fraud necessarily requires a plea that there is a special relationship between the parties. In that regard, we note that there was a purely commercial relationship between the parties in [*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club*, 2002 SCC 19], and that the need for such a special relationship as a prerequisite to a finding of equitable fraud was questioned by Mr. Justice Lowry in *Bayerische Hypotheken-Und Wechsel-Bank AG v. Rieder*, 2003 BCSC 1031.

[104] Applying this principle to the case at bar, the fact that Mr. Godfrey has not pleaded a special relationship does not preclude the operation of the doctrine of fraudulent concealment. A relationship that is purely commercial in nature would not necessarily be inadequate.

[105] As for the Pioneer Defendants' remaining arguments, the certification stage does not provide the appropriate forum in which to address fine arguments about just how "egregious" the alleged conduct is. The Pioneer Defendants appear to take an unduly narrow view of the scope of conduct that may fall within the concept of "fraud".

[106] The breadth of the doctrine of fraudulent concealment is exemplified by the Supreme Court of Canada's decision in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, where La Forest J., for the majority, wrote:

> The leading modern authority on the meaning of fraudulent concealment is *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), where Lord Evershed, M.R. stated, at p. 249:
>
> > It is now clear . . . that the word "fraud" in s. 26(b) of the *Limitation Act*, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special

> relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added by La Forest J.]
>
> While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this Court; see *Guerin v. The Queen*, [1984] 2 S.C.R. 335. What is clear from *Kitchen* and *Guerin* is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action.
>
> [At 56-7; emphasis added.]

[107] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, Binnie J., for the majority, wrote:

> [39] What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.*, (1989), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. … Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken".
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> [Citations omitted; emphasis added.]

[108] Nor am I persuaded by the Pioneer Defendants' analogy to the *Fairview Donut* case. The allegations in the case at bar are serious. It is said that the defendants devised and implemented a complex and nefarious scheme aimed at secretly defrauding and harming consumers and downstream market participants. It is not plain and obvious that such allegations could not trigger the doctrine of fraudulent concealment. Although the Court in *Fairview Donut* may have taken a different view on the allegations before it – which included, *inter alia*, allegations of price maintenance and conspiracy brought by franchisees against a franchisor – I am not persuaded that the gravity of the conduct alleged in this case cannot be captured within the broad equitable concept of fraud.

[109] There remains the Pioneer Defendants' argument that the doctrine of fraudulent concealment cannot be invoked here because mere concealment cannot, on its own,

toll a limitation period under s. 36(4). This argument is premised on the notion that because the cause of action is based on conduct that, by its very nature, is carried out in secret, such conduct cannot qualify as fraudulent concealment. That argument was rejected by La Forest J. in *M.(K.) v. M.(H.)*:

> The factual basis for fraudulent concealment is described in *Halsbury's*, 4th ed., vol. 28, para. 919, at p. 413, in this way:
>
> > It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed.
>
> [At 57; emphasis in original.]

[110] If fraudulent concealment may arise from the very manner in which the act itself is performed, a secret conspiracy would fall within the ambit of this principle. Accordingly, in my view, the judge did not err in concluding it was not plain and obvious that the doctrine of fraudulent concealment cannot toll the limitation period in this case.

Conclusion on Pioneer Defendants' Appeal

[111] In the result, I would not accede to the grounds of appeal raised by the Pioneer Defendants.

Main Appeal

(i) Commonality of Harm

[112] The defendants submit that the chambers judge erred in law by recasting the standard of commonality at certification for indirect purchasers to permit the class to prove claims its members could not. They maintain that on a proper reading of *Microsoft*, taken together with the companion decision in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype SCC*], it is clear that the Supreme Court did not intend to depart from the "class-wide" standard for commonality required in any other type of class action, and it would be inconsistent to hold indirect purchasers to a different, unique standard.

[113] The defendants claim that the commonality requirement can be satisfied for indirect purchasers only by a plausible methodology having a realistic prospect of

proving that *all* class members were harmed, or that can at least separate those that were harmed from those that were not. Applying this principle to the facts, they emphasize that Dr. Reutter admitted during cross-examination that his methodology would produce average pass-through rates and that "[t]here may be some subset [of class members] that were not impacted" and that it would not be possible, using his methodology, to determine which class members were actually harmed. The defendants maintain that because Dr. Reutter's proposed methodology can neither demonstrate loss to each class member nor separate those that suffered harm from those that did not, there is no commonality of harm. To reason otherwise would be to permit individual class members to prove a claim despite some not having suffered a loss.

[114] Fundamentally, the defendants submit the judge's decision is wrong because it allows the class to prove claims its individual members could not. The crux of this submission is captured neatly in *Microsoft*, where Rothstein J. wrote: "The *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims". (Para. 133.) The defendants point to the fact that the *CPA* is nothing more than a procedural statute; it does not change or modify the parties' substantive rights: *Kwicksutaineuk/Ah-Kwa-Mish First Nation* at paras. 68-70.

[115] In support of their argument, the defendants rely in particular on para. 115 of *Microsoft*, in which Rothstein J. stated that in order to certify harm as a common issue, there must be a means of proving that harm was suffered by "the class as a whole" or of establishing "impact common to all the members of the class", as stated in the U.S. decision of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). They also rely on Rothstein J.'s repeated affirmations that loss must be established on "a class-wide basis" (see *Microsoft* at paras. 116, 118).

[116] While the defendants rely on the principles articulated in *Microsoft*, they ultimately seek to distinguish the result reached in that case (restoring the certification) on the basis that a resolution of the common issues as framed by the judge would not

determine liability in respect of all members, unlike the circumstances prevailing in *Microsoft*.

[117] The defendants do not rely solely on *Microsoft*. They also point to, among other authorities, *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 106, and *Linerboard*, both of which were cited by Rothstein J. in *Microsoft* at para. 115. They say the repeated references in these cases to "all" end purchasers signal a requirement that "harm to all" is the required standard for commonality: see *Chadha* at paras. 30-31, 36, 40. Quite simply, they say, "all means all". The defendants also cite *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, for the proposition that "a question will be considered common if it can serve to advance the resolution of every class member's claim". (Para. 46; emphasis added.)

[118] The defendants also draw a contrast between the majority reasons and the dissent in *Sun-Rype SCC*. They maintain that Karakatsanis J.'s dissenting reasons, which they say suggest that the ability to establish harm to *some* would suffice to make loss a common issue, was rejected by the majority, which instead took the view that the methodology must be capable of establishing harm to each class member.

[119] The defendants' final line of argument challenges the judge's reliance on the aggregate damages provisions of the *CPA*. They say, in essence, that the judge erroneously invoked the aggregate damages provisions to overcome the shortcomings in Dr. Reutter's proposed methodology. The defendants maintain that this reliance contravened s. 36 of the *Competition Act*, which provides that only a person "who has suffered loss or damage" may sue, and may be entitled to recover only "an amount equal to the loss or damage proved to have been suffered by him" (together with an additional amount in the court's discretion up to the full costs of the legal proceeding and any related investigation).

[120] Further, the defendants argue that the judge's conclusion cannot be reconciled with the affirmation in *Microsoft* that "an antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*" and that, in the s. 36 context, this antecedent finding would include "a finding of proof of loss". (Para. 131.) *Sun-Rype*

SCC is also relied upon in this respect, particularly para. 75 of that decision, affirming that the aggregate damages provisions of the *CPA* neither create a new cause of action nor alter the basis of existing causes of action.

[121] For his part, Mr. Godfrey submits that even if the standard of commonality requires that the methodology offer a realistic prospect of proving harm to all class members, which he disputes, that standard was met. Mr. Godfrey points to paras. 151-2 of the judge's reasons, where the judge noted Dr. Reutter's opinion that all class members would likely have been impacted by the alleged conspiracy, and that he maintained this opinion despite criticism from the defendants' expert. Mr. Godfrey maintains that absent a palpable and overriding error, "[t]his finding of fact is sufficient to dispose of the Appellants' appeal with respect to commonality of harm", as Dr. Reutter's proposed methodology was accepted by the Court.

[122] Mr. Godfrey goes on to argue that, in any event, the judge's reading of the case law is accurate: all that needs to be established to have loss certified as a common issue is that the plaintiff has proposed a methodology having a realistic prospect of showing that loss was occasioned upon the class as a whole, not necessarily that each and every class member suffered harm. Mr. Godfrey cites *Vivendi*, where LeBel and Wagner JJ. wrote:

> [45] Having regard to the clarifications provided in [*Rumley v. British Columbia*, 2001 SCC 69], it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

[123] Mr. Godfrey maintains that since a common question can exist "even if the answer given to the question might vary from one member of the class to another", it follows that the proposed methodology need not be able to demonstrate that *every member* of the class was harmed in order for harm to be certified as a common issue. A finding that the overcharge was passed on to the Indirect Purchaser *level* would advance the claim for all class members. He says that all class members have an

interest in the answer to the question of whether price increases were passed on to the indirect purchaser level because this would establish liability. In this connection, Mr. Godfrey cites *Watson BCCA* for the proposition that "commonality requires that the members of the class all have the same qualitative stake in the answer to the question, although the degree of importance to each member need not be the same". (Para. 152.)

[124] Before turning to the analysis of this question, I first note that the determination of whether the plaintiff's proposed methodology must present a reasonable prospect of establishing that *each and every class member* suffered harm in order for loss to be certified as a common issue raises a question of law subject to the standard of correctness.

[125] The chambers judge stated, at paras. 151-2 of his reasons, that Dr. Reutter reached the conclusion that "all the proposed class members would have been impacted by the defendants' alleged conspiracy" (emphasis added). That conclusion, if accepted, would satisfy the standard for commonality, whatever its formulation. However, the judge went on to consider whether it would suffice if the methodology could establish loss only at the Indirect Purchaser *level*, rather than to all individual members of that class (see paras. 166-69, 179-80). The judge's analytical approach was perhaps a result of Dr. Reutter's admissions on cross-examination that there may be some subset of class members who were not impacted, and that it would not be possible, using his methodology, to determine which class members were actually harmed. I will follow the judge's approach and decide whether, assuming Dr. Reutter's proposed methodology cannot prove harm to all individual class members, the methodology is nonetheless sufficient to meet the standard of commonality.

[126] The parties quite rightly focused much of their submissions on the Supreme Court of Canada's decision in *Microsoft*, as will I. The earlier authorities, such as *Chadha* (which, given the difficulties in that proposed action, I have not found helpful), are referred to in *Microsoft*. In *Microsoft*, the representative plaintiffs alleged that Microsoft (and a related Canadian entity) had engaged in systematic overcharging for certain operating systems and application software. The proposed class consisted of

end consumers of Microsoft's products, called "indirect purchasers", who acquired Microsoft's products from resellers, which themselves purchased the products either directly from Microsoft or indirectly through resellers higher up the chain of distribution. As described in *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at para. 27, leave to appeal ref'd [2015] S.C.C.A. No. 431, the class was "massive and diffuse, and involved separate instances of wrongdoing over multiple decades with nearly 20 products". (Para. 27.)

[127] The plaintiffs claimed that as a consequence of Microsoft's unlawful conduct, *all* of the class members paid higher prices for the subject operating systems and application software than they would have paid absent the unlawful conduct. They alleged causes of action under s. 36 of the *Competition Act*; in tort for conspiracy and intentional interference with economic interests; and in restitution for unjust enrichment, constructive trust, and waiver of tort.

[128] The Supreme Court of British Columbia certified the class action. A majority of this court allowed the appeal, setting aside the certification order and dismissing the action. The majority did so on the basis that indirect purchaser actions were not available in Canada and therefore the class members had no cause of action under s. 4(1)(a) of the *CPA*.

[129] The key issue before the Supreme Court of Canada was whether indirect purchasers had a cause of action for price-fixing. The Court concluded they did.

[130] As described by this court in *Miller*, prior to *Microsoft*, there remained uncertainty as to whether class-action plaintiffs were required to establish a methodology for proving a common issue, or instead simply to meet the "some basis in fact" threshold. In *Microsoft*, the Court clarified that for a claim to be certified, the plaintiff must put forward a methodology that is sufficiently credible or plausible to establish some basis in fact for the commonality requirement.

[131] On this point, one of the critical issues in *Microsoft* related to "commonality of harm" in respect of indirect purchasers. Rothstein J. for the Court wrote:

> [114] One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.
>
> [115] The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.
>
> [116] The most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis.
>
> …
>
> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question.
>
> [Emphasis added.]

[132] The Court went on to state that "[t]he *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims". (Para. 133.) Rothstein J. clarified that although there may remain issues to address regarding the harm suffered by individual class members, that fact does not detract from the commonality of the issue of loss:

> [140] In the present case, there are common issues related to the existence of the causes of action, but there are also common issues related to loss to the class members. Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of Myers J. that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. I would agree.

[133] In the result, the Supreme Court restored the certification.

[134] *Sun-Rype SCC*, one of the companion cases released alongside *Microsoft* as part of the seminal 2013 class action trilogy, sheds further light on what must be established to certify loss as a common issue. There, the proposed class action was brought on behalf of a "hybrid class" consisting of both direct and indirect purchasers alleging that the defendants, the leading producers of high-fructose corn syrup ("HFCS") in North America, had engaged in an illegal conspiracy to fix the price of HFCS, resulting in harm to manufacturers, wholesalers, retailers, and consumers. While the chambers judge certified the action as a class action and found that the pleadings disclosed various causes of action for both direct and indirect purchasers, a majority of this court concluded that it was plain and obvious that the indirect purchasers could have no claim.

[135] Consistent with its decision in *Microsoft*, the Supreme Court of Canada affirmed that indirect purchasers could, in theory, bring a class action. However, for reasons that need not be fully canvassed here, the majority concluded that neither the direct

purchasers' nor the indirect purchasers' claims could proceed. The latter conclusion followed from the majority's finding that the proposed representative plaintiff could not show some basis in fact that two or more persons would be able to determine if they were a member of the indirect purchaser class. There was no basis in fact to demonstrate that the information necessary to determine class membership was possessed by any of the putative class members; the plaintiffs had not introduced evidence to establish some basis in fact that at least two class members could prove they purchased a product actually containing HFCS produced by one of the defendants (rather than liquid sugar) during the class period and were therefore identifiable members of the class. In short, while there may have been indirect purchasers who were harmed by the alleged price-fixing, they could not self-identify. Rothstein J. wrote:

> [72] A key component in any class action is that two or more persons fit within the class definition. If, as in this case, there is no basis in fact to show that at least someone can prove they fit within the class definition, the class cannot be certified because the criteria of "an identifiable class of 2 or more persons" is not met. No amount of expert evidence establishing that the defendants have harmed the class as a whole does away with this requirement.

[136] Justice Rothstein also observed that "[a]llowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered loss at the hands of the alleged overchargers subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs *who have suffered harm* but for whom it would be impractical or unaffordable to bring a claim individually". (Para. 67; emphasis in original.)

[137] In the result, the claims could not be certified and the actions were dismissed.

[138] Justice Karakatsanis, writing in dissent on behalf of herself and Justice Cromwell, expressed two objections to the majority's conclusion that there was no basis in fact to identify a class because there was no or insufficient evidence that class members could be identified or self-identify, and that therefore it was impossible for the indirect purchasers to prove loss:

> [86] First, I am not persuaded that the requirement that the class be identifiable includes the requirement that individual members of the class be capable of proving individual loss. Indeed, as discussed below, the *CPA* provides

> for remedies when the *class* has suffered harm that are available without proof of individual loss. Such an approach best serves the purposes of class proceedings, which are designed not only to provide enhanced access to justice and judicial economy, but also to motivate behaviour modification.
>
> [87] Second, even if proof of individual loss is necessary to establish an identifiable class under the *CPA*, I do not agree that, on this record, it will be impossible to determine whether an individual is a member of the class.
>
> [Emphasis in original.]

[139] She continued:

> [97] … the *CPA* is designed to permit a means of recovery for the benefit of the class as a whole, without proof of individual loss, even where it is difficult to establish class membership. Thus, if no individual seeks an individual remedy, it will not be necessary to prove individual loss. … I am not persuaded that it is a prerequisite that individual members of the class can ultimately prove individual harm.

[140] Justice Karakatsanis challenged the majority's view that *CPA* was merely procedural. She asserted that the *CPA* has "substantive implications" in the sense that it "creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual members' damages is impractical". (Para. 107.) She continued:

> [108] I agree with Justice Rothstein that the aggregate damages provisions relate to the assessment of damages and cannot be used to establish liability. However, where proof of loss or detriment is essential to a finding of liability, for example in a cause of action under s. 36 of the *Competition Act*, or in tort, expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis. … While these provisions do not create new causes of action, they permit individual members of the class to obtain remedies that may not be available to them on an individual suit because of difficulties of proving the extent of their individual loss. The aggregate damage provision and *cy-près* awards promote behaviour modification and provide access to justice where it otherwise may be difficult to achieve.

[141] Justice Rothstein responded to Karakatsanis J.'s dissenting reasons in the following terms:

> [74] Justice Karakatsanis writes that "if no individual seeks an individual remedy, it will not be necessary to prove individual loss" (para. 97), and that the aggregate damages provisions of the *CPA* allow class actions to proceed "where *liability to the class* has been proven but individual membership in the class is difficult or impossible to determine" (para. 102 (emphasis in original)).

> [75] As I understand it, Justice Karakatsanis's point is that where liability to the class has been proven, there is no requirement to prove that any person is a member of a class or that any person has suffered individual damage. The necessary implication is that class proceeding legislation alters existing causes of action. For example, s. 36 of the *Competition Act* creates a cause of action for "[a]ny person who has suffered loss or damage". My colleague's approach would suggest a class action claim could proceed under s. 36 of the *Competition Act* without any person establishing that they had suffered loss or damage. However, the *CPA* neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants with causes of action to unite and pursue their claims as a class.
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> [Emphasis added.]

[142] Another decision bearing upon the "commonality of harm" issue is Perell J.'s decision in *Shah SCJ*. In several material respects, the scenario in *Shah* parallels that in the case at bar. The plaintiffs proposed a competition law class action on behalf of direct and indirect purchasers of lithium-ion battery cells ("LIBs"). This class included umbrella purchasers. The plaintiffs alleged that between 2000 and 2011, the defendants – leading manufacturers and sellers of LIBs globally – conspired to fix the price of LIBs manufactured and sold in Canada. Their statement of claim alleged that the conspiracy caused the prices of LIBs sold across the entire market – including that part of the market representing non-defendant LIBs and products containing LIBs – to be artificially inflated. As a consequence, class members paid more for LIBs and LIB products than they would have paid in the absence of the wrongful conduct. They asserted four causes of action: (1) a statutory cause of action pursuant to ss. 36 and 45 of the *Competition Act*, (2) unlawful means conspiracy, (3) predominant purpose conspiracy, and (4) unjust enrichment.

[143] As Perell J. explained, the defendants maintained, relying on *Microsoft*, that to be certifiable as a class action, the proposed common issues must have "the commonality of demonstrating that each and every Class Member was harmed by the Defendants' alleged misconduct". (Para. 58.) The defendants read the words "the methodology must offer a realistic prospect of establishing loss on a class-wide basis," at para. 118 of *Microsoft*, as meaning that the proposed methodology must be able to establish that *all* class members suffered harm or, at the very least, to determine whether or not a

particular class member qualifies for compensation. This is, of course, precisely what the defendants in the case at bar maintain.

[144] Justice Perell rejected the defendants' position. He wrote:

> [63] In my opinion … the Defendants have incorrectly interpreted Justice Rothstein's judgment. I conclude that the meaning of Justice Rothstein's judgment is that passing-on; i.e., the idea that indirect purchasers ultimately, in whole or in part, pick up the tab of the overpricing is a constituent element of their cause of action. The constituent element is that the price-fixing has reached the indirect purchaser level of the distribution channel.
>
> [64] The consequential common issue from that constituent element is that there must be a methodology to show that the harm inflicted by the overpricing reached the indirect purchasers. Justice Rothstein did not say that it had to be shown that every member of the class suffered an individual loss, but rather he said that it had to be demonstrated that the indirect purchaser class as a whole; i.e., as a group, suffered from the harm inflicted by the wrongdoers. This means that if the indirect purchasers succeeded in showing that the loss reached their level of the distribution channel, then that success for the class did not necessarily lead to success for each and every member of the class. As a corollary, Justice Rothstein meant that if the indirect purchasers failed to show that the overpricing reached their level of the distribution channel, then their cause of action would fail for the whole class.
>
> [Emphasis added.]

[145] The Court in *Shah* held that on a close reading of *Microsoft* and subsequent case law, the proposed methodology must present a reasonable prospect of establishing that "loss is common across the indirect purchaser members of the class", but that such a methodology need not "prove that each individual member of the hybrid class suffered an individual loss". Put differently, provided the methodology can establish that "the loss impacted the indirect purchasers as a group", loss could be certified as a common issue. (Para. 67.) Perell J. concluded that the test had been met on the facts before him.

[146] In the result, he certified the action as a class action proceeding but denied certification of the claims relating to unlawful means conspiracy and claims brought on behalf of umbrella purchasers, a finding to which I will return later in these reasons.

[147] For reasons indexed as 2016 ONSC 4670, the Ontario Divisional Court denied the defendants' application for leave to appeal Perell J.'s decision on this issue and, consistent with this position, leave on the same issue was recently denied in *Fanshawe*

v. Hitachi, 2017 ONSC 2791 at paras. 52-57 [*Fanshawe 2017 ONSC*]. The Divisional Court did, however, grant the plaintiffs' leave application relating to Perell J.'s decision to deny certification of the unlawful means conspiracy claim and the umbrella purchaser claims. I will review the Divisional Court's decision on the latter issue later in these reasons.

[148] The judge in the case at bar (at para. 167) adopted Perell J.'s conclusion in *Shah* that "for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing". (Para. 69.) He added that the plaintiff need only show that the defendants "sometimes or always overcharged direct purchasers" and that "at least some direct purchasers passed on these overcharges". (Para. 168.) It was, in his view, unnecessary for the methodology to go further and establish that *every single member* of the class suffered harm.

[149] In my view, the judge's conclusion regarding the legal standard of commonality was correct. That conclusion is supported by Rothstein J.'s direction in *Microsoft* that in order to satisfy the commonality requirement in indirect purchaser cases, "the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain" (para. 115), as well as his further instruction that the proposed methodology must "offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e., that passing on has occurred)". (Para. 118.)

[150] In my view, it cannot be contended that the methodology must establish that each and every class member suffered harm. Instead, the methodology must offer a reasonable prospect of establishing that overcharges have been passed through to the indirect purchaser level. Read contextually, the words "loss on a class-wide basis", as applied in the indirect purchaser context, are properly understood as referring to loss

experienced at the indirect purchaser class level, not necessarily loss experienced by each and every member of that class.

[151] I do not see *Sun-Rype SCC* as being inconsistent with this interpretation of the commonality requirement. The Achilles heel of the proposed class members in *Sun-Rype SCC* was that they could not self-identify. That problem is not encountered here. The divergence between the majority's approach and that of the dissent arose from the question of whether, once liability to the class has been proven, there was any requirement to prove any person is a member of the class or that any person has suffered individual damage. Again, that is not the issue in the case at bar. Moreover, there is nothing in Rothstein J.'s reasons in *Sun-Rype SCC* that suggests the standard of commonality is "absolute" in the sense that the defendants suggest.

[152] In my view, the defendants' reliance on the statement in *Sun-Rype SCC* that there must be some basis in fact that "[a]t least two persons can prove they incurred a loss" (paras. 71, 76) is misplaced. This passage, as I read it, merely stipulates that at least two persons must be able to self-identify and prove they suffered loss. I would not, as the defendants would have me do, expand the scope of the plain language of the Court's reasons to require that the methodology be reasonably capable of proving harm to each and every class member. "At least two" is not equivalent to "all".

[153] I also note that the law governing class action proceedings in Quebec, the framework of which is contained in the *Code of Civil Procedure*, R.S.Q., c. C-25, does not require that harm to each and every class member be proven at the authorization stage, the Quebec equivalent of the certification stage. In *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, the third case in the 2013 class action trilogy, the Court stated:

> [130] … In the instant case, which is at the authorization stage, the respondent is merely required to establish an arguable case of an injury suffered. It is therefore not necessary at this preliminary stage to prove that each member of the group suffered a loss. … the demonstration of an aggregate loss may be enough at the authorization stage.

[154] Decisions issued subsequent to the Supreme Court's 2013 class action trilogy support the standard of commonality endorsed in these reasons. Perell J.'s decision in *Shah SCJ* is particularly compelling on this point. As the chambers judge did, I too would adopt this reasoning respecting the standard for commonality of loss in cases involving indirect purchasers:

> [69] Thus, for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing. If the plaintiff's expert's methodology failed in proof at trial, then the class members' claim would fail across the indirect class members' class because each and every one of them would have failed to prove a constituent element of their cause of action; i.e., that the price-fixing penetrated their place or "level" of the distribution channel, and the Defendants would secure a discharge of liability against all the class members. Conversely, if the methodology proved sound to show that overcharges reached the indirect purchaser place in the distribution channel, then there might have to be individual issues trials to determine each class member's entitlement.
>
> [70] Or, if at trial the methodology to prove loss to the group was sound and a methodology for an aggregate assessment was also established, then the distribution mechanisms of the *Class Proceedings Act, 1992* could be used to determine what is a fair and reasonable distribution and it would not be necessary to have any individual issues trials.
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> [Emphasis added.]

[155] Our court in *Watson BCCA* recently reviewed authorities revealing "the essence of the requirement for commonality". (Paras. 147-52.) Having performed this analysis, the Court concluded that a "common issue … must be one encompassed by the litigation, and for which its answer will advance the ultimate determination of outcome", and it must be that "the members of the class all have the same qualitative stake in the answer to the question, although the degree of importance to each member need not be the same". (Para. 152.) This description is, in my view, capable of supporting the standard of commonality endorsed in these reasons.

[156] I also note Justice Rady's reasons in *Crosslink*, in which she stated that "in a claim for damages for tortious economic loss, it is not necessary to show a methodology that can demonstrate harm to all class members"; rather, "[i]t is sufficient if harm can be

shown to some of the class members". (Paras. 66-8.) See also *Fanshawe 2017 ONSC* at paras. 52-57.

[157] Recent U.S. case law supports the standard of commonality adopted here. In *In re Air Cargo Shipping Services Antitrust Litigation*, no. 06-MD-1775 (15 October 2014), the District Court for the Eastern District of New York affirmed that "[n]othing in our class certification jurisprudence requires that every single class member suffer an impact or damages, regardless of the size of the class. To the contrary, courts have routinely recognized what an unrealistic burden this would put on plaintiffs" (p. 74). While I acknowledge that the legal principles governing class action certification proceedings in the U.S. are different from those in Canada in a number of significant respects, the Court's observation that requiring plaintiffs to establish at the certification stage that every single class member suffered harm would constitute an "unrealistic burden" is apt.

[158] The answer to the defendants' concern over rights being granted to the class that its individual members do not enjoy is that the certification of an issue as a common one does not create any ultimate right to recover. The certification of a common issue does not represent a final determination of the class members' individual or collective rights to recover; the certification stage is but a preliminary one. As this court noted in *Kwicksutaineuk/Ah-Kwa-Mish First Nation*, the *CPA* is merely procedural: it does not change the substantive rights of parties. (Paras. 68-70.) Furthermore, even if a positive finding is made at trial that price increases were passed on to the Indirect Purchaser level, this would not necessarily lead to success for each and every member of the class. Individual issues of loss may remain. (See *Shah SCJ* at paras. 69-70.)

[159] The standard of commonality endorsed herein is supported by policy considerations. It would be impractical and unduly burdensome to require that class action plaintiffs be able to devise a methodology at the certification stage that offers a reasonable prospect of establishing that *each and every* class member suffered loss. To impose such a requirement would be to undermine the purposes of class action proceedings – which, as stated in *Hollick* (para. 15) and *Dutton* (paras. 27-9), include serving judicial economy, improving access to justice, and encouraging behaviour

modification – by too readily denying potentially viable claims at a preliminary stage. The less onerous standard of commonality endorsed here recognizes the absence of pre-certification discovery, the information asymmetry between the parties, and the principle that a certification proceeding is not to be treated as a trial on the merits.

[160] Turning to the defendants' argument focusing on the judge's reference to the aggregate damages provisions contained in ss. 29-34 of the *CPA*, I disagree that the judge erred in referring to these provisions. It is clear that the aggregate damages provisions are applicable only once liability has been established. At para. 132 of *Microsoft*, the Supreme Court of Canada adopted Masuhara J.'s reasons in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, to the effect that "liability requires that a pass-through reached the Class Members", and that "[t]hat question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked". (Para. 176.) The judge here did not sidestep the requirement that liability be established before the aggregate damages can be applied, which is cited explicitly in his reasons. (Para. 182.)

[161] The judge referred to the aggregate damages provisions as supporting the notion that liability could be established and an award distributed to class members even where it had not been established that each and every member suffered loss. (Para. 169.) Subsection 31(1) of the *CPA* provides that a court may make an aggregate damages award on an average or proportional basis if it would be "impractical or inefficient" to "identify the class or subclass members entitled to share in the award" and failure to make such an award would "deny recovery to a substantial number of class or subclass members". Clearly, then, the statute contemplates recovery even where certain members of the class have not proven that they suffered harm. The judge did not suggest that such an award could be made in the absence of a finding of liability, and it cannot be said that his reading of the provision was erroneous.

[162] Finally, with respect to the defendants' alternative formulation of the test to be met – i.e., that in order for harm to be certified as a common issue, the proposed methodology must be capable of separating those who suffered harm from those who

did not – none of the authorities reviewed above support this submission. Instead, the authorities confirm that it is sufficient if the methodology presents a reasonable prospect of establishing that price increases were passed on to the indirect purchaser level.

[163] I conclude that the judge applied the correct standard for commonality of harm. To be clear, the methodology need not be capable of demonstrating harm to each and every member of the Indirect Purchaser class, provided it presents a reasonable prospect of establishing that overcharges were passed on to the Indirect Purchaser *level*, the standard of commonality will be met. The judge concluded that a reasonable methodology existed here, and there is no basis upon which to interfere with his decision.

(ii) Breach of Competition Act as Supplying "Unlawfulness" Element

[164] The defendants submit as their second ground of appeal that the judge erred in law by holding that a breach of s. 45 of the *Competition Act* may furnish the "unlawfulness" element for various common law causes of action. This issue turns on an analysis of this court's decisions in *Wakelam* and *Watson BCCA*. The tension between these two decisions, to the extent that there is any, led Mr. Rook, counsel for certain of the defendants, to request that a five-justice division be appointed to hear the present appeal. In making this request, he submitted that *Watson* was either decided *per incuriam* or should be overturned by a five-justice division. Counsel for the plaintiff opposed the request for a five-justice division. Ultimately, this court denied Mr. Rook's request, and the appeal proceeded before a three-justice division.

[165] The defendants' central argument is that *Watson BCCA* was either decided *per incuriam* or should be overturned. Its arguments in support of this submission are two-fold.

[166] First, they say, *Watson BCCA* was decided based on the erroneous premise that the common law recognized a cause of action in unlawful means conspiracy based on a breach of what was then the *Combines Investigation Act* when Parliament enacted a statutory cause of action in 1975, being what is now s. 36 of the *Competition Act*. As a consequence, this court in *Watson BCCA* adopted the wrong principle of statutory

interpretation in ascertaining Parliament's intent – namely, the principle from *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, that statutes do not constrain the prevailing law absent a clear indication to the contrary. The correct principle of interpretation is that articulated in *Orpen v. Roberts*, [1925] S.C.R. 364: where a statute creates an offence and provides an adequate remedy, Parliament is presumed not to have intended that additional remedies be available at common law.

[167] Second, they contend, *Watson BCCA* is inconsistent with and incorrectly distinguished *Wakelam*. The issue in the two cases was the same: whether a breach of the *Competition Act* could support a cause of action outside the *Act*. The Court in *Wakelam* answered this question in the negative, and there is no reason to depart from that conclusion. In short, as recognized in *Wakelam*, the provisions of the *Competition Act* form a complete code that does not admit of parallel remedies.

[168] For his part, Mr. Godfrey submits that *Watson BCCA* is a recent and carefully reasoned decision in which the relevant issues and authorities were fully canvassed. He contends that *Watson BCCA* clarified that *Wakelam* was limited to the proposition that a breach of the *Competition Act* alone could not ground claims for restitutionary remedies, and he maintains there is no reason to revisit the case. Mr. Godfrey adds that *Watson BCCA* has been followed in subsequent cases – most notably, the Ontario Court of Appeal's decision in *Fanshawe*. There, the Court carefully considered and followed *Watson BCCA* and held that a breach of the *Competition Act* can supply the "unlawfulness" element in a claim for unlawful means conspiracy.

[169] Turning to the analysis, it is a question of law whether it is plain and obvious that a breach of s. 45 of the *Competition Act* cannot furnish the "unlawfulness" element for various common law causes of action. As such, the standard of correctness applies.

[170] In order to fully appreciate the issue before this court, it will first be necessary to provide at least a brief discussion of *Wakelam* and *Watson BCCA*. In *Wakelam*, the representative plaintiff, Ms. Wakelam, brought a proposed class action alleging that the defendant manufacturers of children's cough and cold medicines had engaged in "deceptive acts or practices" contrary to the British Columbia *Business Practices and*

Consumer Protection Act, S.B.C. 2004, c. 2 [*BPCPA*], and had made false or misleading representations to the public contrary to s. 52 of the *Competition Act*. Both statutes provide a private right of action to persons who suffer loss or damage as a result of a breach of the legislation. In advancing her claims, Ms. Wakelam sought to "marry the breaches of statute" with "restitutionary remedies not contemplated by the [*BPCPA*] or the *Competition Act*". (Para. 5.) Her theory was that as a result of their statutory breaches, the defendant manufacturers had been wrongfully enriched and therefore a restitutionary award ought to be made. Hence, in addition to the damages that might be available under the statutes, the plaintiff sought recovery under the restitutionary principles of unjust enrichment, waiver of tort, and constructive trust, each premised on a breach of the statutes. Unlike the case at bar, there was no claim in civil conspiracy. The motions judge certified Ms. Wakelam's action as a class action. The defendants appealed the certification order.

[171] On appeal, this court analyzed "whether a breach of the *Competition Act* … can be used to establish the element of the 'wrong' for a restitutionary claim". (Para. 83.) The Court concluded it could not:

> [90] … I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI. It follows in my view that the certification judge did err in finding that the pleading disclosed a cause of action under the *Competition Act* for which a court might grant restitutionary relief ….

Consequently, Ms. Wakelam's claim for restitutionary relief was struck.

[172] *Watson BCSC* followed just two months after *Wakelam* was released. There, the representative plaintiff, Ms. Watson, sought certification of a proposed class action brought on behalf of merchants who accept Visa and MasterCard credit cards, alleging that the credit card networks imposed supra-competitive fees upon merchants. Various causes of action were advanced: a claim under s. 36 of the *Competition Act* based on breaches of ss. 45 and 61; tort claims of conspiracy to injure, unlawful means conspiracy, and the unlawful means tort; and, in the alternative, restitutionary relief based on unjust enrichment, waiver of tort, and constructive trust.

[173] The certification judge, Chief Justice Bauman, took the view that no causes of action located outside the four corners of the *Competition Act* could be founded on a breach of the *Act*. After citing the passage from *Wakelam* reproduced above, he wrote:

> [189] … the plaintiff's claims under the *Competition Act* cannot constitute the foundation for other causes of action. It is not open to the plaintiff to plead unjust enrichment or waiver of tort to the extent that those pleadings rely on acts that are only unlawful as a result of the *Competition Act*. As previously discussed, this effect of *Wakelam*, combined with a relevant limitation period and repeal of s. 61 of the *Competition Act*, is fatal to the plaintiff's claim under that section. Similarly, even if the plaintiff's claim in unlawful interference with economic relations was otherwise certifiable, the decision in *Wakelam* would be fatal to it.
>
> [190] Moreover, the plaintiff's unlawful means conspiracy claim must fail, as it is based exclusively on a breach of the *Competition Act* …. I would accordingly strike the unlawful means conspiracy claim.

[174] On appeal, the Court in *Watson BCCA* considered the impact of *Wakelam* on the case before it. Saunders J.A. stated:

> [24] I conclude that *Wakelam* does not govern the issue before us on the tort of unlawful means conspiracy or restitution and waiver of tort based upon that claim. However, it does bar, in my view, claims in restitution for simple breach of the *Competition Act,* that is, it bars restitution in lieu of a s. 36 remedy, and on that application of *Wakelam*, I would not refer the issue to a five judge division. In the circumstances, it is inconsistent with the orderly development of our jurisprudence to consider changing direction on this issue so soon after the litigants in *Wakelam* received their final answer on the issue. I take *Wakelam* as correctly decided on the issue.

[175] The Court then identified the key issue to be decided:

> [33] The main issue in this appeal may be shortened to the question: can one sue for damages or equitable remedies, alleging a tort that requires proof of breach of the *Competition Act*? Another way of putting the question is whether the *Act* is such a complete code, providing all available remedies within its four corners, that it excludes an action in tort that requires proof of breach of the statute.

[176] The Court engaged in a close analysis of the constitutional history of the *Competition Act*, as well as the Supreme Court jurisprudence relating to the tort of unlawful means conspiracy. It noted that in *Wakelam*, there was no claim in tort, and certainly not the claim of unlawful means conspiracy. Saunders J.A. distinguished *Wakelam* on the following basis:

> [51] [In *Wakelam*, the Court] held that there is nothing in the [*Competition Act*] to indicate that the statutory right of action provided by s. 36 should be augmented by a right to sue in tort or a right to seek restitutionary remedies for breach of Part VI. A case, however, only stands for a proposition in the context of the facts on which the decision was made …. Madam Justice Newbury was not addressing the tort of unlawful means conspiracy – she was dealing with restitutionary claims based solely on breach of the statute and it is a misreading of her reasons for judgment, in my view, to take *Wakelam* that far. Indeed, by her description of the remedy created by the *Act* not being "at large" she presaged a claim of larger scope.

[177] The Court then expressed its view that *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, governed the outcome of the case before it. Applying the principles set out therein, the Court reached the conclusion that "it cannot be said that the scheme for civil redress in s. 36 of the *Act* is a replacement for an action in common law for unlawful means conspiracy". (Para. 58.) The Court added: "I consider a claim for unlawful means conspiracy relying upon breach of the *Competition Act*, is a viable pleading. My conclusion extends to a claim in restitution and waiver of tort to the extent those claims derive from the tort of unlawful means conspiracy". (Para. 58.)

[178] Having reached that conclusion, the Court turned to the claim in restitution for simple breach of the *Competition Act*. It took *Wakelam* to be dispositive of the issue, stating that "[t]o the extent the claim derives from non-observance of the *Act* and nothing else, for the reasons given by Madam Justice Newbury [in *Wakelam*], the remedy provided by the *Act* in s. 36 is the sole route to recovery". (Para. 59.)

[179] Saunders J.A. set out her conclusions as follows:

> [61] I conclude that the claim for unlawful means conspiracy based upon ss. 45 and 61 of the *Act*, and claims in restitution and waiver of tort in relation to that tort disclose a reasonable claim, that is, it is not plain and obvious that it

> cannot succeed. … On the other hand, I conclude on the basis of *Wakelam* that claims in restitution for simple breach of the *Act* cannot succeed.

[180] The effect of *Watson BCCA*, then, was to clarify that *Wakelam* did not have the effect of precluding common law tort claims based on a breach of the *Competition Act*, such as claims for unlawful means conspiracy. *Wakelam* did, however, prevent claims in restitution for simple breach of the *Competition Act* from succeeding.

[181] The implications of *Wakelam* and *Watson BCCA* and the extent to which those two cases are in conflict, if at all, have been debated in subsequent case law. In *Shah SCJ*, for example, Perell J. grappled with the two decisions and ultimately took the view that *Watson BCCA* was wrongly decided and that what he described as "*obiter dicta*" from *Wakelam* precluding tort claims based on a breach of the *Competition Act* ought to be followed. (Paras. 224-8.)

[182] However, Perell J.'s refusal to certify the unlawful means conspiracy claim in the case before him was reversed on appeal. The Divisional Court, for reasons indexed as 2017 ONSC 2586, took itself to be bound by the Ontario Court of Appeal's recent decision in *Fanshawe*. In *Fanshawe*, the Court rejected the notion that the enactment of s. 36 removed litigants' ability to premise a claim of civil conspiracy on a breach of the *Competition Act*. Hourigan J.A. wrote:

> [85] … There is nothing in the language of s. 36 or in the debates surrounding its enactment that suggests it was Parliament's intention to eliminate the use of a breach of Part VI of the Act as the unlawful means in a civil conspiracy claim. To the contrary, it would appear to be incongruous with the purpose of the Act, being the elimination of anti-competitive behaviour, that Parliament would eliminate a common law cause of action that serves to punish such behaviour.

[183] Ultimately, the Court held that it was not plain and obvious that a breach of the *Competition Act* could not furnish the unlawful means component of a claim in civil conspiracy. Hourigan J.A. summarized his conclusion thus:

> *(iv) Is it plain and obvious that a breach of s. 45 of the Competition Act cannot serve as the unlawful means for a civil conspiracy claim?*
>
> No. Prior to the enactment of what is now s. 36 of the *Competition Act*, a breach of Part VI of the Act could serve as the unlawful means in a civil conspiracy. If Parliament intended to take away this existing common law right it would have to

> have done so in the clearest of terms. It did not. The weight of appellate authority on the point, including a case from this court, supports the view that a breach of Part VI of the *Competition Act* may serve as the unlawful means in a civil conspiracy. [Para. 18.]

[184] Having set out this jurisprudential background, I am of the view that neither a detailed discussion of the arguments advanced by the defendants nor a fine-grained analysis of the various decisions in this area of the law need be attempted here. The defendants' arguments may be disposed of in relatively short order. In my view, *Watson BCCA* is directly on point. The very question put before this court – whether a breach of s. 45 of the *Competition Act* may furnish the "unlawfulness" element for various common law causes of action in tort – was answered in the affirmative in *Watson BCCA*.

[185] It is open to a court to depart from the principle of *stare decisis* and to decline to follow one of its own prior decisions. The circumstances in which a three-justice division of the Court of Appeal of British Columbia may take such a course of action are, however, strictly limited. The Court may overturn one of its own decisions only if "the previous decision is manifestly wrong, or should no longer be followed, because, for example, the previous decision failed to consider applicable legislation or binding authorities, or, if followed, would result in a severe injustice": *British Columbia v. Worthington (Canada) Inc.* (1988), 29 B.C.L.R. (2d) 145 at 148 (C.A.), leave to appeal ref'd [1988] S.C.C.A. No. 368; *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board*, 2006 BCCA 364 at para. 24; *Bell v. Cessna Aircraft Company* (1983), 46 B.C.L.R. 145 at 148 (C.A.), leave to appeal ref'd [1982] S.C.C.A. No. 285. Here, none of those conditions is met. The relevant legislation and authorities were put before the Court and fully considered, the words "severe injustice" cannot in my view be applied here, and the result reached in *Watson BCCA* cannot be said to be "manifestly wrong". In my view, it is not open to this division to reconsider and overturn *Watson BCCA*.

[186] In sum, the judge did not err in holding that it is not plain and obvious that a breach of s. 45 of the *Competition Act* cannot furnish the "unlawfulness" element for the various common law causes of action advanced by the plaintiff.

(iii) Umbrella Purchasers

[187] The third ground of appeal raised by the defendants is that the judge erred in law by holding that the Umbrella Purchasers may assert various causes of action against them.

[188] The defendants' first line of argument within this overarching contention is that the judge's analysis was faulty because he did not expressly consider whether the Umbrella Purchasers had claims at common law; he only considered their *Competition Act* claim. They say this was a critical error because the Umbrella Purchasers cannot establish two essential elements of the tort of civil conspiracy: (1) that the unlawful conduct was directed at them, and (2) that the defendants expected their conduct to injure them.

[189] In their second line of argument, the defendants maintain that the judge erred in his interpretation of s. 36 of the *Competition Act*, permitting a claim so long as the defendants' conduct was *a* contributing cause of the class members' loss. They say this interpretation is overly permissive because it lacks meaningful limits on the scope of liability. Consequently, they say, it raises the spectre of indeterminate liability, as economic losses are potentially endless. They submit that the words of caution issued by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, vis-à-vis concerns over indeterminate liability are germane here, as they apply broadly to cases involving economic loss.

[190] The defendants add that if this court concludes it is not plain and obvious that the Umbrella Purchasers do not have causes of action, then it must consider whether the judge erred by:

1) finding that Mr. Godfrey is an appropriate representative of the Umbrella Purchaser subclass; or

2) accepting the litigation plan.

[191] The defendants' first argument focuses on ss. 4(1)(e)(i) and (iii) of the *CPA*, which require, respectively, that there be a representative plaintiff who "would fairly and

adequately represent the interests of the class" and who "does not have, on the common issues, an interest that is in conflict with the interests of other class members". The defendants maintain that Mr. Godfrey cannot fairly and adequately represent the Umbrella Purchaser subclass because he is conflicted: if the claims in restitution, which remain only for the non-Umbrella Purchasers, are permitted to proceed, it would be to Mr. Godfrey's advantage to pursue those claims vigorously or accept a settlement based on those claims, but doing so would be disadvantageous to the Umbrella Purchaser subclass.

[192] The defendants' second argument centres on s. 4(1)(e)(ii) of the *CPA*, which stipulates that there be a representative plaintiff who "has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding". The defendants contend that the separate causation issues relating to the Umbrella Purchasers – namely, whether non-defendant ODD manufacturers and suppliers raised their prices as a result of the alleged conspiracy – necessitate separate evidence from parties who are not defendants to the proceedings. They say the litigation plan is silent on the matter and therefore inadequate.

[193] Mr. Godfrey responds as follows. With respect to the defendants' first line of argument, the plaintiff submits that the chambers judge's reasons provide a basis for his conclusion that the pleadings disclosed a cause of action for both predominant purpose and unlawful means conspiracy at common law for both non-Umbrella Purchasers and Umbrella Purchasers. Furthermore, the facts alleged in the pleadings must, in the s. 4(1)(a) analysis, be accepted as true. Given that the pleadings cite an intention on the part of the conspirators to harm the *entire* class, there is no basis upon which to find the Umbrella Purchasers' civil conspiracy claim is defective.

[194] Moving to the second line of argument, Mr. Godfrey maintains that the authorities from Canada and elsewhere favour certification of umbrella purchaser claims. Perell J.'s decision in *Shah SCJ* must be taken as an outlier and, in any event, Masuhara J.'s reasons for declining to follow that decision are sound. The plaintiff maintains,

furthermore, that s. 36 of the *Competition Act* is concerned only with causally related damages and that the essential elements of s. 45 – namely, proof of the requisite *mens rea* and *actus reus* – limit the potential exposure facing defendants. The concerns over indeterminate liability do not factor into the analysis of an intentional wrong; rather, indeterminate liability is a juridical concept to be restricted to the second stage of the duty of care analysis: whether there are any residual policy considerations that ought to negate or limit a *prima facie* duty of care, as discussed in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 20, citing *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed and explained in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at paras. 25, 29-39.

[195] Mr. Godfrey adds that if the Court accepts his submission that the judge's decision to certify the Umbrella Purchasers' claims based on the tort of civil conspiracy and a breach of the *Competition Act* are upheld, the defendants' remaining challenges to (1) Mr. Godfrey's ability to fairly and adequately represent the Umbrella Purchaser subclass free of conflicts, and (2) the litigation plan, must both fail.

[196] With respect to his ability to serve as the representative plaintiff for the entire class, Mr. Godfrey submits that the alleged "conflict" is, at heart, an issue relating to the distribution of a potential award or settlement. He says that conflicts on the distribution of a judgment do not preclude certification.

[197] Regarding the defendants' contention that the litigation plan is inadequate, Mr. Godfrey submits that the judge's conclusion on the matter is entitled to deference.

[198] Turning to the analysis, I begin with the standard of review. I am of the view that the question of whether it is legally open to umbrella purchasers generally to advance claims against alleged price-fixers said to have caused them harm is a question of law subject to the standard of correctness.

[199] To place the discussion in context, I reproduce a portion of an article cited in the judge's reasons that captures the essence of the theory of umbrella pricing effects:

> Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a substitution away from the cartels' products toward substitute products produced by cartel outsiders. … [T]he increased demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market – for example, in cases where a cartel covers less than 100 percent of the firms in that market – or in neighboring markets.
>
> Roman Inderst, Frank P. Maier-Rigaud & Ulrich Schwalbe, "Umbrella Effects" (2014) 10:3 J. Competition L. & Econ. 739 at 740 [citations omitted].

[200] As Perell J. observed in *Shah SCJ*, "[t]he theory of umbrella liability is that cartel activity could create an 'umbrella' of supra-competitive prices that enable non-cartel members to set their prices higher than they otherwise would have under normal conditions of competition, thus affecting Umbrella Purchasers". (Para. 159.)

[201] Turning to the defendants' first line of argument, I do not accept the claim that the judge's analysis was faulty because he did not expressly consider whether Umbrella Purchasers have a claim at common law. I agree with Mr. Godfrey that the judge's reasons provide a basis for his conclusion that the pleadings disclosed a cause of action for both predominant purpose and unlawful means conspiracy at common law for both non-umbrella and umbrella claimants. (Paras. 90-103.)

[202] In my view, the fact that the judge did not perform a separate, standalone analysis of the Umbrella Purchasers' civil conspiracy claims merely indicates that he did not see any distinguishing features that merited a separate analysis. It was open to the judge to take such an analytical approach. Mr. Godfrey pleaded that the conspirators intended to and succeeded in harming the *entire* class. The defendants' contention that the Umbrella Purchasers can prove neither that the alleged unlawful conduct was directed at Umbrella Purchasers nor that the defendants expected their conduct to injure Umbrella Purchasers must be reserved for trial. The defendants' critiques of the judge's reasons thus cannot be sustained.

[203] The defendants' second line of argument requires a different analysis. At the onset, it must be observed that the law governing the claims of umbrella purchasers in Canadian class action proceedings is still in its nascent stages. A lively debate has emerged in recent years as to whether umbrella purchasers are legally entitled to bring a claim under the *Competition Act*. This can be demonstrated by reviewing the leading cases on point.

[204] A number of proposed class actions in Canada that included umbrella purchaser claims have been certified – see the examples cited at para. 67 of the judge's reasons: *Crosslink*; *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd [2010] S.C.C.A. No. 32, reconsideration of leave to appeal ref'd [2010] S.C.C.A. No. 32; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (Sup. Ct.), leave to appeal to Div. Ct. ref'd 2010 ONSC 2705. See also *Fanshawe College v. Hitachi, Ltd.*, 2016 ONSC 5118 (S.C.J.), in which Masuhara J.'s reasons were cited with approval. (Paras. 35-7.) The first major Canadian class action certification decision to broach the topic of umbrella purchaser claims directly, and to discuss the subject in detail, was *Shah SCJ*.

[205] The alleged facts underlying *Shah SCJ* were reviewed earlier in these reasons. Insofar as the umbrella purchaser claims were concerned, Perell J. found that it was plain and obvious that such purchasers could not have a cause of action under the *Competition Act*. He reached this result despite acknowledging cases in which umbrella claims had been certified. At paras. 164-5, he offered four reasons in support of his conclusion:

1) permitting an umbrella purchaser claim would be inconsistent with restitutionary law;

2) liability would be indeterminate and uncircumscribed and thus contrary to legal policy governing economic loss torts;

3) permitting the claim would be unjust because the defendants would be potentially held liable for the independent pricing decisions of non-defendants,

decisions which would constitute intervening acts breaking any causative link between the defendants' actions and the loss suffered by the umbrella purchasers; and

4) to the extent that tort law plays a role in behaviour modification and deterrence, there is no need to extend liability to include compensation for umbrella purchasers.

[206] As recounted above, the chambers judge in the case at bar rejected each of these four reasons.

[207] Since Masuhara J.'s decision, a new chapter has opened up in the *Shah* saga. As adverted to above, the Ontario Divisional Court granted the plaintiffs' application for leave to appeal Perell J.'s certification order. Leave was granted on two issues:

1) Did Perell J. err in denying certification of the unlawful means conspiracy claim? and

2) Did Perell J. err in denying certification of the umbrella purchaser claims?

[208] For reasons indexed as 2017 ONSC 2586 [*Shah Div. Ct.*], the Divisional Court allowed the appeal on the first issue and dismissed the appeal on the second. The analysis below will focus on the Court's reasons in respect of the umbrella purchaser issue.

[209] Justice Nordheimer, writing for the Court, rejected three of the four reasons offered by Perell J. in support of his finding that the umbrella purchasers had no cause of action under the *Competition Act*. Those were the first, third, and fourth reasons listed above.

[210] Regarding the first reason, Justice Nordheimer stated that the judge's conclusion that the umbrella claim should not be allowed because it would be inconsistent with restitutionary law was "problematic". (Para. 23.) He noted that s. 36 of the *Act* is not concerned with recovery of "ill-gotten gains"; rather, it provides persons with a right of

action for the recovery of loss or damage suffered, from the perspective of that person's losses, not the price-fixers' gains. (Para. 23.)

[211] Moving to the third reason, the Court saw no injustice in holding price-fixers liable for the pricing decisions of non-price-fixers where it can be shown the former created the necessary conditions leading the latter to increase their prices, thereby harming consumers. Nordheimer J. emphasized that whether the umbrella purchasers had actually suffered any loss as a result of the defendants' alleged misconduct was a matter to be left to trial. If the umbrella purchasers could demonstrate that "one reason" for which the non-defendant manufacturers raised their prices was the unlawful conduct of the respondents, the defendants could rightly be held liable for the resulting losses. (Para. 28.) This was so because the loss or damage would have been a result of the defendants' conduct in breach of Part VI, thereby falling within the ambit of s. 36.

[212] With respect to the fourth reason, Justice Nordheimer accepted that for the purposes of deterrence, there was no strict need to extend liability to include umbrella claims; sufficient deterrence could be achieved through a damages award in favour of those who purchased LIBs or LIB products directly or indirectly from defendants. He added, however, that deterrence is not the only policy objective served by s. 36. Another important purpose is "to provide compensation to persons who are harmed by anti-competitive behaviour". (Para. 29.) He took compensation to be a legitimate end goal of s. 36 that militated in favour of permitting umbrella purchaser claims, since such purchasers would otherwise find themselves left harmed as a result of anti-competitive conduct without a right to seek compensation under the *Act*.

[213] Justice Nordheimer accepted only one of Perell J.'s four reasons. But one was enough. He agreed that permitting umbrella purchaser claims would expose the defendants to indeterminate liability. This was, in Nordheimer J.'s view, sufficient to ground a finding that the claims of the umbrella purchasers could not be certified. He stated that while the nature of the allegations in *Imperial Tobacco* was different from the nature of those advanced in the case before him, "the fundamental principle is the same". (Para. 32.)

[214] It will be recalled that *Imperial Tobacco* involved various claims made against tobacco companies, including both a class action brought on behalf of individuals who purchased "light" or "mild" cigarettes and an action brought by the Government of British Columbia seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses. The tobacco companies issued third-party notices to the Government of Canada alleging that if the companies were to be held liable, they would be entitled to compensation from Canada on the basis of, *inter alia*, negligent misrepresentation. The negligent misrepresentation claims were premised on the notion that Canada had negligently misrepresented the health attributes of low-tar cigarettes to consumers and was therefore liable for contribution and indemnity on the basis of the *Negligence Act*, R.S.B.C. 1996, c. 333; and that Canada had made negligent misrepresentations to the tobacco companies and was hence liable for any damages the tobacco companies would be ordered to pay to the plaintiffs. Canada argued that it would be unfair to hold it responsible for claims made to consumers about light or mild cigarettes when the government exercised no control over the number of people who smoked such cigarettes.

[215] The Supreme Court agreed, emphasizing that the government "was not in control of the extent of its potential liability". (Para. 101.) In striking the claim against the federal government, Chief Justice McLachlin wrote:

> [97] Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.
>
> [98] The tobacco companies respond that Canada faces extensive, but not indeterminate liability. They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.
>
> [99] I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no

> means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.
>
> [100] The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.
>
> [101] Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

[216] Like the situation in *Imperial Tobacco*, Nordheimer J. stated the defendants in the case before him were not in control of the extent of their potential liability. He reasoned that "[f]irst and foremost, they had no control over whether the non-defendant manufacturers chose to match prices. Second, they had no control over the volume of LIBs or LIB products that the non-defendant manufacturers chose to produce and sell". (Para. 34.) The judge noted that adding in the umbrella purchaser claims would expand the class significantly, not to mention result in the addition of claims from persons with whom the defendants had no dealings. Furthermore, it was not clear how defendants in such circumstances could ascertain the purchasers to whom they might be held liable.

[217] The Court rejected Masuhara J.'s analysis on the basis that he failed to "explain why the policy rationales, enunciated in *Imperial Tobacco,* are not compelling in this type of case". (Para. 38.) It saw *Imperial Tobacco* as "difficult to distinguish" from the case before him, given that both involved economic loss. (Para. 38.)

[218] Further, Nordheimer J. added, the fact that the defendants may have held a substantial share of the market did not resolve the issue of indeterminate liability. The establishment of a maximum level of exposure – being the entirety of the market – did

not change the fact that the defendants exercised no control over their exposure to liability. The judge drew an analogy: though it would have been possible to establish the maximum liability facing the federal government in *Imperial Tobacco* – namely, all smokers of light or mild cigarettes in Canada – that fact did not stop the Supreme Court from finding that the federal government would face indeterminate liability if the negligent misrepresentation claims were to be permitted.

[219] The Court then turned to the argument advanced by the plaintiffs that the concern over indeterminate liability was mitigated by the fact that their claim was based on an intentional tort: civil conspiracy. They argued, relying on *Bettel v. Yim* (1978), 20 O.R. (2d) 617 (Co. Ct.), which was cited in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at para. 99, that because the claim was based on an intentional tort, the defendants should be held liable for all harm they caused, however remote such harm may be.

[220] The Court rejected this argument for four reasons.

[221] First, it was not clear that the principles governing intentional torts were applicable to claims under s. 36 of the *Competition Act*, even where that cause of action arises from the intentional tort of conspiracy. The Court saw "no pressing reason to exempt a claim under s. 36, as a stand-alone cause of action, from the application of the principle of indeterminate liability". (Para. 44.)

[222] Second, the plaintiffs' reliance on *Bettel* was seen as "problematic" because that case involved a claim for damages arising from an assault, and the principles articulated in that context did not transfer over easily to the context of umbrella purchaser claims. (Para. 45.) The judge remarked that "[i]t is one thing to hold a person liable for unforeseen damages caused to another person whom they intended to harm. It is quite another to hold a person liable for unforeseen damages caused by an intentional act that was not directed at the person claiming the harm". (Para. 45.)

[223] Third, the claim at issue was for economic loss, not for personal and property damage, and as such, the risk of indeterminate liability formed a significant part of the analysis.

[224] Fourth, the Court underscored the nature and breadth of the claim being advanced – a class action with a large, but unknown, number of class members. These features amplified the concerns relating to indeterminate liability and foreseeability of loss.

[225] In the result, Nordheimer J. agreed with the certification judge that permitting the umbrella purchasers' claims would expose the defendants to indeterminate liability and that, therefore, the pleadings as they related to the umbrella purchasers' claims disclosed no cause of action.

[226] This jurisprudential background considerably narrows the issues to be decided here. Indeed, in my view, the Umbrella Purchasers' claim under s. 36 turns on a single question: Do concerns over indeterminate liability require that the Umbrella Purchasers' claim under the *Competition Act* be denied certification?

[227] A preliminary consideration is whether the policy concern over indeterminate liability has any place outside the negligence context. On this issue, I am prepared to assume that such a concern is not necessarily restricted to the negligence context. On my reading of the Supreme Court's decision in *Imperial Tobacco*, the spectre of indeterminate liability may arise wherever the defendant is "not in control of the extent of its potential liability". (Para. 103.) While the prospect of such a scenario arising may be most visible in the negligence context, I will assume it may also be a matter to consider outside that context.

[228] However, as I will discuss below, I am of the view that the concern over indeterminate liability does not arise in the context of umbrella purchaser claims based on an alleged price-fixing conspiracy contrary to the *Competition Act*. To explain why I have reached this conclusion, it will first be necessary to look more closely at the

reasons of the judge below on this point. As I will describe below, Masuhara J. rejected the indeterminacy argument on two principal bases.

[229] First, he took the view that the concerns expressed in *Imperial Tobacco* were "not compelling" in the context of intentional conspiracies. (Para. 75.) This appears to have flowed from his observation that s. 45 of the *Competition Act* prohibits intentional conduct, and that in order to succeed, defendants must prove the subjective and objective components of the *mens rea*. These appear to have been viewed as features that sufficiently limited the scope of potential exposure such that the concerns over indeterminate liability expressed in the negligence context were satisfactorily mitigated.

[230] In my view, the rationale underlying the judge's reasoning on this point is sound. At the most basic level, the judge recognized that a claim under s. 36 based on an alleged price-fixing conspiracy contrary to s. 45 is subject to internal limitations that assist in ensuring liability is appropriately circumscribed. This court in *Watson BCCA* summarized the necessary elements of s. 45 (as it read during the class period in the case at bar):

> [73] … the *actus reus* elements of former s. 45 are:
>
> i) the defendant conspired, combined, agreed, or arranged with another person; and
>
> ii) the agreement was to enhance unreasonably the price of a product, to lessen unduly the supply of a product, or to otherwise restrain or injure competition unduly.
>
> [74] The *mens rea* element of former s. 45 as defined in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 659-660, 93 D.L.R. (4th) 36, requires:
>
> i) the defendant had a subjective intention to agree and was aware of the agreement's terms; and
>
> ii) the defendant had the required objective intention, that is, a reasonable business person would or should be aware that the likely effect of the agreement would be to lessen competition unduly.

[231] For present purposes, the most powerful limiting feature of s. 45 is the subjective fault requirement. The requirement of proving intentional wrongdoing, taken together with the fact that a plaintiff can recover under s. 36 only where it can be demonstrated that the plaintiff suffered harm as a result of the breach of s. 45, mitigates the concern

that defendants will be subject to overbroad liability, at least as compared to the strength of that concern felt in negligence context where there is no requirement to prove intentional wrongdoing and resulting harm caused by that intentional wrongdoing.

[232] It cannot be denied that the tort of civil conspiracy provides even stronger built-in limitations controlling the scope of liability than those inherent in the *Competition Act*. To establish predominant purpose conspiracy, for example, one of the essential elements is that the defendants had the predominant purpose of causing injury to the plaintiff: see *Watson BCCA* at para. 125. To establish unlawful means conspiracy, the plaintiff must establish, *inter alia*, that the defendants' conduct was directed towards the plaintiff (alone or with others) and that the defendants should have known that injury to the plaintiff was likely to result: see *Watson BCCA* at para. 56. Neither of these requirements features in price-fixing claims under the *Competition Act*. Nonetheless, this does not mean that *Competition Act* claims necessarily give rise to indeterminate liability.

[233] The concern over indeterminate liability arising in the context of actions claiming negligent misrepresentation was aptly summarized in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, where La Forest J. wrote:

> [31] … the fundamental policy consideration that must be addressed in negligent misrepresentation actions centres around the possibility that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This potential problem can be seen quite vividly within the framework of the *Anns/Kamloops* test. Indeed, while the criteria of reasonable foreseeability and reasonable reliance serve to distinguish cases where a *prima facie* duty is owed from those where it is not, it is nevertheless true that in certain types of situations these criteria can, quite easily, be satisfied and absent some means by which to circumscribe the ambit of the duty, the prospect of limitless liability will loom.

[234] Here, however, this concern does not loom large. The field of potential claimants is limited by a number of features: for example, the fact that the class period is temporally limited, the class definition is constrained, the claims relate to a specific product and industry, and the *Competition Act* includes a number of limiting features as described above. The scope of liability therefore cannot be described as "limitless".

Moreover, unlike in cases of alleged negligent misrepresentation, the essential elements of a *Competition Act* claim cannot be satisfied "quite easily".

[235] Second, the judge stated that cartel members' exposure would not be "impermissibly indeterminate" because the number of purchases from non-cartel members would not normally exceed the number of purchases from cartel members. (Para. 76.) The judge reasoned as follows:

> [76] In most price-fixing cases the defendants hold a substantial share of the relevant market. And, for umbrella purchasers to be successful, they will generally need to show that the defendants had such market power that their pricing decisions moved the market. Thus, I think it reasonable to assume that in most cases the number of purchases from non-cartel members will not exceed the number of purchases from cartel members. This would expose cartel members to double the liability they would face if umbrella purchasers were excluded; while this is certainly significant, I do not think that it is impermissibly indeterminate.
>
> [Emphasis added.]

[236] The judge's second reason for rejecting the indeterminacy argument is perhaps understated. By this, I mean that the rationale for rejecting the indeterminate liability argument seems stronger than the judge suggested. According to Dr. Reutter's evidence, which has not been challenged on this point, the defendants enjoyed overwhelming market power in the ODD market: by 2007-8, he estimated, a mere six of the defendants accounted for over 90% of ODD shipments (see the judge's reasons at para. 154). Mr. Godfrey's amended notice of civil claim alleges, at para. 66, that during the class period, four of the defendants collectively controlled 94% of the global ODD market. Assuming this to be true, allowing the Umbrella Purchasers' claim to be advanced here would result in some additional exposure but not indeterminate liability. While Dr. Reutter's estimate of the market dominance enjoyed by the defendants was made solely in respect of the ODD industry, the theoretical model underpinning umbrella pricing effects is that umbrella effects will be produced only in industries in which a handful of suppliers effectively control the industry. Accordingly, in price-fixing cases alleging umbrella pricing effects, the defendants' additional exposure to liability resulting from umbrella claims will be limited in comparison to the exposure arising from

non-umbrella purchaser claims. Arguably, the scope of liability in such cases is even more restrained than the judge suggested.

[237] Beyond the observations made by the judge, I would add six points.

[238] First, to the extent that the defendants rely on the notion that permitting umbrella claims would lead to indeterminate or impermissibly broad liability because the defendants exercised no control over the pricing and volume decisions made by non-defendant suppliers, I am of the view that this concern cannot justify exonerating the defendants from facing potential liability to umbrella purchasers. The defendants emphasize that price-fixers control only their own decisions, such as to whom they sell, at what prices, and at what quantities; they exercise no control over the decisions made by their competitors. This argument found favour with Perell J. in *Shah SCJ*, where he stated that permitting the umbrella purchasers' *Competition Act* claim would be "unfair because the law, generally speaking, does not impose liability on one person for the conduct of others". (Para. 175.) With respect, however, this argument fails to take into account the nature of the alleged conspiracy.

[239] Here, it is alleged that the defendants conspired to "move the market". In economic terms, they set out to shift the entire supply curve for ODD and ODD Products. The parties to the conspiracy had such heft in the industry as to be capable of influencing prices across the entire market, and they knowingly and intentionally came together to effect such a market-wide price increase. Accordingly, it is incongruous to say that non-defendant manufacturers and suppliers made decisions that were truly autonomous and independent. Although it was the non-defendants who ultimately set their own prices, the allegations posit that their pricing decisions were made in reference to a distorted market price fixed by the defendants and, furthermore, that market-wide prices would have been lower but for the cartel. If the allegations advanced are proven, it cannot be said that the defendants exercised no influence over the decisions made by their competitors. If, as implicitly alleged (though not specifically pleaded), competitors' pricing decisions were in part attributable to the alleged cartel's price-fixing conspiracy intentionally designed to raise market-wide prices, one struggles

to see how the non-defendants' purportedly "independent" decisions should exonerate the defendants for the losses suffered by the Umbrella Purchasers.

[240] Second, as I read the decision, the overriding concern in *Imperial Tobacco* is the unfairness inherent in holding a defendant liable for the full extent of the economic losses it caused when it was not "in control of the extent of its potential liability". (Para. 101.) In the case at bar, I have some difficulty accepting that the defendants exercised no control over the extent of their potential liability. I say this because the facts alleged in the pleadings, which I must assume to be true, posit that the defendants entered into a conspiracy that would have the desired effect of raising prices *across the ODD market*, not just within the part of the market representing sales of the defendants' products. Hence, not only did they foresee that losses would be occasioned upon the Umbrella Purchasers, but they intended that result.

[241] I see no reason why defendants who intend to inflict damage on umbrella purchasers should be exonerated from liability on the basis that they exercised no control over their liability, since at least in this case – and I limit my comments to the circumstance of the case before me – the allegations posit that the defendants were aware of the effect their conspiracy would have. They must be taken to have understood they could potentially be held liable for the damage they intentionally caused to those who were harmed by their wrongful conduct should their conspiracy be brought to light. While it is true that the defendants would not, at the time the alleged conspiracy was formed, have been able to ascertain the individual identities of the Umbrella Purchasers to whom they may later be held liable, they would have had a clear sense for the size of the market and the impact their price-fixing agreement would have had on the market, and therefore the extent of their potential liability.

[242] Third, although Nordheimer J. in *Shah Div. Ct.* questioned the wisdom of holding a defendant liable for "unforeseen damages caused by an intentional act that was not directed at the person claiming the harm", I doubt that this concern is applicable on the facts before me. I say this because in the present case, it is alleged that one of the predominant purposes of the defendants' conspiracy was to cause harm to all class

members (see the judge's reasons at paras. 24, 97), which includes the Umbrella Purchasers, and that harm to all class members was not only foreseen but also intended. Assuming the truth of the pleaded facts, there is therefore no danger that the defendants will find themselves "on the hook" for unforeseen damages caused by an intentional act that was not directed at the person claiming harm.

[243] Fourth, I acknowledge there is a tension between, on the one hand, concerns over what some may view as a very broad scope of liability resulting in unfairness to defendants accused of price-fixing and, on the other hand, the need to give effect to the objectives sought by the *Competition Act* such as compensation, deterrence, and behaviour modification. To the extent that such a tension arises in the present context, however, I am convinced it must be resolved in favour of the latter policy objective. The apprehension about potential unfairness to defendants resulting from the inclusion of umbrella claims ought to be accorded less weight in circumstances where it is alleged that the defendants entered into a price-fixing conspiracy that aimed to distort prices across the market, thereby harming *all* purchasers in the relevant industry. In such a scenario, the objectives of deterrence, behaviour modification, and, most of all, compensation prove more compelling.

[244] Fifth, in making these observations, I do not imply that the scope of liability facing the defendants here is small. To the contrary, *Competition Act* claims based on alleged price-fixing, such as the present case, will more often than not involve significant potential liability. Nonetheless, the size of a potential claim should not be conflated with the concept of indeterminate liability. "Extensive" liability is not synonymous with "indeterminate" liability.

[245] Sixth, concerns over indeterminate liability have not stopped umbrella purchaser claims from being permitted in other jurisdictions. As the judge noted, such claims are allowed in the European Union: see *Treaty on the Functioning of the European Union*; *Kone AG and Others v. ÖBB-Infrastruktur AG*, C-557/12 (5 June 2014), ECLI:EU:C:2014:1317. On the other hand, I acknowledge that the case law in the U.S. is mixed as to whether umbrella purchasers may advance a claim under the *Sherman*

Act, 15 U.S.C. §1-7. Cases permitting umbrella claims include *In re Beef Industry Antitrust Litigation*, 600 F. (2d) 1148 (5th Cir. 1979), cert. denied 449 U.S. 905; and *In re Arizona Dairy Products Litigation*, 627 F. Supp. 233 (D. Ariz. 1985). Cases denying such claims include *Mid-West Paper Products Co. v. Continental Group Inc.*, 596 F. (2d) 573 (3rd Cir. 1979); and *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F. (2d) 1335 (9th Cir. 1982). I also recognize that the U.S. class action jurisprudence should be treated with caution given that, unlike in Canada, indirect purchaser claims are generally barred in the U.S.: see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[246] Finally, for the sake of clarity, I would adopt the judge's remaining reasons for rejecting the decision in *Shah SCJ* as it relates to umbrella purchaser claims (see paras. 73-4, 77-9), as well as his conclusion at para. 71 that the language employed in s. 36 of the *Competition Act* is capable of permitting umbrella claims.

[247] Hence, I conclude that the judge was correct in concluding that the Umbrella Purchasers were legally entitled to bring a claim under s. 36 of the *Competition Act* based on a breach of s. 45. Neither the spectre of indeterminate liability nor the other concerns raised provide a basis for denying certification of the Umbrella Purchasers' claim under the *Competition Act*.

[248] As I have rejected both lines of argument advanced by the defendants in support of their submission, that the judge erred in law by holding that the Umbrella Purchasers may assert various causes of action against them, it follows that the judge did not err in concluding it was not plain and obvious that the Umbrella Purchasers had no cause of action.

[249] Having reached this conclusion, I must now consider whether the judge erred by:

1) finding that Mr. Godfrey is an appropriate representative of the Umbrella Purchaser subclass; or
2) accepting the litigation plan.

[250] Although the standard of correctness has thus far dominated these reasons, the remainder of the analysis takes on a more deferential character. The decision that a plaintiff is an appropriate representative of the class members, including a subclass, is a determination involving the exercise of discretion, as is the determination of whether a litigation plan should be accepted. Accordingly, those decisions are entitled to deference unless the judge erred in principle or was clearly wrong: *Hoy* at para. 38; *Kwicksutaineuk/Ah-Kwa-Mish First Nation* at paras. 22-3. It should also be recalled that the plaintiff need only establish some basis in fact that Mr. Godfrey meets the requirements under s. 4(1)(e): *Hollick* at para. 25. This threshold is not a high one.

[251] Beginning with the first submission, I agree with Mr. Godfrey that conflicts on the distribution of a judgment do not preclude certification: see *Sun-Rype SCC* at para. 20; *Smith v. Sino-Forest Corporation*, 2012 ONSC 24 at para. 260 (S.C.J.). However, I have some difficulty accepting that the alleged conflict complained of is truly one that relates solely to the distribution of a judgment. It seems to me the alleged conflict would relate more to whether an eventual settlement should be accepted in the first place and whether certain causes of action should be pursued vigorously. Nonetheless, in my view, the judge's observation at para. 217, that separate representation could easily be established should problems arise, answers the defendants' concern here. I emphasize that class action proceedings governed by the *CPA* are flexible and dynamic; they are not ossified and unable to adapt to changes in circumstances (see *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 76). In addition, the Court exercises a supervisory role in approving class settlements, which provides a safeguard against settlements that would be unjust or unfair to the class members or any subclass thereof.

[252] With respect to the second submission, I begin by noting Goudge J.A.'s observation in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2004] S.C.C.A. No. 410, that:

> [95] … The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any

> shortcomings … can be addressed under the supervision of the case management judge once the pleadings are complete.

[253] I also note the following passage from *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717, aff'd 2004 BCCA 549:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[254] It has been said that "[t]he detail of a [litigation] plan should correspond to the complexity of the action": *Watson BCSC* at para. 352.

[255] As I have suggested above, class proceedings are flexible and dynamic in nature. At the certification stage, the standard that a litigation plan must meet is not one of perfection; as affirmed in *Fakhri*, the plan need only set out "a framework within which the case may proceed" and "demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case". (Para. 77.)

[256] Here, while the proposed class action is undoubtedly a complex one requiring a carefully considered litigation plan, the judge was satisfied that the plan was adequate. That finding is entitled to deference. No doubt, the separate causation issues relating to the Umbrella Purchasers create significant complexities, and the litigation plan may need to be revised and adapted over time to account for such complexities. But the judge's determination – one involving the exercise of discretion – that the litigation plan was adequate was a conclusion that was open to him, particularly given that any shortcomings could be addressed through case management.

[257] Accordingly, the judge did not err in finding that Mr. Godfrey is an appropriate representative of the Umbrella Purchaser subclass, nor did he err in accepting the litigation plan.

Conclusion on Main Appeal

[258] I would not accede to the grounds of appeal raised by the defendants on the Main Appeal.

VI. CONCLUSION

[259] In the result, I would dismiss the appeal, with thanks to counsel for their very helpful submissions.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Groberman"