

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,
2011 BCCA 186

Date: 20110415
Docket: CA034325; CA037968

Between:

Pro-Sys Consultants Ltd. and Neil Godfrey

Respondents
(Plaintiffs)

And

**Microsoft Corporation and
Microsoft Canada Co./Microsoft Canada CIE**

Appellants
(Defendants)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, March 5, 2010, July 6, 2006,
and November 24, 2006 (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*,
2010 BCSC 285, 2006 BCSC 1047 and 2006 BCSC 1738)

Counsel for the Appellants: N. Finkelstein, J. M. Sullivan
and S. L. Knowles

Counsel for the Respondent: J. J. Camp, Q.C., R. M. Mogerman
and M. L. Buckley

Place and Date of Hearing: Vancouver, British Columbia
November 29 and 30, 2010

Place and Date of Judgment: Vancouver, British Columbia
April 15, 2011

Dissenting Reasons by:

The Honourable Mr. Justice Donald

Written Reasons by:

The Honourable Mr. Justice Lowry (P. 30, para. 72)

Concurred in by:

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] The Defendants appeal from decisions by Mr. Justice Tysoe, then in the Supreme Court, on motions related to the pleadings: 2006 BCSC 1047 (the defendants' application to strike the statement of claim under Rule 19(24) (now Rule 9-5(1)) and 2006 BCSC 1738 (the plaintiffs' application to amend the statement of claim); and from the decision of Mr. Justice Myers certifying the action as a class proceeding: 2010 BCSC 285.

[2] The appeal was heard consecutively with *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187, by the same division of this Court. Because of overlapping issues, there will be some cross-reference between the decisions, which are being released at the same time.

[3] The action alleges that Microsoft engaged in various kinds of anti-competitive behaviour which allowed it to overcharge for its products. The plaintiffs are retail purchasers of computers installed with Microsoft operating systems and applications software. They are referred to herein as indirect purchasers (IPs). Direct purchasers (DPs) are those computer manufacturers who incorporated Microsoft products into their computers.

[4] The plaintiffs allege that Microsoft combined with the manufacturers in schemes to exclude competition and keep the prices higher than they should be. They further allege that the overcharge at the direct purchaser level passed through to them and they claim redress in tort and restitution.

[5] The action follows anti-competition litigation against Microsoft in the United States and the European Union.

[6] In the appeal related to the pleadings, Microsoft submits that the action is really about allegations of "abuse of market dominance", a subject assigned exclusively to the Competition Tribunal in Part VII of the *Competition Act*, R.S.C. 1985, c. C-34. The claim should be struck for want of jurisdiction.

[7] Second, Microsoft argues that the plaintiffs, as IPs, have no claim. The law in Canada is settled: there is no pass-through defence available to a vendor in resisting the claim of a DP on the ground that the DP passed on the overcharge and sustained no loss. It must follow, Microsoft says, that pass-through of the overcharge to IPs cannot form the basis of a cause of action because otherwise the vendor would be exposed to multiple claims.

[8] As its third ground of appeal, Microsoft submits that a common essential ingredient of the plaintiffs' claims for interference with economic interests, conspiracy and unjust enrichment is plainly and obviously absent. The missing ingredient is an unlawful act. Microsoft argues that the market behaviour of which the plaintiffs complain is not actionable by third parties and therefore cannot satisfy the unlawful act requirement for the claims in tort or restitution. The only recourse is to the statutory scheme under Part VIII of the *Competition Act*.

[9] In the fourth ground, Microsoft argues that the claims of conspiracy and economic interference are plainly and obviously deficient in advancing "preposterous" assertions of a predominant intention to cause injury to the plaintiffs and in failing to allege material facts concerning illegal arrangements with the manufacturers.

[10] In the fifth ground, Microsoft says the unjust enrichment claim must be struck as it is bound to fail. On the pleadings, there is no direct relationship between the plaintiffs and Microsoft and the arrangements with manufacturers, the legality of which cannot be questioned by third parties, provide a juristic reason for the benefits said to be an overcharge.

[11] Turning to the certification order by Myers J., Microsoft takes two points. First, the plaintiffs cannot rely on s. 36 of the *Competition Act* for a cause of action because it is not pleaded and, even if applicable, it sets up a two-year limitation period barring the claims. Second, Myers J. set too low a standard of proof for the alleged overcharge at certification, and had the evidence been given appropriate scrutiny, it would have been found lacking.

[12] For the reasons that follow, I do not accept these contentions and I would dismiss the appeal.

CERTIFICATION ORDER

[13] The order of Myers J. made March 5, 2010, certifying the action as a class proceeding, is as follows:

ON THE APPLICATION of the Plaintiffs coming on for hearing at the Courthouse, 800 Smithe Street, Vancouver, BC on January 12-23, 2009 and on hearing J.J. Camp, Q.C. and R. Mogerman, counsel for the Plaintiffs, and N. Finkelstein, J. Sullivan, C. Beagan Flood and S. Knowles, counsel for the Defendants and on Judgment being reserved to this date;

THIS COURT ORDERS that:

1. This action be certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50,
2. The Class be described as all persons resident in British Columbia who, on or after January 1, 1994, indirectly, and not for the purpose of further selling or leasing, purchased a genuine license for any full or upgrade version of:
 - (a) Microsoft's Word or Excel applications software or any full or upgrade version of Microsoft's Office, Works Suite, or Home Essentials applications suites, intended for use on Intel-compatible personal computers ("Microsoft Applications Software"); or
 - (b) Microsoft's MS-DOS or Windows operating systems software intended for use on Intel-compatible personal computers ("Microsoft Operating Systems") (collectively the "Class Members").
3. The Plaintiffs, Pro-Sys Consultants Ltd. and Neil Godfrey be appointed as the representative plaintiffs for the class.
4. The following questions be certified as common issues:

Breach of Competition Act, R.S.C. 1985, c. C-34

 - (a) Did the Defendants, or either of them, engage in conduct which is contrary to s. 45 and or s. 52 of the *Competition Act*?
 - (b) Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount?
 - (c) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Conspiracy

- (d) Did the Defendants, or either them, conspire to harm the Class Members?
- (e) Did the Defendants, or either of them, act in furtherance of the conspiracy?
- (f) Was the predominant purpose of the conspiracy to harm the Class Members?
- (g) Did the conspiracy involve unlawful acts?
- (h) Did the Defendants, or either of them, know that the conspiracy would likely cause injury to the Class Members?
- (i) Did the Class Members suffer economic loss?
- (j) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?
- (k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Tortious Interference with Economic Interests

- (l) Did the Defendants, or either of them, intend to injure the Class Members?
- (m) Did the Defendants, or either of them, interfere with the economic interests of the Class Members by unlawful or illegal means?
- (n) Did the Class Members suffer economic loss as a result of the Defendants' interference?
- (o) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?
- (p) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unjust Enrichment, Waiver of Tort and Constructive Trust

- (q) Have the Defendants, or either of them, been unjustly enriched by the receipt of an Overcharge? "Overcharge" means the difference between the prices the Defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the Defendants would have been able to charge in the absence of their wrongdoing.
- (r) Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge?
- (s) Is there a juridical reason why the Defendants, or either of them, should be entitled to retain the Overcharge?
- (t) What restitution, if any, is payable by the Defendants, or either of them, to the Class Members based on unjust enrichment?

- (u) Should the Defendants, or either of them, be constituted as constructive trustees in favour of the Class Members for the Overcharge?
- (v) What is the quantum of the Overcharge, if any, that the Defendants, or either of them, hold in trust for the Class Members?
- (w) What restitution, if any, is payable by the Defendants to the Class Members based on the doctrine of waiver of tort?
- (x) Are the Defendants, or either of them, liable to account to the Class Members for the wrongful profits, if any, that they obtained on the sale of Microsoft Operating Systems or Microsoft Applications Software to the Class Members based on the doctrine of waiver of tort?
- (y) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

Punitive Damages

- (z) Are the Defendants, or either of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, in what amount and to whom?

Interest

- (aa) What is the liability, if any, of the Defendants, or either of them, for court order interest?

Distribution of Damages and/or Trust Funds

- (bb) What is the appropriate distribution of damages and/or trust funds and interest to the Class Members and who should pay for the cost of that distribution?

5. AND THIS COURT FURTHER ORDERS that the Litigation Plan shall be approved as sufficient for the purposes of certification.
6. AND THIS COURT FURTHER ORDERS that notice shall be given to Class Members and the time, manner and costs of the notice to be directed by the Court after further submissions by the parties.
7. AND THIS COURT FURTHER ORDERS that the time and manner for opting out of the proceeding shall be as directed by the Court after further submissions by the parties.

[14] The relevant enactments are:

Supreme Court Rules, Rule 19(24):

Scandalous, frivolous or vexatious matters

(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4 and 5:

Class certification

- 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.
- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
 - (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
 - (d) whether other means of resolving the claims are less practical or less efficient;

- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Certification application

- 5 (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.
- (2) A copy of the notice of motion and supporting affidavit must be filed and
 - (a) delivered to all persons who are parties of record, and
 - (b) served on any other persons named in the style of proceedings.
- (3) Unless otherwise ordered, there must be at least 14 days between
 - (a) the delivery or service of a notice of motion and supporting affidavit, and
 - (b) the day named in the notice of motion for the hearing.
- (4) Unless otherwise ordered, a person to whom a notice of motion and affidavit is delivered under this section or on whom a notice of motion and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and deliver a copy of the filed affidavit to all persons who are parties of record.
- (5) A person filing an affidavit under subsection (2) or (4) must
 - (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
 - (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
 - (c) provide the person's best information on the number of members in the proposed class.
- (6) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
- (7) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

[Subsections (2), (3) and (4) of s. 5 have since been amended, effective July 1, 2010, to harmonize with the *Supreme Court Civil Rules: 2010-6-29.*]

***Competition Act*, R.S.C. 1985, c. C-34, ss. 36, 45:**

Recovery of damages

- 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, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

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.

Evidence of prior proceedings

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

Jurisdiction of Federal Court

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

Limitation

(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; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

- (i) a day on which the order of the Tribunal or court was contravened, or
- (ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

R.S., 1985, c. C-34, s. 36; R.S., 1985, c. 1 (4th Supp.), s. 11.

* * *

Conspiracies, agreements or arrangements between competitors

45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both.

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

- (a) that person establishes, on a balance of probabilities, that
 - (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
 - (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
- (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- (c) is in respect only of the supply of services that facilitate the export of products from Canada.

Exception

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

(a) is entered into only by companies each of which is, in respect of every one of the others, an affiliate; or

(b) is between federal financial institutions and is described in subsection 49(1).

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Definitions

(8) The following definitions apply in this section.

“competitor”

“competitor” includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

“price”

“price” includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714; 2009, c. 2, s. 410.

DISCUSSION

A. CAUSES OF ACTION

1. Abuse of Market Dominance

[15] As originally cast, the statement of claim alleged abuse of market dominance by Microsoft, contrary to Part VIII of the *Competition Act*, as an independent cause of action.

[16] Mr. Justice Tysoe struck out those claims in decision No. 1 on the ground that Part VIII matters fell exclusively within the jurisdiction of the Competition Tribunal. He ruled (2006 BCSC 1047):

[46] I conclude that the fact that the Defendants’ alleged conduct was of the nature described in Part VIII of the *Competition Act* does not, in the absence of an order of the Competition Tribunal, make such conduct unlawful for the purposes of the tort of interference with economic relations. Such conduct is not unlawful simply as a result of being of the nature described in Part VIII.

* * *

[49] My ruling at this stage is that it is plain and obvious that, in the absence of an order of the Competition Tribunal and with no other reason to make it illegal or unlawful, conduct of the nature described in Part VIII of the *Competition Act* does not constitute illegal or unlawful means to satisfy the second element of the tort of interference with economic relations. I order that the portions of the Statement of Claim alleging that conduct of the nature described in Part VIII was illegal or unlawful be struck out.

[17] No cross appeal is taken from that decision.

[18] The plaintiffs sought leave to amend upon receiving this decision. They retained some of the abuse of dominance language (which is the nomenclature of Part VIII), but they redrafted the key paragraphs regarding market misconduct in relation to operating systems and applications software in terms of conspiracy. This was with the intention of bringing the misconduct within s. 36 of the *Competition Act*, which allows a civil right of action for conspiracies prohibited by s. 45.

[19] In decision No. 2 (2006 BCSC 1738), Tysoe J. (as he then was) gave leave to amend, and the third amended statement of claim now reads in relevant part:

19. Beginning as early as 1988, Microsoft embarked upon a campaign to prevent or lessen competition substantially and to thereby increase the price of its products in the market for Intel-compatible PC operating systems. Microsoft Canada and others actively participated in or facilitated that campaign. As a part of the campaign, Microsoft and Microsoft Canada combined or agreed with others, including IAPs, ISVs OEMs, and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. As a consequence, Microsoft has unlawfully maintained and abused its dominant position in the North American market for Intel-compatible PC operating systems and has charged supra-competitive prices.

* * *

66. Having secured its dominance in the Intel-compatible PC operating systems market, Microsoft has abused that dominance to gain unfair advantages in the complementary applications software markets. In the late-1980's, Microsoft recognized that the transition to GUIs, where it had a strong market position with its Windows operating environment, provided Microsoft an opportunity to gain an important presence in application, such as, word processors and spreadsheets.

* * *

70. When Microsoft's anti-competitive applications software campaign began in the late 1980's and early 1990's, there were several existing

competitors in both markets. Lotus 1-2-3 was the market leader in spreadsheets, and WordPerfect was the market leader in word processors. Beginning as early as 1988, Microsoft embarked upon a campaign to prevent or lessen competition substantially and to thereby increase the price of its products in the market for Intel-compatible PC applications software. Microsoft Canada and others actively participated in or facilitated that campaign. As a part of the campaign, Microsoft and Microsoft Canada combined or agreed with others, including IAPs, ISVs, OEMs, and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. As a consequence, Microsoft has unlawfully maintained and abused its dominant position in the North American market for Intel-compatible PC operating systems and has charged supra-competitive prices.

[20] Microsoft submits on appeal that:

1. despite the amendments, the real claim remains a complaint against abuse of market dominance; and
2. regardless of the reference to ss. 36 and 45, the substance of the allegations brings them into the administrative scheme of the *Competition Act* and the claim should be struck.

[21] In the alternative, Microsoft says that the present form of the statement of claim is so replete with the language of abuse of market dominance, a matter invalidated by Tysoe J. in decision No. 1 and therefore irrelevant, this Court should strike the pleading. This would force the plaintiffs to strip away the extraneous words and narrow the pleading to the causes of action which survived the Rule 19(24) challenge.

[22] I reject the contention that the amendments did not really change anything. What were Part VIII allegations are now recast as conspiracies under Part VI and actionable under s. 36 of Part IV. The jurisdiction of the court has been properly invoked and it is not ousted by the administrative scheme.

[23] Microsoft cites *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609, in support of its argument that the *Competition Act* is a complete code which confers exclusive jurisdiction on the Tribunal. That

case applies only if, despite the amendments to the statement of claim, the case remains in essence a Part VIII claim. Microsoft quoted the following passages from *Chrysler* at 406 and 408:

As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) *CTA* confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the *CA* therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the *CA* and the *CTA* that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII *CA*, since it involves complex issues of competition law, such as abuses of dominant position and mergers.

* * *

This cursory examination of the *CA* shows that Parliament intended the Tribunal to oversee Part VIII and that Parliament was strongly concerned with long-term compliance with the *CA*, in both its criminal and civil parts.

As I have said, I do not accept that the substance of the case is about Part VIII, and it follows that the exclusivity argument must be rejected.

[24] As for the alternative remedy of striking the whole pleading to expunge references to abuse of market dominance, I can see no practical utility in such an order. No one concerned with the case will be lead astray by the terminology and I do not see how Microsoft could be prejudiced by having it left in place. While the phrase belongs to a Part VIII matter, it is not entirely out of place in a pleading where the plaintiffs allege that the conspiracies and other economic torts are actionable manifestations of market abuse.

2. Indirect Purchasers – No Claim

[25] The plaintiffs are indirect purchasers of Microsoft's operating systems and applications software. They complain that overcharges at the direct purchaser level were passed through to them. The third amended statement of claim defines, in para. 6 (aa), "overcharge":

- (aa) "Overcharge" means the difference between the prices the defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the defendants would have been able to charge in the absence of their wrongdoing;

[26] For the most part, direct purchasers fall under the designation “original equipment manufacturers” (OEMs), defined in para. 7(x) of the third amended statement of claim in this way:

- (x) “OEMs” or “original equipment manufacturers” means PC manufacturers such as Dell, Gateway, Hewlett Packard, Acer, Lenovo, Toshiba, Sony, LG Electronics, Panasonic, Fujitsu/Fujitsu Siemens, Averatec, and IBM and, in Canada, Budgetron;

[27] The Supreme Court of Canada has definitively struck down the pass-through defence: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, per LeBel J. *Kingstreet* was decided after Tysoe J.’s decision on the pleadings.

[28] A pass-through defence would allow Microsoft, on the facts alleged in this case, to resist a claim of overcharge by the OEMs on the ground that the overcharge was passed to others in the chain of distribution and hence the OEMs suffered no loss. Since the defence is unavailable in Canada, Microsoft says it would be exposed to multiple duplicate claims from direct purchasers and indirect purchasers were each category to have a cause of action. The result may be a double recovery of damages. This potential exposure plus the apprehended difficulty in proving where the overcharge ended up led in the United States to a determination that (1) the defence is invalid and (2) as a necessary corollary, to avoid multiple claims, indirect purchasers have no claim for overcharges that have been passed on: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[29] In the companion appeal, *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, I rejected the attempt to strike the action brought by indirect purchasers on this line of argument. For the reasons expressed in that case, I likewise refuse to give it effect in the present matter.

[30] The facts alleged here demonstrate how Microsoft’s position cannot be said to raise a plain and obvious barrier to the indirect purchasers’ claim. One of the

central facts of the plaintiffs' case is the allegation that Microsoft combined with the OEMs to achieve overcharges. If effect were given to Microsoft's pass-through analysis then the only class holding a valid claim would be the very group that participated in the illegal scheme and the innocent victims would be out of court.

3. Unlawful Act

[31] An unlawful act is an essential ingredient in the claims for conspiracy, interference with economic interests and unjust enrichment.

[32] The three essential requirements of the tort of interference are (P.H. Osborne, *The Law of Torts*, 3d ed. (Toronto: Irwin Law, 2007) at 297-298):

1. the intention to injure the plaintiff's economic interests;
2. an interference in those interests by illegal or unlawful means; and
3. economic harm.

[33] Microsoft argues that the plaintiffs cannot supply the common element by proof of market behaviour said to be in restraint of trade. Unless and until such conduct is declared by the Competition Tribunal to violate Part VIII of the *Competition Act*, it is not illegal in Canada. Otherwise, the common law remains as expressed in such cases as *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*, [1892] A.C. 25 (H.L.), to the effect that a contract in restraint of trade is voidable as between contracting parties but cannot ground an action by a third party for damages. According to Microsoft, Parliament altered the common law not by giving third parties a right of action but by creating an administrative scheme where the circumstances can be assessed by those with special expertise and where the remedy, if any, will be carefully measured. In short, Microsoft suggests that the plaintiffs advance a case not known to law. There is no unlawful interference with economic interests, no unlawful purpose for conspiracy, and the juridical reason for the benefits said to be unjust enrichment – namely the contracts and arrangements with OEMs – cannot be negated.

[34] The plaintiffs answer this contention by pointing to the right of a third party to enjoin restraints of trade. From this, they say, it is but a small incremental step to a full right of action for damages and they cite the opinion of Mr. Justice Lambert in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corporation of British Columbia*, 2000 BCCA 463, 80 B.C.L.R. (3d) 62, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 488, supporting them.

[35] Mr. Justice Tysoe dealt with the issue in this way (No. 1):

[50] The Defendants say that conduct amounting to a restraint of trade at common law does not satisfy the second element of illegal or unlawful means of the tort of interference with economic relations. In this regard, they point to the English decision of *Brekkes v. Cattel*, which was distinguished on another ground in *Harbord Insurance Services*. Relying on *Mogul Steamship Co. Ltd. v. McGregor Gow & Co.*, [1892] A.C. 25 (H.L.), Pennycuik V.-C. held that the mere circumstance of restraint of trade at common law does not render an act unlawful for the purpose of the tort of intentional interference with economic interests.

[51] However, a contrary view was advocated by Lambert J.A. in his dissent in *No. 1 Collision*:

If an act in restraint of trade is a wrong rectifiable, in relation to the time after the hearing, by the remedy of an injunction, then, in my opinion, that wrong ought, in appropriate circumstances, to be compensated for, with respect to the period from when the wrong was committed until the court hearing, by a money award, call it equitable compensation or call it damages, as you will. What is more, having been identified as a wrong, that is, an unlawful act which the perpetrator was not at liberty to commit, then, subject only to arguments about justification, the wrongful restraint of trade supports, in my opinion, a claim for the tort of deliberate unlawful interference with economic interests.

I realize that the conclusion that I have reached in that respect is not yet independently supported by Canadian authority, or, so far as I know, by direct Commonwealth authority. But once the principles about mingling law and equity in their remedies, as enunciated by the majority of the Supreme Court of Canada in *Canson v. Boughton & Co.* have been applied to wrongful restraint of trade, those principles support the wrongful restraint of trade as being compensable by a money award, compensation or damages, and so lead to the view that as a deliberate unlawful act it will also support the tort of interference with economic interests.

(¶s 183 and 184)

[52] The comments of Lambert J.A. were made in a dissenting judgment and were not addressed by the majority, who decided the appeal on other

grounds. Hence, the comments are not binding on me and constitute no more than a novel argument unsupported by authority. However, Lambert J.A. is a distinguished jurist and his views are deserving of respect. While it is a novel argument, it is one deserving of consideration upon all of the relevant evidence. Under *Hunt*, it is not an argument which should be rejected on a Rule 19(24) application.

[53] My conclusion is that it is not appropriate for me to order that the Plaintiffs' pleading of restraint of trade as the illegal or unlawful means of the tort of interference with economic relations be struck out.

[36] Mr. Justice Lambert's opinion in *No. 1 Collision Repair* received favourable comment in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.), followed in *Barber v. Molson Sport & Entertainment Inc.*, 2010 ONCA 570, 322 D.L.R. (4th) 577 at para. 58, where it was listed as one of the several expressions of a broad view of "unlawful" in the law of torts. Mr. Justice Laskin for the court in *Reach M.D.*, wrote:

[49] The case law reflects two different views of "illegal or unlawful means", one narrow, the other broad. The narrow view confines illegal or unlawful means to an act prohibited by law or by statute. See *Dunlop v. Woollahra Municipal Council*, [1981] 1 All E.R. 1202 (P.C.). Though unauthorized, the Committee's August 1990 ruling was not prohibited either by law or by statute.

[50] The broader view, however, extends illegal or unlawful means to an act the defendant "is not at liberty to commit" -- in other words, an act without legal justification. Lord Denning espoused this broader view in *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 1 All E.R. 522, [1969] 2 Ch. 106 (C.A.) at p. 530 All E.R.:

I must say a word about unlawful means, because that brings in another principle. I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.

[51] The trial judge adopted the principle in *Torquay Hotel* in finding that Lucas' March 28 letter was "an improper and unwarranted act" that satisfied the second element of the tort. Several Canadian appellate courts have taken the same view. For example, the Nova Scotia Court of Appeal applied this principle in finding a franchisor liable for unlawful interference with economic interests because of its unauthorized instruction to a franchisee's bank not to honour certain cheques. See *Volkswagen Canada Ltd. v. Spicer* (1978), 91 D.L.R. (3d) 42, 21 N.S.R. (2d) 496 (S.C. App. Div.). See also *United Food and Commercial Workers, Local 1252 Fishermans' Union v. Cashin*, [1996] N.J. No. 343 (QL), 149 Nfld. & P.E.I.R. 112, affd [2002] N.J.

No. 223 (QL), 217 D.L.R. (4th) 620 (Nfld. C.A.) and *No. 1 Collision Repair and Painting (1982) Ltd. v. Insurance Corp. of British Columbia*, [2000] B.C.J. No. 1634 (QL), 80 B.C.L.R. (3d) 62 (C.A.) *per* Lambert J.A., dissenting.

[52] I think that the trial judge was right to take a broader view of illegal or unlawful means. It is, however, unnecessary to decide the outer limits of the principle in *Torquay Hotel*. Unlawful means at least include what occurred here: the Committee made a ruling that it was not authorized to make. Its ruling was beyond its powers. I see no policy reasons for taking a narrower view of unlawful means. Indeed, to do so would preclude redress against organizations like PMAC and others for any number of unauthorized acts that on a common sense view would be considered unlawful, but nonetheless, were not prohibited by law or by statute.

[37] Novelty of a disputed claim is, as Tysoe J. held, not a basis for striking it out: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. The treatment of restraint of trade activity as supplying the unlawful act ingredient for the claims may be a small or a large step, but I am not persuaded that the law is so fixed in the 19th century economic philosophy represented by *Mogul Shipping* that on the right facts the step cannot be taken.

[38] It must be noted that in addition to restraint of trade, the plaintiffs also plead that Microsoft's impugned activity was found unlawful in litigation in the United States and the European Union and that it was also unlawful by reason that it contravened Microsoft's own internal policies obliging it to abide by competition law. The unlawful ingredient could also be found in the alleged violations of s. 45 of the *Competition Act*. While these added features were questioned by Microsoft on this appeal, none were shown to be plainly and obviously without substance or validity.

[39] In my view, Tysoe J.'s disposition of the unlawful means issue was correct and in full accordance with this Court's decision in *Poirier v. Community Futures Development Corp. of Mt. Waddington*, 2005 BCCA 169:

[14] In my opinion, in applying the principles that ought to be applied to a motion under Rule 19(24)(a) and confining the case closely to the pleadings as I have set them out, and having regard also to the nature of the cause of action for unlawful interference with economic relations, particularly to the statement by Lord Denning in the case of *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 2 Ch.D. 106 (N.C.A.) at p. 39, where Lord Denning said:

I have always understood that if one person deliberately interferes with a trade or business of another, and does so by unlawful means,

that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract.

that the pleadings set out a known cause of action under all three heads of claim. It would be improper on this application to apply any test about the likelihood of proof or the weight that might be given to those causes of action, though it is important to understand the nature of the causes of action. There may be issues about what is meant by “unlawful means” in the tort of intentionally inducing interference with economic relations and whether the heads pleaded at para. 5 of the statement of claim come within the tort but that is not an issue which we should be trying to resolve without the benefit of any evidence on the hearing of an appeal from the decision on a motion such as this.

4. Civil Conspiracy

[40] In a challenge to the pleading of conspiracy, but not limited to that tort, Microsoft asserts that the claim lacks an air of reality and that there are no material facts pleaded.

[41] The argument is that it is preposterous to say that in its vast business enterprises Microsoft set out to cause injury to these plaintiffs as its predominant purpose.

[42] Predominant purpose is discussed in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-472, 145 D.L.R. (3d) 385:

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants’ conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants’ conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the

defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[43] I think it is arguable that the plaintiffs' claim of civil conspiracy may fall within the second category in the above formulation: that the alleged unlawful acts were directed in part at end users of Microsoft's products with the reasonable expectation that they would bear the overcharges.

[44] As for the material facts setting out the means by which the conspirators effected their unlawful purpose, the statement of claim, in my opinion, sets out sufficient allegations to meet the pleading requirements. Those facts include allegations of licensing arrangements for operating systems, browsers and applications software that were intended to exclude competition. The statement of claim is not lacking in descriptive detail. There is, in my judgment, at least an air of reality to the conspiracy claim.

5. Unjust Enrichment – Restitution

[45] Microsoft says the unjust enrichment claim must be struck on two grounds:

1. there is no direct relationship between Microsoft and the plaintiffs; and
2. there is in the case pleaded by the plaintiffs a juristic reason, namely, the contracts with OEMs, for enrichment.

[46] I have already dealt with the second ground in the discussion on the unlawful nature of the contracts and the admittedly novel right of the plaintiffs to rely on their unlawfulness to found a claim. If at trial the plaintiffs can establish that the contracts are invalid, then arguably they cannot provide a juristic reason for the benefits which the plaintiffs say are illegal overcharges.

[47] The first ground is closely akin to the issue of whether IPs can maintain an action. The lack of direct connection formed part of the rationale for the line of authority restricting overcharge claims to those who dealt directly with the seller, namely, direct purchasers. But I think the argument has another dimension as well.

The legal theory of unjust enrichment, argues Microsoft, involves corresponding benefit and detriment and, in the case of indirect purchasers such as the plaintiffs, there is no such correspondence. For instance, in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 797, McLachlin J., as she then was, rejected the idea that any restitutionary claim could be made against the recipient of an indirect benefit:

The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant. This limit is also recognized in other jurisdictions. For example, German restitutionary law confines recovery to cases of direct benefits: Zweigert and Kotz, *Introduction to Comparative Law*, vol. II (2nd ed. 1987), at pp. 234-35.

[48] Microsoft would have us apply the flip side of that analysis: those complaining of an indirect detriment have no recourse in restitution.

[49] Yet that is not the treatment the issue has consistently received in Canada. Mr. Justice Tysoe reviewed competing authority, including *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44 (C.A.), supporting Microsoft's position, and *Innovex Foods 2001 Inc. v. Harnett*, 2004 BCSC 928, for the contrary view, and arrived at this conclusion:

[73] In my opinion, it is not plain and obvious that the royalty received by the Defendants upon a sale of the personal computers purchased by the Plaintiffs was an incidental collateral benefit beyond the limits of recovery prescribed in *Peel*. Even if one accepts that *Boulanger* was correctly decided, the evidence presented in this action may make it distinguishable. In *Boulanger*, it does not appear that the amount payable by the retailer to the manufacturer was dependent upon the monies paid by the plaintiff to the retailer, and the benefit to the manufacturer as a result of the sale of the product by the retailer to the plaintiff might be properly regarded as an incidental collateral benefit. In this case, however, the pleadings allege that the manufacturers of the personal computers were required to pay a royalty to the Defendants. The evidence may establish that the Defendants did receive more than an incidental collateral benefit from the sale of the personal computers purchased by the Plaintiffs.

[50] I am in respectful agreement with Tysoe J. His decision on this point can be supported by the Ontario Divisional Court judgment in *Serhan Estate v. Johnson &*

Johnson (2006), 269 D.L.R. (4th) 279, 85 O.R. (3d) 665, where in the following discussion the benefit/detriment symmetry is found not to be essential to a constructive trust:

80 The decision of the Supreme Court of Canada in [*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217], the case upon which Cullity J. thought the plaintiffs could potentially rely for the remedy of a constructive trust, is seen as the most recent extension of the constructive trust. In that case, the court distinguished a separate type of constructive trust - one based on the concept of "good conscience". The defendant real estate agent had purchased property for himself that he had been negotiating to buy for his client, the plaintiff. When the plaintiff discovered the breach of fiduciary duty, he claimed a constructive trust over the property. However, land values had declined. As a consequence, the plaintiff was unable to show any loss on his part or any gain by the defendant. Even so, for his own idiosyncratic reasons, the plaintiff wanted the property and sought a constructive trust.

81 In the opening words of her judgment, McLachlin J. (as she then was) said "this case stands for the proposition that a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff" (para. 1). Under the broad umbrella of the concept of good conscience, constructive trusts are recognized both to remedy unjust enrichment and corresponding deprivation, as well as to address wrongful acts like fraud.

82 McLachlin J. observed, at para. 14, that the appeal presented "two different views of the function and ambit of the constructive trust". One view sees the constructive trust arising only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. *On the other view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust that underlie many of our industries and institutions.*

83 It was McLachlin J.'s view that "the second, broader approach to constructive trust should prevail" and that the law of constructive trust embraces both "the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence" (paras. 15 and 25). In particular, McLachlin J. noted that good conscience has attracted the support of many jurists as "the unifying concept underlying constructive trust" and cited, at para. 27, the following comment by A. J. McLean ["Constructive and Resulting Trusts – Unjust Enrichment in a Common Law Relationship – *Pettkus v. Becker*" (1982) 16 U.B.C. L. Rev. 155]:

"Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. Macferlan* . . . in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore,

as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

84 McLachlin J. then elaborated upon this second type of constructive trust, saying that it may be imposed where good conscience so requires. Significantly, at para. 33 she stated:

The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

85 At para. 45 of *Soulos*, McLachlin J. identified four conditions that “generally” should be satisfied for a constructive trust based on wrongful conduct, the conditions (set out in para. 22 herein) that Cullity J. explored in order to determine if the plaintiffs may be entitled to a constructive trust based on waiver of tort ([McLachlin J.’s] emphasis).

86 As will be discussed below, the first three conditions appear to attempt to limit the scope of the remedy by requiring the existence of a sufficient connection between a plaintiff and a defendant. A close examination of the relationship between the parties is central to the inquiries under these conditions. The fourth condition then demands that we ask whether, in light of this relationship, there is any other reason why the remedy should not be extended in these circumstances.

[51] One of the elements of a wrongful conduct trust is a “sufficient connection” between a plaintiff and defendant. Arguably, that is supplied by the fact that Microsoft makes its products for the ultimate use of customers like the plaintiffs. If more is required, then the licences for use of the operating systems and applications software directly connect Microsoft and the indirect purchasers. See the reasons in the companion case, *Sun-Rype*, for a more complete discussion of the “proprietary link” issue.

[52] Since Tysoe J.’s decision was rendered, this Court gave judgment in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 312 D.L.R. (4th) 419, and 2010 BCCA 91, 317 D.L.R. (4th) 122 (“*DRAM*”), leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 32.

[53] One of the many issues in that case was the question whether at certification of a class action in which a restitutionary claim is made it is necessary for the plaintiff to present sufficient facts to establish an actual loss suffered by the plaintiff. This is not dissimilar from the question whether there exists a correspondent benefit and detriment argued here. In *DRAM*, the court drew a distinction between loss-based claims and benefit-based claims and embraced the possibility that either can be pursued in a class action seeking a restitutionary remedy. Mr. Justice K. Smith referred, with approval, to *Serhan*:

[31] In her majority judgment in *Serhan*, Epstein J. (now Epstein J.A.) surveyed the law relating to unjust enrichment, constructive trust, and waiver of tort and noted that there is an argument to be made that these claims may be established on the basis of proof of wrongful conduct and resulting gain without proof of any loss by the plaintiff. As she notes, this view finds support among some academic commentators and some case authorities and is based on the principle against unjust enrichment – that a wrongdoer must be compelled to disgorge the fruits of the wrongdoing. These are benefit-based claims, as distinguished from loss-based claims such as claims in tort and contract, where the object is to compensate the innocent party for a loss. Accordingly, she reasoned,

[157] Given the uncertain state of the law concerning both waiver of tort and the potential of disgorgement liability and the circumstances under which the remedy of a constructive trust may be recognized, it is not appropriate that the court should embark upon an analysis of this nature and significance at this early stage without a complete factual foundation. This is particularly so given the policy implications of the issues raised in this proceeding, implications for which the class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.

As a result, since liability might be established without proof of loss, she approved the certification of an aggregate award as a common issue (paras. 138-39).

[54] In my opinion, the law has evolved to the point where indirect harm can provide a basis for a claim in unjust enrichment.

B. CERTIFICATION ISSUES

1. Conspiracy Contrary to Section 45 of the *Competition Act*

[55] Microsoft raises for the first time a challenge to the plaintiffs' reliance on s. 36 of the *Competition Act* as a basis for its claim. As the point is not taken in Microsoft's factum, the plaintiffs asked the Court to disregard it. But no one wanted an adjournment so we heard the argument while reserving on the timeliness objection.

[56] The first issue arises from the fact that s. 36 is not pleaded. There is an outstanding motion to amend by adding s. 36.

[57] The order of Mr. Justice Myers of March 5, 2010, certified as one of the common issues: "Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount?"

[58] The statement of claim refers in several places to breaches of s. 45 of the *Competition Act*. The necessary implication is that s. 36 is or will be engaged because it is the only means by which a criminal conspiracy becomes actionable.

[59] In light of all this, I consider the lack of pleading to be a purely technical objection without substance. Obviously the parties put their minds to s. 36 at the certification hearing and so no surprise or prejudice can be complained of.

[60] The second issue is a limitations argument. Section 36(4) prescribes a two-year prescription period running from a day on which conduct contrary to any provision of Part VI was engaged in. While this is not strictly a pleadings point, on the submission of Microsoft, it should have the same effect as striking the claim because there is no possibility of overcoming the limitation obstacle. This is said to be the effect of the notoriety of the United States and European Union litigation in which the same or similar restrictive trade practices were alleged many years before the commencement of this action. In other words, no credible postponement or discoverability argument can arise and the claim has no reasonable prospect of

success. In the alternative, Microsoft says the matter will break down into individual enquiries as to postponement and the class action will cease to be the preferable procedure.

[61] The short and simple answer to this argument is that it is premature. Limitations problems like this are so bound up in the facts that they must be left to a later stage of the process. Moreover, the force of the argument is considerably diminished by the timing of its presentation – it looks and feels like an afterthought.

2. Proof Requirement at Certification

[62] Section 5(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, provides that affidavit evidence must support an application for a certification order:

5 (1) An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

[63] The threshold requirement was described in the following passage from *DRAM*:

[65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: [*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158] at para. 16. The burden is on the plaintiff to show “some basis in fact” for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a “minimum evidentiary basis”: *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref’d [2005] S.C.C.A. No. 50 [*Cloud*],

[O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[64] Microsoft argues that *DRAM* should be distinguished as a less complex case and one in which the liability element was predetermined by the defendants’ guilty

plea in the United States. Here, says Microsoft, the plaintiffs needed to provide sufficient evidence as to both liability and loss and failed in the attempt.

[65] The focus of the argument is on the evidence of the plaintiffs' expert, Dr. Janet S. Netz, an economist based in Michigan. Microsoft submits that her evidence in support of certification falls short of establishing a credible methodology for proof of pass-through. The chief deficiency is said to lie in her reliance on U.S. data and a failure to consider the Canadian market context.

[66] In her principal affidavit, Dr. Netz deposed, at para. 49:

There is no theoretical reason, in my opinion, why the methods described above cannot be applied to the sales of Microsoft software in Canada. The applicability of the methods to different geographic regions is illustrated by the scholarly literature on the pass-through rate in gasoline distribution channels, which extends across countries and across regions within countries.

[67] Microsoft argues that the plaintiffs had to go beyond theory and identify actual Canadian data available for the pass-through analysis.

[68] The plaintiffs respond that such evidence was provided by Dr. James A. Brander, a U.B.C. Sauder School of Business economist, who deposed in his affidavit as follows:

72. My discussion of methods indicates that it is possible in principle to quantify, on a class-wide basis, economic damages suffered by Class members. To implement these methods, it is necessary to obtain appropriate data. I have assessed the availability of data necessary to carry out the quantification described in the previous sections. It is my belief that suitable data to carry out such quantification is available.

* * *

76 In order to apply pass-through results and other inferences based on U.S. data to British Columbia or to Canada more broadly it is necessary to consider the degree of relevant similarity between Canada and the U.S. I would expect pass-through to be similar in the two countries. One piece of evidence supporting this is the global or at least continent-wide decision-making undertaken by Microsoft and the other firms in question. In addition, income levels, the nature of supply and demand, and various market characteristics are sufficiently similar between British Columbia, other Canadian jurisdictions, and relevant jurisdictions in the United States that

economists would normally take estimates of economic behaviour from one of these jurisdiction[s] as being relevant to the others.

77. I would be able to test the validity of assuming significant integration and similarity between U.S. and Canadian jurisdictions. In particular I could test whether software prices in the two countries tend to move together. I would also emphasize that, while relying on U.S. results would be convenient, it is not essential. Estimates of relevant effects can be carried out relying strictly on Canadian price data, although considerable effort would have to go into data collection.

[69] Is this good enough? Mr. Justice Myers thought it was (2010 BCSC 285):

[133] It is true that Dr. Netz has not used Canadian data in her analyses. But she is not required to do so. Once again, at the certification stage, the plaintiff must only show a credible or plausible methodology. That does not mean preparing an actual report. While the plaintiffs here rely on the reports done in the United States, they are not meant to be the reports to be used in this litigation; rather, they are pointed to in support of the contention that a credible or plausible methodology exists. The fact that Pro-Sys has the advantage of being able to point to such reports does not mean that that is the level of proof they need meet.

[134] Dr. Netz says that the methods she has used in the United States are equally applicable to Canada. I do not see that the defendants have raised a sufficient case to allow me to conclude otherwise. The markets might have different characteristics, but that does not mean that the methodologies used in the U.S. will not work here.

[70] In my opinion, the decision of Myers J. in this regard is entitled to deference. He applied the standard enunciated in *DRAM* and committed no error of principle in his judgment. I do not accept that *DRAM* can be distinguished on the grounds asserted by Microsoft. Whether or not *DRAM* was a less complex case than this, and the point is debatable, and regardless whether the fault element was settled in *DRAM* and not here, the standard of proof at certification as settled by *DRAM* transcends the differences and is applicable here.

DISPOSITION

[71] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Donald"

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[72] I have read a draft of Mr. Justice Donald's reasons for dismissing the appeal. I find, with respect, that for the reasons I have given in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187, I am unable to accept the plaintiffs have a cause of action. As that is determinative, I find it unnecessary to consider the other issues to which the appeal gives rise.

[73] The question of whether the pleadings disclosed a cause of action that could be maintained, and thereby fulfilled the requirement of s. 4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, was addressed by Mr. Justice Tysoe in his dispositions of the defendants' applications to strike the pleadings under Rule 19(24) for reasons he gave over four years ago (2006 BCSC 1047 and 2006 BCSC 1738). That was before the Supreme Court of Canada's decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, in which what is referred to as the passing-on defence was rejected. The order for certification was made by Mr. Justice Myers for the reasons he gave (2010 BCSC 285) wherein it was made clear s. 4(1)(a) of the *Class Proceedings Act* was not at issue (para. 22). Thus, the significance of the rejection of the passing-on defence is raised for the first time in this action on this appeal.

[74] As I have endeavoured to explain in *Sun-Rype*, I consider Canadian law to be consistent with American federal law as established by the Supreme Court of the United States in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061 (1977).

[75] In rejecting the passing-on defence, the Supreme Court of Canada conclusively determined in *Kingstreet* that, as a matter of law, a defendant cannot reduce its liability to those who paid an unlawful charge by establishing some or all of it was passed on to others. In my view, it follows that any passing on of the charge it is said there may have been is not recognized in law and so cannot give rise to a cause of action for its recovery by those to whom the charge was in whole or in part said to have been passed on. Were it to be otherwise, in the absence of

the passing-on defence, a defendant would be liable for both the whole of the charge paid to it directly (liability to the direct purchasers) and for all or any portion of the charge passed on (liability to the indirect purchasers). That would result in liability for double recovery – some or all of the same charge being recoverable from the defendant twice – which our law does not permit.

[76] In this action, the representative plaintiffs allege on behalf of the proposed class that, as a consequence of the defendants' unlawful conduct, in combination and agreement with computer manufacturers and others, the defendants defeated all competition and have charged more for their operating systems and application software licensed for, and installed on, personal and laptop computers since the 1980s than they otherwise could have done. The allegation is that, as the purchasers of computers for their own use, the members of the proposed class ultimately bore the entire overcharge that was paid to the defendants; it was passed on to them through the distribution channels.

[77] Thus, the alleged overcharge, though paid to the defendants directly by other than the proposed class members, was passed on to them. They are then essentially in the same legal position as the indirect purchasers in *Sun-Rype*. I do not understand counsel for the proposed class to suggest otherwise, the contention in both appeals on the point being that the causes of action can be maintained despite the rejection of the passing-on defence in *Kingstreet*.

[78] As in *Sun-Rype*, I consider it plain and obvious the representative plaintiffs have no cause of action maintainable in law. I would accordingly allow the appeal, set aside the certification order, and dismiss the action.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Frankel"