



SUPREME COURT OF CANADA

CITATION: Sun-Rype Products Ltd. v. Archer Daniels Midland Company, 2013 SCC 58

DATE: 20131031
DOCKET: 34283

BETWEEN:

Sun-Rype Products Ltd. and Wendy Weberg

Appellants/Respondents on cross-appeal
and

**Archer Daniels Midland Company, Cargill, Incorporated,
Cerestar USA, Inc., formerly known as American Maize-Products Company,
Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC
International, Inc., ADM Agri-Industries Company, Cargill Limited, Casco Inc.
and Unilever PLC doing business as Unilever Bestfoods North America**

Respondents/Appellants on cross-appeal
- and -

Attorney General of Canada and Canadian Chamber of Commerce
Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 80)

Rothstein J. (McLachlin C.J. and LeBel, Fish, Abella,
Moldaver and Wagner JJ. concurring)

DISSENTING REASONS:
(paras. 81 to 122)

Karakatsanis J. (Cromwell J. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

SUN-RYPE v. ARCHER DANIELS MIDLAND

**Sun-Rype Products Ltd. and
Wendy Weberg**

Appellants/Respondents on cross-appeal

v.

**Archer Daniels Midland Company,
Cargill, Incorporated,
Cerestar USA, Inc., formerly known as American Maize-Products Company,
Corn Products International, Inc.,
Bestfoods, Inc., formerly known as CPC International, Inc.,
ADM Agri-Industries Company,
Cargill Limited,
Casco Inc. and
Unilever PLC doing business as
Unilever Bestfoods North America**

Respondents/Appellants on cross-appeal

and

**Attorney General of Canada and
Canadian Chamber of Commerce**

Interveners

Indexed as: Sun-Rype Products Ltd. v. Archer Daniels Midland Company

2013 SCC 58

File No.: 34283.

2012: October 17; 2013: October 31.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Class actions — Certification — Direct and indirect purchasers — Plaintiffs allege that defendants fixed price of high fructose corn syrup and overcharged direct purchasers and overcharge was passed on to indirect purchasers — Whether indirect purchasers have right to bring action against alleged overcharger — Whether inclusion of indirect and direct purchasers in proposed class warrants dismissing action — Whether case meets certification requirements of having an identifiable class of indirect purchasers — Whether direct purchasers have cause of action in constructive trust — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).

The appellants, direct and indirect purchasers, brought a class action alleging that the respondents engaged in an illegal conspiracy to fix the price of high fructose corn syrup (“HFCS”) resulting in harm to manufacturers, wholesalers, retailers and consumers. HFCS is a sweetener used in various food products, including soft drinks and baked goods. The respondents are the leading producers of HFCS in North America. On the application for certification, it was determined that the pleadings disclosed causes of action for the direct purchasers in constructive trust and for the indirect purchasers under s. 36 of the *Competition Act*, in tort and in restitution. The action was certified. On appeal, the majority of the court allowed the

appeal with respect to the indirect purchasers and held that it was “plain and obvious” that indirect purchasers did not have a cause of action. The appeal with respect to direct purchasers was dismissed. The matter was remitted to the British Columbia Supreme Court to reconsider the certification of the action of the direct purchasers alone. In this Court, the appellants challenge the decision that the indirect purchasers have no cause of action. On cross-appeal, the respondents request dismissal of the direct purchasers’ claim in constructive trust.

Held (Cromwell and Karakatsanis JJ. dissenting on the appeal): The appeal should be dismissed and the cross-appeal allowed.

Per McLachlin C.J. and LeBel, Fish, Abella, **Rothstein**, Moldaver and Wagner JJ.: Having decided in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, that indirect purchasers have the right to bring an action, a question in this case is whether the additional challenges that arise where the class is made up of indirect and direct purchasers are sufficient to warrant dismissing the action. The inclusion of indirect and direct purchasers in the proposed class does not produce difficulties that would warrant dismissing the action. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. The court also possesses the power to modify settlement and damage awards in accordance with awards already received in other

jurisdictions if the respondents are able to satisfy them that double recovery may occur.

Assuming all facts pleaded to be true, a plaintiff satisfies the requirement that the pleadings disclose a cause of action unless it is plain and obvious that the claim cannot succeed. In relation to the causes of action in restitution for the indirect purchasers, the requirement that there be a direct relationship between the defendant and the plaintiff for a claim in unjust enrichment is not settled. Case law does not appear to necessarily foreclose a claim where the relationship between the parties is indirect. It is not plain and obvious that a claim in unjust enrichment should fail at the certification stage on this ground alone. As to the recognition of passed on losses — the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses. No insurmountable problem is created by allowing the claims in restitution to be brought. Nor is it plain and obvious that a cause of action for the indirect purchasers under s. 36 of the *Competition Act* cannot succeed and this cause of action should therefore not be struck out.

A court must certify a proceeding if, among other requirements, there is an identifiable class of two or more persons. The difficulty lies where there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class. Allowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered a 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. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have not introduced evidence to establish some basis in fact that at least two class members could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class. The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. The foundation upon which an individual action could be built must be equally present in the class action setting. That foundation is lacking here. In the end, given the finding that an identifiable class cannot be established for the indirect purchasers, the class action as it relates to the indirect purchasers cannot be certified.

With respect to the one cause of action remaining to the direct purchasers, it is determined that the cause of action in constructive trust should fail. Neither the requirement of a proprietary nexus nor the requirement that the constructive trust be imposed only where a monetary remedy was found to be inadequate were met in this case and as such it is plain and obvious that the direct purchaser claim in constructive trust has no chance of succeeding.

Per Cromwell and **Karakatsanis JJ.** (dissenting on the appeal): In this case, there is some basis in fact to find an identifiable class of 2 or more persons that includes indirect purchasers.

The requirement that the class be identifiable does not include the requirement that individual members be capable of proving individual loss. The *Class Proceedings Act (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. Such class actions permit the disgorgement of unlawful gains and serve not only the purposes of enhanced access to justice and judicial economy, but also the broader purpose of behaviour modification. Further, the aggregate damages provisions in the *CPA* are tools which are intended to permit access to justice and behaviour modification in cases where liability to the class has been proven but individual membership in the class is difficult or impossible to determine. The legislation explicitly contemplates difficulties or, in some cases, impossibility in self-identification. Such difficulties have not been considered fatal to authorizations under the *CPA* provided that there is some basis in fact that the class exists. The criteria for membership must be clearly defined — not the ability of a given individual to prove that they meet the criteria. Whether claimants can prove their claim for an individual remedy is a separate issue that need not be resolved at the certification stage.

Here, the record contained an evidentiary basis to establish the existence of the class and to show that the members of the class suffered harm. It may never be necessary or legally required to identify individual class members. The *CPA*, while primarily a procedural statute, also creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual member's damages is impractical, and that is available even if those who are not members of the class can benefit. The statute should be construed generously to give life to its purpose of encouraging judicial economy and access to justice and modifying the behaviour of wrongdoers.

Even though it is not necessary at the certification stage to show that individual class members could stand alone as plaintiffs, this record contains a sufficient evidentiary basis to establish the existence of an identifiable class of 2 or more persons. Direct purchasers of high fructose corn syrup (HFCS) used it extensively in products that were sold widely to retailers and to consumers. Given the nature of a price-fixing case, loss flows directly from the purchase of HFCS, or in the case of indirect purchasers, products containing HFCS. Claimants will not have to prove definitively that they purchased a particular product that contained HFCS. It will be sufficient if the trial judge is satisfied, upon expert or other evidence, that an individual claimant probably purchased a product containing it. The requirement that there be an evidentiary foundation — or some basis in fact — to support the certification criteria does not include a preliminary merits test and does not require the plaintiffs to indicate the evidence upon which they will prove these claims. The

question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. The appellants in this case have tendered evidence which establishes some basis in fact to show that the proposed class is identifiable and that individual class members may be able to establish individual loss on a balance of probabilities. Individual claimants, including indirect purchasers, would be able to self-identify as potential plaintiffs based on knowledge of the products in which HFCS is known to have been commonly used.

Cases Cited

By Rothstein J.

Applied: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, rev'g 2011 BCCA 186, 304 B.C.A.C. 90; **Referred to:** *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), aff'd 2013 SCC 59; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Tracy (Guardian ad litem of) v. Instalans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* (2002), 20

C.P.C. (5th) 351; *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172; *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379.

By Karakatsanis J. (dissenting on the appeal)

Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534; *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271; *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373; *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774; *Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35; *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301; *MacKinnon v. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4(1), 29, 31(1), 34.

Competition Act, R.S.C. 1985, c. C-34, ss. 36, Part VI.

Authors Cited

Blynn, Daniel. “Cy Pres Distributions: Ethics & Reform” (2012), 25 *Geo. J. Legal Ethics* 435.

Eizenga, Michael A., et al. *Class Actions Law and Practice*, 2nd ed. Markham, Ont.: LexisNexis, 2009 (loose-leaf updated May 2013, release 22).

Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution*. Toronto: Canada Law Book, 2013 (loose-leaf updated May 2013, release 10).

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Lowry and Frankel JJ.A.), 2011 BCCA 187, 305 B.C.A.C. 55, 331 D.L.R. (4th) 631, 515 W.A.C. 55, [2011] B.C.J. No. 689 (QL), 2011 CarswellBC 931, setting aside a decision of Rice J., 2010 BCSC 922 (CanLII), [2010] B.C.J. No. 1308 (QL), 2010 CarswellBC 1749. Appeal dismissed, Cromwell and Karakatsanis JJ. dissenting. Cross-appeal allowed.

J. J. Camp, Q.C., Reidar Mogerma, Melina Buckley and Michael Sobkin, for the appellants/respondents on cross-appeal.

D. Michael Brown, Gregory J. Nash and David K. Yule, for the respondents/appellants on cross-appeal Archer Daniels Midland Company and ADM Agri-Industries Company.

J. Kenneth McEwan, Q.C., and Eileen M. Patel, for the respondents/appellants on cross-appeal Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company and Cargill Limited.

Stephen R. Schachter, Q.C., Geoffrey B. Gomery, Q.C., and Peter R. Senkpiel, for the respondents/appellants on cross-appeal Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America.

John S. Tyhurst, for the intervener the Attorney General of Canada.

Davit D. Akman and Adam Fanaki, for the intervener the Canadian Chamber of Commerce.

TABLE OF CONTENTS

Reasons of Rothstein J.

- I. Introduction
- II. Background
- III. Summary of the Proceedings Below
 - A. Commencement of the Action
 - B. Pre-certification Motion to Strike
 - C. Certification Proceedings in the British Columbia Supreme Court
 - D. Appeal of the Certification to the British Columbia Court of Appeal
- IV. Analysis
 - A. Indirect Purchaser Actions (the “Passing On” Issue)
 - (1) Double or Multiple Recovery as Between Indirect and Direct Purchasers
 - (2) Over-Recovery as Between Jurisdictions
 - (3) Restitutionary Law Principles
 - (4) Deterrence and Compensation
 - B. The Certification of the Class Action
 - (1) Do the Pleadings Disclose a Cause of Action?
 - (a) Restitution — Indirect Purchasers
 - (b) Constructive Trust — Direct Purchasers
 - (c) Section 36 of the Competition Act — Indirect Purchasers
 - (i) Passed-On Losses Recognized at Law
 - (ii) Jurisdiction Over Extraterritorial Conduct
 - (2) Are There Common Issues?
 - (3) Is There an Identifiable Class?
 - (4) Conclusion on Identifiable Class
- V. Conclusion

Reasons of Karakatsanis J.

- I. Overview
- II. Class Requirements — General Principles
- III. Application to This Case
 - A. The Record and Position of the Parties
 - B. Class Identification Does Not Require That Individual Class Members Can Prove Individual Loss

- C. Some Basis in Fact to Show That Individuals Could Prove Personal Loss/Class Members Are Identifiable

IV. Conclusion

APPENDIX: Common Issues Certified by Rice J.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Wagner JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

[1] In price-fixing cases, indirect purchasers are customers who did not purchase a product directly from the alleged price-fixers/overchargers but who purchased it indirectly from a party further down the chain of distribution. Those who say indirect purchasers should not be able to bring actions against their alleged overchargers cite complexities in tracing the overcharge, risks of double or multiple recovery and failure to deter anti-competitive behaviour as reasons why they should not be permitted in Canada. These were some of the issues before the Court in the companion case of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (“*Pro-Sys*”). In that case, a proposed indirect purchaser class action, those arguments were found to be insufficient bases upon which to deny indirect purchasers the right to bring an action against the alleged overcharger.

[2] In this case, both the indirect and direct purchasers are class members. Having decided in *Pro-Sys* that indirect purchasers have the right to bring an action, a question in this case is whether the additional challenges that arise where the class is made up of indirect and direct purchasers are sufficient to warrant dismissing the action. If the Court finds that the action may proceed, it must then consider whether the class action should have been certified by the applications judge.

[3] For the reasons that follow, I would find that the inclusion of indirect and direct purchasers in the proposed class does not produce difficulties that would warrant dismissing the action. However, I find this case cannot meet the certification requirements because there is not an identifiable class of indirect purchasers as required for certification under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (“*CPA*”). I would dismiss the appeal on that basis. The case of the direct purchasers, which is restricted to constructive trust, is dismissed as I find there is no cause of action. The cross-appeal is therefore allowed.

II. Background

[4] Sun-Rype Products Ltd., a juice manufacturer, is the direct purchaser representative plaintiff and Wendy Bredin (formerly Wendy Weberg) is the indirect purchaser representative plaintiff in this action. The representative plaintiffs (referred to collectively as the “appellants”), brought the class action pursuant to the *CPA*. They allege that Archer Daniels Midland Company and ADM Agri-Industries Company (the “ADM respondents”), Cargill, Incorporated, Cerestar USA, Inc.,

formerly known as American Maize-Products Company, and Cargill Limited (the “Cargill respondents”), and Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America (the “Casco respondents”) (collectively, the “respondents”), engaged in an illegal conspiracy to fix the price of high-fructose corn syrup (“HFCS”) resulting in harm to manufacturers, wholesalers, retailers and consumers.

[5] HFCS is a sweetener used in various food products, including soft drinks and baked goods. The respondents are the leading producers of HFCS in North America. The appellants claim that between January 1, 1988, and June 30, 1995, the respondents engaged in an “intentional, secret and illegal conspiracy to fix the price of HFCS”, which allowed them to charge the class members more for HFCS than they would have charged but for the alleged illegal conduct (A.F., at paras. 9 and 11).

III. Summary of the Proceedings Below

A. *Commencement of the Action*

[6] The appellants commenced this class action in June 2005 on behalf of “all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the [respondents] (collectively, the ‘class’) from January 1, 1988 to June 30, 1995 (the ‘Class Period’)” (2010 BCSC 922 (CanLII), at para. 2). It alleged the following causes of action (*ibid.*, at para. 27):

- a) contravention of s. 45(1) of Part VI of the *Competition Act* giving rise to a right of damages under s. 36(1) of that Act;
- b) tortious conspiracy and intentional interference with economic interests;
- c) unjust enrichment, waiver of tort and constructive trust; and
- d) punitive damages.

B. *Pre-certification Motion to Strike*

[7] The respondents brought a pre-certification motion to strike the appellants' claims on the basis that they were statute-barred. In an order dated May 10, 2007, the motions judge only allowed the claim for a remedial constructive trust because it was subject to a longer (10-year) limitation period than the other claims (2007 BCSC 640, 72 B.C.L.R. (4th) 163). The respondents appealed the order to the British Columbia Court of Appeal ("BCCA") and the appellants cross-appealed (2008 BCCA 278, 81 B.C.L.R. (4th) 199). The result was that the BCCA found that the direct purchaser representative plaintiff, Sun-Rype, could maintain only its cause of action in remedial constructive trust and that all of its claims for damages, including damages under the *Competition Act*, R.S.C. 1985, c. C-34, were statute-barred. As to the indirect purchaser representative plaintiff, Wendy Bredin, the BCCA found that she could maintain all of her causes of action because the limitation period on her claims did not begin until "she received the telephone call from her lawyer advising her of the proposed class action" (para. 138).

C. *Certification Proceedings in the British Columbia Supreme Court, 2010 BCSC 922 (Can LII)*

[8] The British Columbia Supreme Court (“BCSC”) dealt with the appellants’ application for certification by its decision dated June 30, 2010. As to the issue of whether indirect purchasers could bring actions against their alleged overchargers, Rice J. found that it was “not plain and obvious” that indirect purchaser claims were unavailable as a matter of law in Canada (para. 58).

[9] Rice J. then addressed the requirement under s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action. Excluding the portions of the claim struck by the pre-certification decision on the limitation periods, Rice J. found that the pleadings disclosed causes of action for the direct purchasers in constructive trust and for the indirect purchasers under s. 36 of the *Competition Act*, in tort and in restitution. Rice J. also found that the remaining certification requirements, namely (i) whether there were common issues; (ii) whether there was an identifiable class; (iii) whether the class action was the preferable procedure; and (iv) whether Sun-Rype and Wendy Bredin could adequately represent the class, were met. He certified the action identifying common issues relating to the indirect purchasers’ claims seeking statutory, common law and equitable damages and restitution based on allegations that the respondents engaged in an international and unlawful conspiracy to fix the price of HFCS during the class period. The common issues certified by Rice J. are listed in the appendix to these reasons.

D. *Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 187, 305 B.C.A.C. 55*

[10] The majority of the BCCA (*per* Lowry J.A., Frankel J.A. concurring) held that it was “plain and obvious” that indirect purchasers did not have a cause of action (para. 97). The majority reached this conclusion for the same reasons as in its decision in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2011 BCCA 186, 304 B.C.A.C. 90: it held that the rejection of the passing on defence in Canada carried as its necessary corollary a corresponding rejection of the offensive use of passing on in the form of an indirect purchaser action. The majority found Canadian law “to be consistent with American federal law as established by the Supreme Court of the United States in *Hanover Shoe . . .* and *Illinois Brick*” (*Pro-Sys*, at para. 74).

[11] With respect to the indirect purchasers, the majority allowed the appeal and found that the pleadings did not disclose a cause of action on their part (para. 98). However, with respect to direct purchasers, the majority found that the appeal should be dismissed (para. 74). The BCCA set aside the certification order of Rice J. and remitted the matter to the BCSC to reconsider the certification of the action of the direct purchasers alone.

[12] Donald J.A., dissenting as he did in *Pro-Sys*, would have found that indirect purchaser actions were permitted as a matter of law in Canada and would have certified the action for both direct and indirect purchasers, finding that all of the requirements in s. 4(1) of the *CPA* were met.

IV. Analysis

[13] This appeal was brought concurrently with the appeal in the companion case of *Pro-Sys*. Counsel for the appellants are the same in both cases, and the appellants in this case rely heavily on the appellants' submissions in *Pro-Sys* to support their arguments. In view of the significant overlap in issues, these reasons will frequently refer to the reasons in *Pro-Sys*.

[14] In this Court, the three groups of respondents filed separate factums. However, each adopt the pleadings of the others in the appeal and the cross-appeal. In the appeal, the respondents argue first and foremost that indirect purchasers do not have a cause of action. They also argue that the class action should be decertified in respect of the indirect purchasers because the class is not identifiable as required by s. (4)(1)(b) of the *CPA*. On the cross-appeal, the respondents request dismissal of the direct purchasers' claim in constructive trust on the grounds that the elements required to establish a constructive trust are not present. They also seek decertification of the class action on the basis that Rice J. applied the wrong standard of proof in his analysis of the certification requirements.

[15] As indicated, I am unable to find an identifiable class as it relates to the indirect purchasers and would dismiss the appeal on that basis. Nonetheless, for completeness, the various arguments presented in this case are assessed below. I turn first to the indirect purchaser question and then consider the arguments pertaining to the certification of the class action.

A. *Indirect Purchaser Actions (the "Passing On" Issue)*

[16] The appellants largely adopt the submissions of Pro-Sys Consultants Ltd. on the passing-on issue. As the offensive use of passing on has been analysed in the reasons in *Pro-Sys*, it is unnecessary to repeat it in its entirety here. I add only the following to address the differences that arise with regard to passing on where indirect purchasers and direct purchasers are part of the same class.

(1) Double or Multiple Recovery as Between Indirect and Direct Purchasers

[17] The respondents argue that the “fundamental difficulty with the case of the indirect purchasers is that they seek recovery of amounts to which the direct purchasers have a valid claim, such that, to recognize the claim of the indirect purchasers would be to recognize an overlapping claim to the same amount and the prospect of double recovery” (Cargill factum, at para. 54). They argue that, because the passing-on defence has been rejected in Canada, the direct purchasers are entitled to 100 percent of the amount of the overcharge. Consequently they say that indirect purchasers “make a duplicative and overlapping claim to an overcharge to which the direct purchasers are entitled based on settled principles” (Cargill factum, at para. 61).

[18] For the reasons given in the *Pro-Sys* appeal, this argument is insufficient to deny indirect purchasers the right to be included in the class action. I agree with Rice J. that, by including both direct and indirect purchasers in the class and by using economic methodologies to ascertain the aggregate amount of the loss, there will be no over-recovery from the respondents (BCSC, at para. 53).

[19] In this case, the appellants seek recovery of a defined sum equal to the aggregate of the overcharge. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. Recovery is limited to that aggregate amount, no matter how it is ultimately shared by the direct and indirect purchasers. This was the view of the BCCA in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 98 B.C.L.R. (4th) 272 (“*Infineon*”), at para. 78, and of the Quebec Court of Appeal in *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), at para. 114. The appeal of the latter decision was heard together with *Pro-Sys* and this case. See *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

[20] To the extent that there is conflict between the class members as to how the aggregate amount is to be distributed upon the awarding of a settlement or upon a successful action, this is not a concern of the respondents and is not a basis for denying indirect purchasers the right to be included in the class action.

(2) Over-Recovery as Between Jurisdictions

[21] In addition to concern of double recovery as between indirect and direct purchasers, the respondents also express concerns of over-recovery arising from actions in the U.S. Specifically, the respondents state that in the U.S. direct purchasers of HFCS have already reached a settlement with the respondents for the entire overcharge. They claim that if the rights of the indirect purchasers to bring an

action are recognized in Canada, this will create “overlapping claims to the same loss between direct purchasers in the U.S. and indirect purchasers in British Columbia” (Cargill factum, at para. 70). As stated in the *Pro-Sys* reasons, the court is equipped to deal with these risks. The court possesses the power to modify settlement and damage awards in accordance with awards already received by plaintiffs in other jurisdictions if the respondents are able to satisfy them that double recovery may occur. If the respondents adduce relevant evidence, the court will be able to ensure that double recovery does not occur.

(3) Restitutionary Law Principles

[22] The majority of the BCCA rejected the offensive use of passing on based on the theory that once the passing-on *defence* is rejected, the direct purchasers would be entitled to the whole amount by which they were overcharged:

. . . I am unable to see why the [direct purchasers] would not as a matter of law be entitled to the whole of the amount they overpaid regardless of any amount that may have been passed on to the [indirect purchasers] in the same way they would if they were the only plaintiffs in the action. Anything less would serve to disadvantage them because of the nature of the proceedings such that they would be deprived of what they would legally be entitled to recover. [para. 84]

[23] I would agree that absent an action by indirect purchasers or absent the inclusion of indirect purchasers in the action, the direct purchasers would be able to recover the entire amount of the overcharge because the overcharger would be unable to invoke the passing-on defence. However, this is not the same as saying the direct

purchasers are *entitled* to the entire amount of the overcharge. The disgorgement of amounts obtained through wrongdoing is one of the fundamental principles of restitutionary law (P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (loose-leaf), at p. 3-1). Restitutionary law is “a tool of corrective justice” that seeks to take money away from the party who has unjustly taken it and return it to the party who unjustly lost it (*Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at paras. 32 and 47). While a defendant cannot invoke the passing-on defence, the direct purchasers cannot deny that they have passed on the overcharge to the indirect purchasers. Where indirect purchasers are able to demonstrate that overcharges were passed on to them they are entitled to claim those overcharges.

(4) Deterrence and Compensation

[24] As part of their argument that indirect purchaser actions should not be allowed, the respondents make much of the fact that in many other price-fixing cases in Canada, awards to indirect purchasers have been disbursed in the form of *cy-près* payments because the amounts in question were so small as to make identification of and distribution to each individual class member impractical. They claim that *cy-près* distributions do not advance the deterrence objective of the Canadian competition laws because any deterrence function could be achieved to an equal extent by a claim made solely by direct purchasers. They also argue that because the award would be

distributed to a not-for-profit entity in place of the class members, the compensation goal of the Canadian competition laws is also frustrated.

[25] There is merit to these arguments; however, the precedent for *cy-près* distribution is well established (see M.A. Eizenga et al., *Class Actions Law and Practice* (loose-leaf), at § 9.19). While *cy-près* distributions may not appeal to some on a policy basis, this method of distributing settlement proceeds or damage awards is contemplated by the *CPA*, at s. 34(1):

34 (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

[26] It is also a method the courts have used in indirect purchaser price-fixing cases, as demonstrated by the respondents' summary of nine cases in which distribution of the settlement funds was made on a *cy-près* basis. And, while its very name, meaning "as near as possible", implies that it is not the ideal mode of distribution, it allows the court to disburse the money to an appropriate substitute for the class members themselves (see D. Blynn, "Cy Pres Distributions: Ethics & Reform" (2012), 25 *Geo. J. Legal Ethics* 435, at p. 435).

[27] As such, while the compensation objective is not furthered by a *cy-près* distribution, it cannot be said that deterrence is reduced by the possibility that a

settlement will eventually be distributed in that manner. These factors do not preclude indirect purchasers from bringing an action or from being included in the class.

B. *The Certification of the Class Action*

[28] Having determined that indirect purchasers may pursue actions against their alleged overchargers, the issue is now whether this action should be certified. The analysis of the certification requirements was carried out by the applications judge, Rice J., but was not addressed by the majority of the BCCA. The majority of the BCCA disposed of the action based solely on its finding that passing on could not be used offensively to allow indirect purchasers to bring an action.

[29] The requirements for certification under the *CPA* are set forth in s. 4(1):

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.

[30] The respondents contest only three of the certification criteria. The first is whether the pleadings disclose a cause of action as required under s. 4(1)(a). They argue that the remaining cause of action of the direct purchasers in constructive trust should be struck and that the indirect purchaser causes of action in restitution and under s. 36 of the *Competition Act* should fail. They do not contest the indirect purchasers' causes of action in tort. Second, they say that the requirement under s. 4(1)(c) that the claims raise common issues is not met. Third, they argue that the class is not identifiable as it relates to the indirect purchasers as required under s. 4(1)(b).

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

[31] Section 4(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. This requirement is judged on the standard of proof applied in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980, namely that a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 20 ("Alberta Elders"); *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

[32] I first consider the respondents' arguments in relation to the causes of action in restitution for both the indirect and direct purchasers (remedial constructive trust) and then turn to the arguments against the cause of action of the indirect purchasers under s. 36 of the *Competition Act*.

(a) *Restitution — Indirect Purchasers*

[33] In the alternative, the appellants claim that the respondents have been unjustly enriched as a result of the alleged overcharge on the sale of HFCS and that the class members have suffered a deprivation in the amount of the overcharge attributable to the sale of HFCS in B.C. and in Canada. They plead that this overcharge resulted from wrongful or unlawful acts and that there can thus be no juristic reasons for the enrichment. The appellants seek the disgorgement of the alleged overcharge paid to the respondents by the class members.

[34] The respondents argue that “both the benefit conferred and deprivation (or loss) suffered was that of the direct purchasers alone” and as such, it is the direct purchasers alone who can bring a claim for restitution for wrongful conduct. They submit that no benefit was conferred directly by the indirect purchaser to the overcharger and that the deprivation in question was suffered by the direct purchasers and *not* the indirect purchasers, because the passing on of losses is not recognized at law (Cargill factum, at para. 30).

[35] I understand the respondents to be making two separate points: one, that a direct relationship between a plaintiff and a defendant is needed to ground a claim in unjust enrichment; and two, that because indirect purchasers cannot base a claim on passed-on losses, they have no cause of action in unjust enrichment. Both of these arguments have been addressed in the reasons in *Pro-Sys*.

[36] The requirement that there be a direct relationship between the defendant and the plaintiff for a claim in unjust enrichment is not settled. As indicated in the *Pro-Sys* reasons, *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, states only that “[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant” (p. 797 (emphasis added)). *Peel* requires only that a claim in unjust enrichment must be based on “more than an incidental blow-by” and that “[a] secondary collateral benefit will not suffice” (p. 797). These words would appear not to necessarily foreclose a claim where the relationship between the parties is indirect. However, as in *Pro-Sys*, this does not resolve the issue. First, it is not apparent here that the benefit received by the respondents was mere “incidental blow-by” or “collateral benefit”. Second, the appellants in *Pro-Sys* argue that *Alberta Elders* is an example of a case where an unjust enrichment was found absent a direct relationship, calling the requirement into question. Accordingly, it cannot be said that it is plain and obvious that a claim in unjust enrichment should fail at the certification stage on this ground alone.

[37] As to the recognition of passed-on losses, that question has been answered conclusively: the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses. For the reasons previously explained, no insurmountable problem is created by allowing the claims in restitution to be brought by a class comprised of both direct and indirect purchasers. Unjustly obtained amounts are recoverable on the basis that they have been extracted at the plaintiffs' expense (Maddaugh and McCamus, at p. 3-9). That is what is alleged to have occurred in this case. The appellants allege that the respondents committed wrongful acts that were directed at both the direct *and the indirect purchasers* and as such both groups should be able to recover their losses.

[38] It is true that, absent indirect purchasers, the rejection of the passing-on defence entitles direct purchasers to 100 percent of the amount of the overcharge. However, this entitlement is altered when indirect purchasers are included in the action. As explained above, this does not mean, as the respondents suggest, that to allow indirect purchasers to join the action would be "to admit of the possibility that a plaintiff could recover twice — once from the person who is the immediate beneficiary of the payment or benefit . . . and again from the person who reaped an incidental benefit" (Cargill factum, at para. 32, citing *Peel*, at p. 797). Rather, it means that the indirect and direct purchasers will share the aggregate amount recovered in the event that the action is successful. To the extent that there are competing claims among the direct and indirect purchasers, I agree with Rice J. that this may be sorted out at a later stage of the proceeding (BCSC, at para. 195). At this stage, both groups share

the common interest of maximizing the amount recoverable from the respondents. The indirect purchasers' cause of action in restitution should therefore not be struck out.

(b) *Constructive Trust — Direct Purchasers*

[39] On cross-appeal, with respect to the one cause of action remaining to the direct purchasers, the respondents argue that the cause of action in constructive trust should fail.

[40] The respondents claim that neither the requirement of a “proprietary nexus” nor the requirement that the constructive trust be imposed only where a monetary remedy was found to be inadequate were met in this case: As such it is plain and obvious that the direct purchaser claim in constructive trust has no chance of succeeding (See Casco cross-appeal factum, at para. 28, citing *Tracy (Guardian ad item of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577, for the requirements of a constructive trust). I agree.

[41] In *Pro-Sys*, noting that *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, was the relevant controlling authority, I found that the claim in constructive trust must fail because there was no referential property and no explanation by the appellants why a monetary remedy would be inappropriate or insufficient. For the same reasons, I find it plain and obvious that Sun-Rype's claim in constructive trust in this case must fail and should be struck.

(c) *Section 36 of the Competition Act — Indirect Purchasers*

(i) Passed-On Losses Recognized at Law

[42] Section 36 of the *Competition Act* provides a cause of action to “[a]ny person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI”. The respondents, basing their argument on their fundamental position that passed-on losses are not recognized at law, assert that s. 36 was not intended to provide a right of action to indirect purchasers.

[43] For the reasons explained in *Pro-Sys*, this argument is rejected. It is not plain and obvious that a cause of action for the indirect purchasers under s. 36 of the *Competition Act* cannot succeed.

(ii) Jurisdiction Over Extraterritorial Conduct

[44] The respondents argue that “an alleged conspiracy entered into outside Canada, among foreign defendants, to fix prices of products sold to foreign direct purchasers does not constitute an offence under the *Competition Act* giving rise to a right of civil action” (ADM factum, at para. 54). They claim that the jurisdiction of Canadian courts over violations of the *Competition Act* by foreign defendants “will have to be determined by reference to the presumptive connecting factors identified in *Club Resorts*, which determination is beyond the scope of the present appeal” (ADM factum, at para. 53) and that conduct cannot be contrary to Part VI of the *Competition*

Act “unless there is a real and substantial link between that conduct and Canada” (para. 60).

[45] I agree with the respondents that the framework proposed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, will need to be applied in establishing whether there is “real and substantial connection” sufficient to find that Canadian courts have jurisdiction in this case. However, I would question the respondents’ characterization of the factual situation.

[46] The conduct in question, while perpetrated by foreign defendants, allegedly involved each respondent’s Canadian subsidiary acting as its agent. The sales in question were made in Canada, to Canadian customers and Canadian end-consumers. There is at least some suggestion in the case law that where defendants conduct business in Canada, make sales in Canada and conspire to fix prices on products sold in Canada, Canadian courts have jurisdiction (see *VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.), at paras. 58, 63-86 and 101-02 (“It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad”: para. 58); *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45, at para. 32 (BCCA refusing to deny certification of a class action based on the argument that Canadian courts had no jurisdiction over *Competition Act* violations occurring outside of Canada); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263, at paras. 32-45 (“A conspiracy occurs in British Columbia if the

harm is suffered here, regardless of where the ‘wrongful conduct’ occurred. On that basis, the court has jurisdiction over the *ex juris* defendants who are alleged to be parties to the conspiracy”: para. 41).

[47] The respondents have not demonstrated that it is plain and obvious that Canadian courts have no jurisdiction over the alleged anti-competitive acts committed in this case. The cause of action under s. 36 of the *Competition Act* should not be struck out.

(2) Are There Common Issues?

[48] Section 4(1)(c) of the *CPA* requires that the claims of the class members raise common issues. The respondents’ arguments as to the commonality requirement centre on the standard of proof to be applied to this and the other certification requirements other than the requirement that the pleadings disclose a cause of action. Here, as in *Pro-Sys*, the respondents urge the Court to resolve the remainder of the certification requirements on a balance of probabilities. They say the Court should adopt the U.S. approach of weighing conflicting evidence at the certification stage. For the reasons set out in *Pro-Sys*, the standard to be applied here is “some basis in fact” and not a balance of probabilities.

[49] As to the standard to be applied to the expert evidence, the respondents do not argue that it is insufficient to demonstrate commonality, rather they submit that

Rice J. erred in that he applied the wrong standard of proof to the expert methodologies that he examined.

[50] The reasons in *Pro-Sys* have set out that the standard to be applied to expert evidence is one requiring a credible and plausible methodology capable of proving harm on a class-wide basis.

[51] It is evident that on the certification application, Rice J. analysed the significant amount of expert evidence that was before him and that he applied the correct standard to both the certification requirements (“plain and obvious” for s. 4(1)(a) and “some basis in fact” for s. 4(1)(b) to (e)) and the expert methodology required to establish some basis in fact (whether the expert evidence consisted of a credible and plausible model capable of proving harm on a class-wide basis). There is no basis upon which to interfere with his common issues determination.

(3) Is There an Identifiable Class?

[52] Section 4(1)(b) of the *CPA* provides that the court must certify a proceeding if, among other requirements, there is an identifiable class of two or more persons. *Hollick* provides that this certification requirement will be satisfied by demonstrating “some basis in fact” to support it (para. 25).

[53] The class definition proposed by the appellants is “all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products

containing HFCS manufactured by the defendants (collectively, the ‘class’) from January 1, 1988 to June 30, 1995 (the ‘Class Period’) ” (BCSC, para. 2).

[54] The respondents take issue with the inclusion of indirect purchasers in the class. They acknowledge that while impracticability or impossibility in distributing class action proceeds to indirect purchasers does not necessarily preclude finding an “identifiable class”, the facts of this particular case are such that the class cannot be found to be “identifiable” to the extent that it includes indirect purchasers (ADM factum, at para. 85). The respondents argue that the inclusion of indirect purchasers in the class in the present case runs contrary to the purpose of the “identifiable class” requirement because indirect purchasers are not able, based on the class definition, to determine if they are members of the class. Relying on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, the respondents argue that the identifiable class requirement should allow for class membership to be determinable.

[55] They argue that the proposed class definition does not allow for indirect purchasers to determine if they are in fact members of the class as defined. Contrary to the *Infineon* and *Pro-Sys* cases where there was evidence that class membership could likely be determined, here “it is simply impossible to make a determination of the presence, or lack of presence, of HFCS in particular products a consumer in British Columbia may have purchased between 1988 and 1995” (ADM factum, at para. 97). They argue that prominent direct purchasers such as Coke, Pepsi, Vitality

Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited have used both HFCS and liquid sugar in their products. In many cases, the labels on the products sold in Canada by these direct purchasers did not reflect which sweetener was used. They also point out that on cross-examination on her affidavit, the representative plaintiff Wendy Bredin stated that “she did not know whether any product she purchased during the class period actually contained HFCS” (ADM factum, at para. 18); They state that “[i]f the proposed representative Plaintiff in this action is unable to say whether any product she bought in the class period contained HFCS, it is difficult to see how any other potential class member could be aware of this fact” (ADM factum, at para. 103).

[56] This is not a typical ground on which the “identifiable class” requirement is challenged. Here, there is no question whether the class definition is too narrow or too broad, whether the definition contains subjective criteria or whether the class definition creates a need to consider the merits. However, when the purpose for which there must be a class definition that designates an “identifiable class” is examined, the problems with the appellants’ case become evident.

[57] I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and

30; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), at para. 10; Eizenga et al., at § 3.31). *Dutton* states that “[i]t is necessary . . . that any particular person’s claim to membership in the class be determinable by stated, objective criteria” (para. 38). According to Eizenga et al., “[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership” (§ 3.33).

[58] I do not take issue with the class definition on its face. It uses objective criteria, it does not turn on the merits of the claim, and it cannot be narrowed without excluding members who may have a valid claim. Where the difficulty lies is that there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class.

[59] The appellants claim that the respondents “attempt to use the complexity inherent in claims arising from a large-scale price-fixing conspiracy to deny those injured by the alleged conduct a legal remedy” and that “courts have found that class definitions similar or identical to that proposed in this case were appropriate” (response factum, at paras. 58 and 61). The appellants rely on the instruction in *Dutton*, at para. 38, that “[i]t is not necessary that every class member be named or known”. They cite *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (Ont. S.C.J.), in support of the proposition that courts can engage in a “relatively elaborate factual investigation in order to determine class membership” and that “[t]he fact that particular persons may have difficulty in proving that they satisfy the conditions for

membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable” (response factum, at para. 67, citing *Sauer*, at para. 28).

[60] However, in *Sauer* the passage relied upon pertained to the issue of the objectivity of the criteria used in the class definition. In that case, a class action involving cows infected with bovine spongiform encephalopathy (“BSE”) or “mad cow disease”, the class was defined to include “all cattle farmers in Canada”, except Quebec (para. 11). The representative plaintiff adduced evidence of his own personal losses as well as those of others in the community as a result of the BSE crisis. The defendants challenged the term “cattle farmers” as being too broad and creating a problem for those farmers seeking to self-identify. Lax J. of the Ontario Superior Court of Justice held that in such situations the court could engage in a factual investigation to determine class membership.

[61] That is not the situation in this case. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified. Here, they have not met even this relatively low evidentiary standard.

[62] This is not a case of mere difficulty in proving membership in a defined class. That is what distinguishes this case from *Pro-Sys*. In *Pro-Sys*, even if class

membership is not immediately evident to potential class members based on the class definition, records of purchase or the presence of the application software or operating systems that form the subject of the appeal on the computers of the putative class members would serve to identify them as part of the identifiable class. Further, in *Pro-Sys*, Sam Leung, president and director of Pro-Sys Consultants Ltd., one of the representative plaintiffs, offered proof that he had purchased the product in question in the form of the invoice for the purchase of the computer. That evidence demonstrated that class membership was determinable and established some basis in fact that there was an identifiable class.

[63] Conversely, in this case, the respondents' evidence is that HFCS and liquid sugar had been used interchangeably by direct purchasers during the class period. They also claim that

Canadian labelling requirements during the class period were such that food and beverage producers were not required to specify which of the two sweeteners was contained in their products. A generic label indicating "sugar/glucose-fructose" could be used for either liquid sugar or HFCS. The result is that a consumer who purchased such a product during the class period would have had no way of determining whether that product contained HFCS, even if they had bothered to check the label. [ADM factum, at para. 100]

[64] The appellants say only that "hundreds of millions of dollars of HFCS was sold to Canadian direct purchasers during the Class Period" and that this HFCS was used in "products such as soft drinks, baked goods and other food products which are purchased by restaurants, grocery wholesalers, supermarkets, convenience stores,

movie theatres and others” (response factum, at para. 69). Their expert offers evidence that the amount of HFCS used and the specific products which contained it are identifiable (para. 69, citing Leitzinger Report, at paras. 10-11, 18-20 and 27 (A.R., vol. II, at pp. 85-86, 89-91 and 95-96)).

[65] The question, however, is not one of whether the identified products contained HFCS, or even whether the overcharge would have reached the indirect purchaser level (i.e. whether passing on had occurred). The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. The appellants have not offered evidence that could help to overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably.

[66] Even Ms. Bredin testified that she is unable to state whether the products she purchased contained HFCS. This fact will remain unchanged because, as noted above, liquid sugar and HFCS were used interchangeably and a generic label indicating only “sugar/glucose-fructose” could be used for either type of sweetener. Ms. Bredin presented no evidence to show that there is some basis in fact that she would be able to answer this question. On the evidence presented on the application for certification, it appears impossible to determine class membership.

[67] The appellants’ claim that “although some class members may not be able to self-identify, class membership is determinable by reference to the nature of the

purchases made by each individual and the quantity of HFCS in the products purchased” (response factum, at para. 71). However, this is no answer to the self-identification problem. While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. Allowing 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. In this case, class membership is not determinable.

[68] Built into the class certification framework is the requirement that the class representative present sufficient evidence to support certification and to allow the opposing party to respond with its own evidence (*Hollick*, at para. 22). The goal at the certification stage is to ensure that this is an appropriate matter to proceed as a class proceeding (*Pro-Sys*, at para. 104). And while the certification stage is not a preliminary trial of the merits, “the judge must be satisfied of certain basi[c] facts required by [the CPA] as the basis for a certification order” (*Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), at p. 381).

[69] In this case, the appellants argue that denying that there is an identifiable class is to confuse the ability to identify a class with the ability to identify each individual member of that class (response factum, at para. 72). I agree that it is not

necessary for each individual class member to be identified at the outset of the litigation in order for the class to be certified. However, as set out in the legislation, the matter will only be certified if, *inter alia*, “there is an identifiable class of 2 or more persons” (s. 4(1)(b)). In this case, the problem is that the indirect purchaser plaintiff did not offer any evidence to show some basis in fact that two or more persons could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class.

[70] Justice Karakatsanis says that there is some basis in fact to conclude that some indirect purchasers could prove that they probably purchased products containing HFCS (para. 115). With respect, no evidence was provided to establish some basis in fact that any individual indirect purchasers could do so. Allowing the class to be certified in such circumstances would be to lower the evidentiary standard necessary to satisfy the criteria at the certification stage from some basis in fact to mere speculation.

[71] Justice Karakatsanis also states that “expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis” (para. 108). However, even if expert evidence satisfies the certification judge that the class as a whole was harmed, that does not obviate the need for the certification judge to be satisfied that there is some basis in fact indicating that at least two persons can prove they incurred a loss.

[72] A key component in any class action is that at least 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.

[73] This is not to say that an identifiable class could never be found in similar circumstances as appear in this case. An identifiable class could be found if evidence was presented that provided some basis in fact that at least two persons could prove they had suffered individual harm. The problem in this case is that no such evidence was tendered.

[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 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.

[76] The aggregate damages provisions of the *CPA* allow the court to dispense with the need to calculate the quantum of damages for each individual class member and permits distribution of the proceeds on a *cy-près* basis rather than to individual members of the class. However, where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss. Establishing that the class as a whole has suffered loss does not obviate this requirement.

(4) Conclusion on Identifiable Class

[77] The goal of the certification stage, as indicated by McLachlin C.J. in *Hollick* is to determine if, procedurally, the action is best brought in the form of a class action (para. 16). In this case, given that the appellants did not show that there was some basis in fact to believe that at least two persons can establish they are members of the class, I am unable to answer that question in the affirmative.

[78] An advantage of a class proceeding is that it serves judicial economy by allowing similar individual actions to be aggregated (*Hollick*, at para. 15; *Dutton*, at para. 27). In my view, implicit in this objective is that the foundation upon which an individual action could be built must be equally present in the class action setting. That foundation is lacking here.

[79] I do not disagree with Justice Karakatsanis that behaviour modification can be an objective of class proceedings. However, the circumstances here demonstrate that class proceedings are not always the appropriate means of addressing behaviour modification. In cases in which loss or damage due to price-fixing cannot be proven, the appropriate recourse may be for the Commissioner of Competition to charge the defendants under the *Competition Act*. A process commenced by the Commissioner requires only proof of price-fixing. There is no need to prove passing on or that any particular consumer overpaid for a particular product. Whether the Competition Bureau intends to prosecute the respondents in this case is not known. Regardless, it does not change the fact that in a case such as this, where certification criteria cannot be met, such prosecutions may have to be considered if behaviour modification is the objective.

V. Conclusion

[80] Given the finding that an identifiable class cannot be established for the indirect purchasers, the class action as it relates to the indirect purchasers cannot be certified. I would dismiss the appeal with costs. Given the finding that the pleadings

do not disclose a cause of action in constructive trust, the claim of the direct purchasers cannot succeed and should be dismissed. The class action as it relates to the direct purchasers cannot be certified. The cross-appeal is allowed with costs.

The reasons of Cromwell and Karakatsanis JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[81] I disagree with my colleague’s conclusion that the claim by the indirect purchasers fails to meet the certification requirement under s. 4(1)(b) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*). In my view, there is “some basis in fact” to find “an identifiable class of 2 or more persons”. Accordingly, I would allow the appeal and remit the matter to the British Columbia Supreme Court for trial.

[82] The appellants’ proposed class definition includes “all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the defendants (collectively, the ‘class’) from January 1, 1988 to June 30, 1995 (the ‘Class Period’)” (2010 BCSC 922 (CanLII), at para. 2).

[83] This class includes both the direct and indirect purchasers of high-fructose corn syrup (HFCS) — the subject of alleged price fixing. At issue is the identification of a class which would include indirect purchasers — the retailers and consumers — who purchased products containing HFCS.

[84] Justice Rothstein notes that this definition of the class appears to satisfy the requirements of an identifiable class on its face. It uses objective criteria; it does not turn on the merits of the claim; and it cannot be narrowed without excluding members who may have a valid claim (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38). However, the class of indirect purchasers is challenged on the basis that individuals will be unable to determine whether they purchased a product containing HFCS and thus whether they are a member of the class. The issue of the appropriateness of the representative plaintiff is not before the Court.

[85] Justice Rothstein concludes that there is no basis in fact to identify a class because there is no or insufficient evidence that class members can be identified or can self-identify (paras. 58 and 65-67). He concludes that it is impossible for the indirect purchasers to prove they purchased a product containing HFCS and thus suffered loss.

[86] I have two objections to this conclusion. 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.

[88] The application judge, Rice J., held that the appellants satisfied the requirement that there is an identifiable class (2010 BCSC 922 (CanLII)). The Court of Appeal did not address this issue (2011 BCCA 187, 305 B.C.A.C. 55). For the reasons that follow, I conclude that there is no basis to set aside the decision of the application judge.

II. Class Requirements — General Principles

[89] Section 4(1)(b) of the *CPA* requires that there be “an identifiable class of 2 or more persons”.

[90] In *Dutton*, this Court addressed the specific certification requirement that there be an identifiable class (para. 38):

First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria

[91] Obviously, it is not sufficient to make a bald assertion that a class exists. The record must contain a sufficient evidentiary basis to establish the existence of the class (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at para. 23). But the evidentiary standard at the certification stage is not onerous: the applicant must establish that there is "some basis in fact" for each of the requirements (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25). This standard falls below the standard used in the United States and purposefully avoids a trial on the merits at the certification stage. See *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, at para. 102.

III. Application to This Case

A. *The Record and Position of the Parties*

[92] The respondents led evidence establishing that prominent direct purchasers such as Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited have used both HFCS and liquid sugar in

their products. At the time, the relevant laws permitted the use of a generic label indicating “sugar/glucose-fructose” for either type of sweetener. In many cases, the labels on the products sold in Canada by these direct purchasers did not reflect which sweetener was used. Indeed, the representative plaintiff stated on cross-examination that she did not know whether any product she purchased during the class period actually contained HFCS.

[93] HFCS was used in “products such as soft drinks, baked goods and other food products which were purchased by restaurants, grocery wholesalers, supermarkets, convenience stores, movie theatres and others”. The appellants filed expert evidence and proposed methodology to show that the amount of HFCS used and the specific products which contained it are identifiable (response factum, at para. 69, citing Leitzinger Report at paras. 10-11, 18-20 and 27). The expert evidence also provides specific industry research confirming that the use of HFCS in the soft drink industry was more prevalent as time went on, and largely had replaced liquid sugar as early as two years into the Class Period (A.R., vol. II, at p. 94; Leitzinger Report, at para. 24).

[94] The respondents’ position is that because HFCS was used interchangeably with liquid sugar, and because labeling requirements during the class period did not require food and beverage producers to specify which of the two sweeteners was contained in their products, indirect purchasers (retailers and consumers) would have had no way of determining whether the product contained

HFCS, even if they had checked the label (factum of Archer Daniels Midland Company and ADM Agri-Industries Company, at paras. 99-100).

[95] The appellants submit that “although some class members may not be able to self-identify, class membership is determinable by reference to the nature of the purchases made by each individual and the quantity of HFCS in the products purchased” (response factum, at para. 71). Indeed, the industry research data suggests that such information may be more readily available for indirect purchasers who are commercial retailers with more consistent recording practices.

B. *Class Identification Does Not Require That Individual Class Members Can Prove Individual Loss*

[96] Justice Rothstein accepts that the class definition complies on its face with the *Dutton* criteria. However, he concludes that there is insufficient evidence to show that any persons will be able to determine if they bought a product containing HFCS and thus if they are a member of the class. My colleague says that if individuals cannot show they have suffered individual loss, this “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 original)).

[97] This is not the only purpose of class actions. Behaviour modification is an important goal, especially in price-fixing cases. While class proceedings are

clearly intended to create a more efficient means of recovery for plaintiffs who have suffered harm, there are strong reasons to conclude that class proceedings are not limited to such actions. As I detail below, 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. Such class actions permit the disgorgement of unlawful gains and serve not only the purposes of enhanced access to justice and judicial economy, but also the broader purpose of behaviour modification. Therefore, I am not persuaded that it is a prerequisite that individual members of the class can ultimately prove individual harm. See, for example, *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271.

[98] An identifiable class serves to give individual members notice so that they can exercise their willingness to be a member and to claim relief. Nonetheless, there will often be circumstances where it is difficult for class members to self-identify based on the class definition.

[99] In *Dutton*, at para. 38, McLachlin C.J. held: “It is not necessary that every class member be named or known.” In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373 (Ont. S.C.J.), Cullity J. held, at para. 31: “The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not,

by itself, a reason for a finding that the class is not identifiable.” See also *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (Ont. S.C.J.), at para. 28.

[100] As already noted, the statute provides for aggregate damages and *cy-près* awards that permit recovery and disgorgement of ill-gotten gains, without proof of individual loss and even where individual members cannot be identified. Section 29 of the *CPA* permits “an order for an aggregate monetary award in respect of all or any part of a defendant’s liability to class members”, upon certain conditions, including when:

- (c) the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.

Section 31(1) of the *CPA* provides:

- (1) If the court makes an order under section 29 [for an aggregate monetary award], the court may further order that all or a part of the aggregate money award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if
 - (i) it would be impractical or inefficient to
 - (i) identify the class or subclass members entitled to share in the award . . .

And s. 34 of the *CPA* provides:

- (3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.
- (4) The court may make an order under subsection (1) even if the order would benefit
- (a) persons who are not class or subclass members . . .

[101] Section 34 has been interpreted to authorize *cy-près* awards — awards made to charities in situations where some class members cannot be identified. Interpreting the equivalent Ontario provision, s. 26 of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Winkler J. remarked that this vision of the class determination permitted “a settlement that is entirely *Cy pres*” (*Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35 (Ont. S.C.J.), at para. 15 (emphasis added)). See also *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.), at paras. 15 and 17.

[102] And, while aggregate damages provisions are tools which are intended to be resorted to only upon an antecedent finding of liability (see *Pro-Sys*, at para. 131), they nonetheless permit access to justice and behaviour modification in cases where *liability to the class* has been proven but individual membership in the class is difficult or impossible to determine. The aggregate assessment of damages is an important common issue at the heart of the behaviour modification goal of class actions. It is a powerful tool for class actions.

[103] Thus, the legislation explicitly contemplates difficulties or, in some cases, impossibility in self-identification in the class procedural vehicle. Such difficulties have not been considered fatal to authorization under the *CPA* (in B.C. and in its equivalent in Ontario) provided that there is “some basis in fact” that the class exists and there is a rational connection between the class and the common issues. See, for example, *Lau*, at paras. 21-22 and *Steele*.

[104] This Court noted in *Dutton* that “any particular person’s claim to membership in the class [should] be determinable by stated, objective criteria” (para. 38). This requirement speaks to the need to clearly define the criteria for membership — not to the ability of a given individual to prove that they meet the criteria. Whether the claimants can prove their claim for an individual remedy is a separate issue that need not be resolved at the certification stage.

[105] Here, the record contains a sufficient evidentiary basis to establish the *existence* of the class (*Lau*, at para. 23). Direct purchasers of the HFCS used it extensively in products that were sold widely to retailers and to consumers. Given the nature of a price-fixing case, loss flows directly from the purchase of HFCS, or, in the case of indirect purchasers, products containing HFCS. An individual who purchased such a product during the relevant time period would have the foundation for an individual suit. All indirect purchasers share the same basis for establishing harm. There is a rational connection between the class as defined and the asserted common issues. See *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758

(S.C.J.), at paras. 22-23; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301, (Ont. S.C.J.), at para. 11.

[106] Nor is it seriously disputed that there is some basis in fact to show that indirect purchasers as a class were harmed by the alleged price fixing and thus the members of the class suffered harm. The methodology proposed to establish the harm to the class members purports to ascertain an aggregate amount by which the class members were overcharged. Indeed, as Justice Rothstein finds, it has some basis in fact and there is a high probability that any award stemming from these proceedings would be distributed on a *cy-près* basis. This means that it may never be necessary or legally required to identify individual members of the class.

[107] For these reasons, I am not persuaded that the issue of whether an individual can prove individual loss is a necessary enquiry at certification. In sum, while class actions are a procedural vehicle, they are not *merely* procedural. They make possible claims that are very complex or could not be prosecuted individually, not only because it would be inefficient or unaffordable, but also because it may be extremely difficult to prove individual claims. The *CPA* does have substantive implications: it creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual member's damages is impractical, and that is available even if those who are not members of the class can benefit.

[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. See *Pro-Sys*, at paras. 120 and 140. 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.

[109] This Court cautioned in *Hollick* that class proceedings legislation should be construed generously and not narrowly to give life to the statute's purpose, namely to encourage judicial economy and access to justice, and to modify the behaviour of wrongdoers (paras. 14-15).¹

C. *Some Basis in Fact to Show That Individuals Could Prove Personal Loss/Class Members Are Identifiable*

[110] Justice Rothstein accepts the respondents' position and concludes that the appellants fail to provide evidence that would overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably during the Class Period and that labeling at the time did not differentiate between them. He

¹ Although the Court considered Ontario legislation in *Hollick*, similar reasoning has been adopted for British Columbian class action legislation (see, e.g., *MacKinnon v. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214, at para. 16).

concludes that it appears impossible to show that an indirect purchaser had, in fact, bought a particular product that contained HFCS (para. 66). He found this failure fatal to the certification application.

[111] In my view, the record does not lead to the conclusion that it will be impossible to prove an individual is a member of the class — or that individual members of the group could not stand alone as plaintiffs. As I have explained, I do not agree that this is a necessary inquiry at the certification stage. Even so, I agree with the judge of first instance that there is “some basis in fact” to show that individual loss is capable of being proven.

[112] In effect, Justice Rothstein focuses on the difficulties that individual claimants will have to prove personal loss. Here, he accepts that expert evidence meets the standard of “some basis in fact” and consists of a credible and plausible model capable of proving harm on a class-wide basis. However, he is not satisfied that the evidence provides “some basis in fact” that there will be evidence capable of proving individual loss.

[113] Justice Rothstein’s conclusion sets the evidentiary standard too high. In this price-fixing case, personal loss will follow if indirect purchasers can prove that they purchased a product containing HFCS. Even at the merits stage, however, claimants will not have to prove *definitively* that they purchased a *particular* product that contained HFCS. Labeling — if indeed generic labeling was used throughout — is not the only way to prove an individual loss. It will be sufficient if the trial judge is

satisfied, upon expert or other evidence, that an individual claimant *probably* purchased a product containing it.

[114] The requirement that there be an evidentiary foundation — or some basis in fact — to support the certification criteria does not include a preliminary merits test and does not require the plaintiffs to indicate the evidence upon which they will rely on to prove these claims. “The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action” (see *Hollick*, at paras. 16 and 25).

[115] A claim under s. 36 of the *Competition Act* requires that the fact of loss — rather than the amount of loss — be proven in order to establish liability. As Justice Rothstein accepts, the expert evidence in this case is capable of proving the fact of loss to the class. Here, the appellants have provided evidence and a framework capable of proving — on a balance of probabilities — that products containing HFCS were purchased. While it may prove challenging, there is “some basis in fact” to conclude that some indirect purchasers could prove that they *probably* purchased products that contained price-fixed HFCS during the relevant period. Evidence of market practices, the prevalence of the product, and the nature of the purchases may provide a sufficient basis for a trial judge to make the necessary findings.

[116] For example, the expert report tendered by the appellants, authored by Dr. Leitzinger, included the following information. The respondents jointly

controlled the “vast majority of production” of HFCS and therefore likely possessed monopoly power (Leitzinger Report, at para. 6). Soft drink manufacturers are the leading purchasers of HFCS, and HFCS products are purchased by restaurants, food wholesalers, grocery and convenience stores, cinemas, and others (paras. 10-11). The Canadian soft-drink industry “uses about 20 times as much HFCS as it does sugar as the sweetening agent” (para. 27), and the extent to which HFCS overcharges were passed on to indirect consumers could be analyzed using existing economic modeling techniques (paras. 56-57). Dr. Leitzinger expected that at least some of any overcharge for HFCS would have been passed on to indirect purchasers, and that the extent of the overcharge could be calculated using publicly available information together with discovery data (paras. 58-64 and 75-77).

[117] To take a simple example, since a significant proportion of soft drinks contains HFCS, a trial judge may have no difficulty in finding that wholesalers of soft drinks, grocery stores or even individual persons — all possible indirect purchasers of HFCS — *probably* purchased some products containing HFCS, and in determining the loss based upon the percentage of the products purchased that contained the substance.

[118] There was debate between the appellants’ and the respondents’ expert witnesses regarding the existence, extent and determinability of HFCS overcharges and pass-through to indirect consumers. However, the weighing of expert evidence is a matter for the trial on the merits. The point is simply that the appellants have

tendered evidence which establishes some basis in fact to show that the proposed class is identifiable and that individual class members may be able to establish individual loss on a balance of probabilities, overcoming the identification problem to which Justice Rothstein refers (para. 65).

[119] And although the representative plaintiff Wendy Bredin (formerly Weberg) could not state with certainty that she had purchased products containing HFCS, she and other individuals would be able to self-identify as potential plaintiffs based on knowledge of the products in which HFCS is known to have been commonly used. For indirect purchasers, such as wholesalers and grocery stores, the inquiry would likely be simplified, given the likelihood of more extensive record-keeping systems regarding purchases of products that likely contained HFCS.

[120] Thus, in my view, the evidentiary difficulties relied upon by my colleague and the respondents are not fatal to this certification application.

IV. Conclusion

[121] For these reasons, I agree with the application judge, Rice J., that the appellants have established that there is some basis in fact that there is an identifiable class in accordance with s. 4(1)(b) of the *CPA*. As for the other elements of certification discussed by Rothstein J., I agree with the reasons of my colleague.

[122] I would allow the appeal with costs and remit the matter to the British Columbia Supreme Court for trial. I agree with Justice Rothstein's disposition of the cross-appeal.

APPENDIX: Common Issues Certified by Rice J.

Breach of the *Competition Act*

- (a) Did the defendants, or any of them, engage in conduct which is contrary to s. 45 of the *Competition Act*? If yes, what was the duration of such conduct?
- (b) What damages, if any, are payable by the non-settling defendants to the Class Members pursuant to s. 36 of the *Competition Act*?
- (c) Should the non-settling defendants, or any of them, pay the full costs, or any, of the investigation into this matter pursuant to s. 36 of the *Competition Act*?

Conspiracy

- (d) Did the defendants, or any of them, conspire to harm the Class Members?
- (e) Did the defendants, or any 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 any of them, know that the conspiracy would likely cause injury to the Class Members?

- (i) Did the Class Members suffer economic loss? If yes, what was the duration of such economic loss?
- (j) What damages, if any, are payable by the non-settling defendants, or any 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 any of them, intend to injure the Class Members?
- (m) Did the defendants, or any 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? If yes, what was the duration of such economic loss?
- (o) What damages, if any, are payable by the non-settling defendants, or any 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 non-settling defendants, or any of them, been unjustly enriched by the receipt of overcharges on the sale of HFCS?
- (r) Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of HFCS?
- (s) Is there a juridical reason why the non-settling defendants, or any of them, should be entitled to retain the overcharges on the sale of HFCS?
- (t) What restitution, if any, is payable by the non-settling defendants, or any of them, to the Class Members based on unjust enrichment?

- (u) Should the non-settling defendants, or any of them, be constituted as constructive trustees in favour of the Class Members for all of the overcharges from the sale of HFCS?
- (v) What is the quantum of overcharges, if any, that the non-settling defendants, or any of them, hold in trust for the Class Members?
- (w) What restitution, if any, is payable by the non-settling defendants to the Class Members based on the doctrine of waiver of tort?
- (x) Are the non-settling defendants, or any of them, liable to account to the Class Members for the wrongful profits that they obtained on the sale of HFCS 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 non-settling defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, what amount and to whom?

Interest

- (aa) What is the liability, if any, of the non-settling defendants, or any of them, for court order interest?

Availability of Pass-Through Defence

- (bb) To what extent, if at all, are the non-settling defendants entitled to assert a pass-through defence to any or all of the Class Members' causes of action?

Distribution of Damages and/or Trust Funds

- (cc) 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?
- (dd) Are the non-settling defendants, or any of them, liable to account to the Class Members for the wrongful profits that they obtained on the sale of HFCS to the Class Members based on the doctrine of waiver of tort?

- (ee) Can the amount of restitution be determined on an aggregate basis and if so, in what amount? [A.R., vol. I, at pp. 69-71]

Appeal dismissed with costs, CROMWELL and KARAKATSANIS JJ. dissenting. Cross-appeal allowed with costs.

Solicitors for the appellants/respondents on cross-appeal: Camp Fiorante Matthews Mogerman, Vancouver.

Solicitors for the respondents/appellants on cross-appeal Archer Daniels Midland Company and ADM Agri-Industries Company: Norton Rose Fulbright, Toronto; Nash & Company, Vancouver.

Solicitors for the respondents/appellants on cross-appeal Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company and Cargill Limited: Hunter Litigation Chambers, Vancouver.

Solicitors for the respondents/appellants on cross-appeal Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America: Nathanson, Schachter & Thompson, Vancouver.

*Solicitor for the intervener the Attorney General of Canada: Attorney
General of Canada, Ottawa.*

*Solicitors for the intervener the Canadian Chamber of
Commerce: Davies Ward Phillips & Vineberg, Toronto.*