IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pro-Sys Consultants Ltd. v. Microsoft Corporation,*** 2006 BCSC 1047

Date: 20060706
Docket: L043175
Registry: Vancouver

Between:

Pro-Sys Consultants Ltd. and Neil Godfrey

Plaintiffs

And

Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE

Defendants

Before: The Honourable Mr. Justice Tysoe

Reasons for Judgment

Counsel for the Plaintiffs:	J.J. Camp, Q.C., R. Mogerman, D. Jones, H. Peterson and D. Stellings
Counsel for the Defendants:	N. Finkelstein, J. Sullivan, D. Gruber and C. Beagan-Flood
Dates and Place of Hearing:	May 18 and 19, 2006 Vancouver, B.C.

Introduction

[1] The Plaintiffs have from time to time purchased personal computers containing pre-installed Microsoft operating systems and software applications. They maintain that they paid artificially inflated prices for the operating systems and applications as a result of unlawful and anti-competitive acts of Microsoft which have given rise to pernicious monopolies. On their own behalf and on behalf of other purchasers of personal computers, the Plaintiffs bring this action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, for equitable and common law remedies against Microsoft Corporation and its Canadian subsidiary.

[2] The Defendants make this application pursuant to Rule 19(24) of the *Rules of Court* for an order striking out the Further Further Amended Statement of Claim filed on April 19, 2006 (the "Statement of Claim") and an order dismissing this action. In the alternative, the Defendants seek to strike out portions of the Statement of Claim.

[3] One of the requirements of s. 4 of the *Class Proceedings Act* for a proceeding to be certified as a class proceeding is that the pleadings must disclose a cause of action. The parties have agreed that the decision on this application will also be treated as a decision in respect of that requirement. They have additionally agreed that no costs will be payable in respect of this application.

Impugned Portions of the Statement of Claim

[4] The Statement of Claim is lengthy, consisting of 129 paragraphs and 44 pages. The majority of the Statement of Claim (paragraphs 19 to 82 and 105 to 108) sets out alleged facts as to the actions taken by Microsoft against its competitors, which the Plaintiffs say resulted in higher prices for Microsoft operating systems and software applications than they would have otherwise been required to pay.

[5] The causes of actions asserted in the Statement of Claim are as follows:

(a) interference with economic relations (also referred to as intentional or unlawful interference with economic interests);

(b) conspiracy;

(c) unjust enrichment;

(d) waiver of tort;

(e) constructive trust; and

(f) spoliation.

[6] The Defendants argue that, based on the facts alleged in the Statement of Claim, there are no causes of action maintainable against them. In the event that I do not order that the Statement of Claim be struck out in its entirety, the Defendants also say that I should make an order under Rule 19(1) striking out portions of the Statement of Claim which plead evidence, as opposed to facts, in relation to litigation against Microsoft in the United States and the European Union. In addition, the Defendants say that claims in the Statement of Claim in respect of the defined term "Overcharge" should be struck out.

Test Under Rule 19(24)

[7] Rule 19(24) of the *Rules of Court* authorizes the court to order struck out or amended the whole or any part of a pleading on the ground, among other things, that it discloses no reasonable claim. The authorities establish that the court should only strike out a part of a statement of claim on this basis if it is plain and obvious that no reasonable cause of action has been disclosed: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[8] The facts alleged in the statement of claim should be assumed to be true for this purpose. Potential amendments to the statement of claim should be considered, and the action should not be dismissed if the statement of claim can be amended to disclose a cause of action. Novel claims should not necessarily be struck out, nor should claims involving difficult or important points of law: see *Hunt*.

Competition Act

[9] As this action is based primarily on Microsoft's anti-competitive actions and as the Statement of Claim is replete with references to the *Competition Act*, R.S.C. 1985, c. C-34, it is useful to set out the relevant provisions of that *Act*. However, before quoting from the *Competition Act*, I will refer briefly to its companion statute, the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), which, as its name suggests, establishes the Competition Tribunal. Section 8(1) of the *Competition Tribunal Act* deals with the jurisdiction of the Competition Tribunal, as follows:

> The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

[10] The *Competition Act* consists of 10 Parts, of which Parts VI and VIII are the most relevant to this action. Part I deals with Purpose and Interpretation, with the purpose of the *Act* being set out in s. 1.1, as follows:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

Section 10 authorizes the Commissioner of Competition to conduct an inquiry if, among things, the Commissioner has reason to believe that (i) grounds exist for the making of an order under Part VII.1 or VIII or (ii) an offence under Parts VI or VII has been or is about to be committed. The Commissioner is authorized to (i) make application to the Tribunal with reference to Parts VII.1 and VIII, and (ii) refer the matter to the Attorney General of Canada with reference to Parts VI and VII.

[11] Section 36(1), which is contained in Part IV dealing with special remedies, authorizes proceedings in the courts in certain circumstances:

> 36(1) Any person who has suffered loss or damage as a result of
>
> (*a*) conduct that is contrary to any provision of Part VI, or
>
> (*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[12] Part VI sets out offences in relation to competition. Subsection 45(1) of Part VI sets out the following offences:

> 45(1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Subsection 45(8) provides that subsection 45(1) does not apply in respect of an agreement, combination, agreement or arrangement that is entered into only by companies which are affiliates.

[13] Subsection 50(1) creates an offence in respect of price discrimination, as follows:

> 50(1) Every one engaged in a business who

> (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,
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> (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[14] Subsection 52(1) creates an offence in relation to false advertising, as follows:

> 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Section 62 states that, except as otherwise provided, nothing in Part VI is to be construed as depriving any person of any civil right of action.

[15] Part VIII deals with matters reviewable by the Competition Tribunal. Section 79 of Part VIII relates to an abuse of a dominant position in a market. Subsections (1) and (2) read as follows:

> 79 (1) Where, on application by the Commissioner, the Tribunal finds that
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> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.
>
> (2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Subsection 79(7) provides that an application cannot be made under s. 79 if proceedings are pending under s. 45 on the basis of substantially the same facts.

Competition Act is a Complete Code

[16] There were extensive submissions by the parties regarding the jurisdiction of this Court to deal with anti-competitive conduct governed by the *Competition Act*. The submissions on this topic do not, of themselves, lead to the conclusion that all or part of the Statement of Claim should be ordered to be struck out. Rather, the submissions become important when one considers the elements of the various causes of actions pleaded by the Plaintiffs.

[17] The principal authority relied upon by the Defendants under this topic is *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394. The issue in that case was whether the Competition Tribunal had the jurisdiction to find a party in contempt of the Tribunal. The Defendants particularly rely on the italicized portion of the following paragraph:

> The *1986 Act* completed the broad division of the *CA* into two substantive parts, one criminal (Part VI) and one civil/administrative in nature (Part VIII), in accordance with proposals put forward as early as in 1969 by the Economic Council of Canada in its *Interim Report on Competition Policy*. Jurisdiction over the criminal part lies with the courts ordinarily dealing with criminal cases, as well as the Federal Court, Trial Division (ss. 67, 73 *CA*). *As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) CTA confirms the jurisdiction of the*

> *Tribunal over Part VIII. The civil part of the CA therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the CA and the CTA that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII CA, since it involves complex issues of competition law, such as abuses of dominant position and mergers.* (pp. 405-6)

The other principal authorities relied upon by the Defendants are *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 and *Canadian Pacific Ltd. v. Canada (Director of Investigation and Research)*, [1997] 103 O.A.C. 310. The Defendants submit that these authorities, and the specific powers granted to the Commissioner under the *Competition Act*, indicate that the legislative scheme establishes a complete code. Relying on the approach adopted in *Weber v. Ontario*, [1995] 2 S.C.R. 929, *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.) and *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Ont. Gen. Div.), the Defendants say that the courts do not have jurisdiction with respect to matters reviewable under the *Competition Act*. In their reply submissions, the Defendants clarified that it is not their position that Part VI of the *Act*, as distinct from Part VIII, is a complete code that displaces civil law damages claims.

[18] I do not understand the Plaintiffs' position to be that this Court has the jurisdiction to make orders under Part VIII of the *Competition Act*. They say that if the courts have the jurisdiction to deal with a matter that may also be the subject matter of proceedings before the Competition Tribunal under Part VIII, the courts retain the jurisdiction to grant a remedy (such as an award of damages) that the Tribunal does not have the power to make. The Plaintiffs submit that the availability of public law remedies under the *Act* does not limit the scope of the jurisdiction of the courts to grant private remedies with respect to conduct dealt with under the *Act*. In this regard, the Plaintiffs rely on *Acier Leroux Inc. v. Tremblay*, [2004] Q.J. No. 2206 (Q.L.) (Que. C.A.) (where it was held that the court had jurisdiction to consider unfair competition of a nature falling under Part VIII in entertaining an oppression remedy under the *Canada Business Corporations Act*) and *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (where it was held that a claim for unjust enrichment in respect

of late payment charges was a private law matter at its heart and that the Ontario Energy Board did not have exclusive jurisdiction even though the action involved rate orders).

[19] The Plaintiffs also rely on the decision in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, a case involving the torts of misfeasance in a public office and negligence in respect of a shooting by police officers. After discussing the unlawful exercise of a statutory power in the context of the tort of misfeasance in a public office, the Supreme Court of Canada continued as follows:

> I wish to stress that this conclusion is not inconsistent with R. v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, in which the Court established that the nominate tort of statutory breach does not exist. Saskatchewan Wheat Pool states only that it is insufficient that the defendant has breached the statute. It does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied. Put a different way, the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. (¶ 31)

Rather than disagreeing with the applicability of the principle articulated in *Odhavji Estate* in their reply submissions, the Defendants say that this is precisely their point: civil liability only lies where all the constituent elements of a cause of action are made out.

[20] The applicable principles that I derive from the authorities relied upon by the parties are as follows:

(a) the Competition Tribunal has exclusive jurisdiction under Part VIII of the *Competition Act*, and the courts do not have the jurisdiction to make orders under Part VIII;

(b) if the courts otherwise have jurisdiction to grant a remedy in respect of matters covered by Part VIII, their jurisdiction is not ousted;

(c) if a breach of the *Competition Act* serves to satisfy one of the constituent elements of a tort, the courts may rely on the breach to grant a remedy in respect of the commission of the tort (as long as all of the other constituent elements of the tort are also satisfied).

As I previously indicated, these principles cannot determine this application without considering them in the context of the constituent elements of the causes of action pleaded by the Plaintiffs. I will now consider those causes of action.

(a) Interference with Economic Relations

[21] It is common ground that the three elements of the tort of interference with economic relations are as follows:

(a) the defendant intended to injure the plaintiff;

(b) the defendant interfered with the economic interest of the plaintiff by illegal or unlawful means;

(c) the plaintiff suffered consequential economic loss.

See *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 1 All E.R. 522 (C.A.), which has been followed numerous times in Canada.

[22] In their written submissions, the Defendants only challenged the existence of the second requirement. Passing reference was made by counsel for the Defendants in oral submissions to the first requirement, but those submissions did not persuade me that it is plain and obvious that the first requirement has not been met on the pleadings.

[23] The Statement of Claim contains the following three allegations which potentially satisfy the second requirement:

(i) the actions of the Defendants were illegal because they constituted offences under Part VI of the *Competition Act*;

(ii) the actions of the Defendants were unlawful because they fell under Part VIII of the *Competition Act*;

(iii) the actions of the Defendants were unlawful because they constituted a restraint of trade at common law.

I will deal with each of these allegations separately.

(i) Offences under Part VI

[24] The Defendants concede that conduct which constitutes an offence under Part VI of the *Competition Act* satisfies the second element of the tort. It is not necessary for the offender to be first found guilty of the offence before the conduct can be regarded as illegal. There is no jurisdictional issue because it is the courts, not the Competition Tribunal, which try allegations of offences under Part VI and s. 36(1) specifically provides that claims for loss or damage as a result of conduct that is contrary to Part VI may be pursued in the courts.

[25] The Defendants say, however, that no such conduct has been pleaded in the Statement of Claim. They submit that in order for Microsoft Corporation to be guilty of an offence under s. 45(1) of the *Competition Act*, it must conspire, combine, agree or arrange with another party to do one of the things listed in clauses (a) through (d) of s. 45(1). Paragraphs 105 to 111 of the Statement of Claim do allege a conspiracy between Microsoft Corporation and its wholly owned subsidiary, Microsoft Canada Co., but s. 45(8) provides that s. 45(1) does not apply in respect of a conspiracy, combination, agreement or arrangement entered into by affiliates. As Microsoft Corporation and Microsoft Canada Co. are clearly affiliates within the description of affiliated corporations contained in s. 2 of the *Act*, the pleadings contained in paragraphs 105 to 111 of the Statement of Claim do not allege facts which constitute an offence under s. 45(1).

[26] In response, the Plaintiffs point to paragraphs 12, 21, 24, 25, 31 to 33, 37, 42, 47 to 51, 59, 64, 65 and 74 to 76 of the Statement of Claim as constituting pleadings that Microsoft combined and agreed with others, particularly the personal computer manufacturers, in a manner calculated to produce pernicious monopolies that virtually annihilated competition. I agree that paragraph 12 does contain a pleading of such conduct between Microsoft and "Microsoft Canada and other participants", but the other participants are not identified and the Plaintiffs should particularize them. The other paragraphs relied upon by the Plaintiffs do allege that Microsoft engaged in a campaign of anti-competitive practices with personal

computer manufacturers, but they are lacking in alleging that Microsoft and the manufacturers conspired, combined, agreed or arranged to do any of the things listed in clauses (a) through (d) of s. 45(1). The Statement of Claim does adequately allege that Microsoft engaged in conduct with the personal computer manufacturers in order to lessen competition, but it is not sufficient in alleging that any of the manufacturers conspired, combined, agreed or arranged with Microsoft to lessen competition.

[27] In their written submissions, the Plaintiffs also made reference to breaches of ss. 50 and 52 of Part VI of the *Competition Act*, although the Statement of Claim does not refer to these sections or paraphrase the language of the sections. Section 50 deals with price discrimination and s. 52 deals with false or misleading representations.

[28] The Plaintiffs point to paragraphs 21, 25, 31, 32, 33, 47, 48, 50 and 76 of the Statement of Claim as containing allegations of price discrimination contrary to s. 50. Those paragraphs allege that Microsoft entered into licence agreements with personal computer manufacturers which required the manufacturers to pay Microsoft a royalty on each computer irrespective of whether Microsoft's operating system had been installed on the computer and that Microsoft gave incentives in the form of royalty reductions. Those paragraphs also allege that Microsoft threatened the manufacturers that it would increase the price for its operating system if the manufacturers distributed competitors' software applications.

[29] None of this alleged conduct represents a violation of s. 50(1). To be guilty of the offence under s. 50(1)(a), the party must be a vendor which gives different discounts, rebates, allowances, price concessions or other advantages to different purchasers. The royalties were paid to Microsoft, not by Microsoft. There may have been a violation of s. 50(1)(a) if Microsoft actually charged different prices for its operating system, but the Statement of Claim only asserts that Microsoft made the threat to do it. Nothing in the Statement of Claim comes close to alleging the activities described in clauses (b) and (c) of s. 50(1).

[30] The Plaintiffs point to paragraphs 22, 26, 34 and 41 of the Statement of Claim as containing allegations of false or misleading representations contrary to s. 52. Paragraph 41 alleges that Microsoft made false claims about the nature and timing of the release of one of its products in order to deprive a competitor of the advantage of being the first in the market of that product and of having the superior product. I agree with the Plaintiffs that the making of these false claims could constitute a violation of s. 52. I also agree that the conduct alleged in paragraph 22 (telling journalists about "supposed" flaws in competitors' products) could constitute a violation of s. 52. I disagree with respect to paragraphs 26 and 34 because they do not allege any representations.

[31] In summary, paragraph 12 of the Statement of Claim alleges conduct in violation of s. 45 and constitutes a pleading of the second element of the cause of action of interference with economic relations. Other paragraphs of the Statement of Claim, if properly amended, could also fulfill this element. Paragraphs 22 and 41 of the Statement of Claim allege conduct in violation of s. 52 and constitutes a pleading of the second element of the cause of action of interference with economic relations.

(ii) Conduct under Part VIII

[32] It is the position of the Defendants that conduct of the nature described in Part VIII of the *Competition Act* cannot fulfill the second element of the tort of interference with economic relations until there is non-compliance with an order made by the Competition Tribunal under Part VIII. In the context of this case, the Defendants say that there is no illegal or unlawful conduct in the absence of an order of the Competition Tribunal under s. 79 of the *Competition Act* prohibiting the conduct. The Defendants point to s. 36 of the *Competition Act*, which authorizes civil remedies. Section 36 authorizes civil proceedings in respect of conduct that is contrary to Part VI but does not authorize civil proceedings in respect of conduct that is reviewable under Part VIII unless the conduct represents a failure to comply with an order of the Competition Tribunal. The Defendants rely here on their argument,

which I summarized above, that the *Competition Act* constitutes a complete code with respect to matters that are reviewable under Part VIII.

[33] There are four authorities supporting the Defendants' position, which I will review in chronological order. The first is *Procter & Gamble Co. v. Kimberly-Clarke of Canada Ltd.* (1991), 40 C.P.R. (3d) 1 (Fed. Ct.). In that case, the Court held that the defence of *ex dolo* had no application because abuse of dominant position under the *Competition Act* is not improper conduct until such time as the Competition Tribunal so finds.

[34] The issue in *Harbord Insurance Services Ltd. v. Insurance Corp. of British Columbia*, [1993] B.C.J. No. 3036 (Q.L.) (S.C.) was whether the Court should issue an interlocutory injunction in respect of conduct alleged to constitute tortious interference with economic relations. The alleged unlawful conduct was conduct of the nature described in s. 77 of the *Competition Act*. Although not articulated in the decision, the first leg of the test for granting interlocutory injunctions has a relatively low threshold in requiring only that there be a serious question to be tried. Hutchinson J. refused to grant the injunction because the alleged conduct was *per se* lawful but could be prohibited by the Competition Tribunal. In doing so, Hutchinson J. distinguished two English cases, *Daily Mirror Newspapers Ltd. v. Gardner*, [1968] 2 Q.B. 762 (Eng. C.A.) and *Brekkes v. Cattel*, [1972] 1 Ch. 105, on the basis that, among other things, the English legislation deemed certain conduct to be contrary to the public purpose.

[35] The third and fourth decisions were both made in response to applications under the Ontario equivalent of Rule 19(24). In *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202 (Ont. Gen. Div.), Sharpe J. struck out a plea relying upon abuse of dominant position contrary to s. 79 of the *Competition Act*. His reasoning was as follows:

> Section 79 confers jurisdiction on the Competition Tribunal to make an order prohibiting certain activity, after which that prohibited activity is unlawful. However, before any prohibition is made at the Tribunal, the effect of s. 79 is plainly not to make the activity described unlawful. It is not alleged that any

> order by the Tribunal has been made in the present case. Accordingly, I find that para. 24 of the Statement of Claim should be struck out as disclosing no cause of action.

[36] A similar conclusion was reached in *Ice Fashionable Accessories Inc. v. Holt, Renfrew & Co.*, [2001] O.J. No. 1527 (Q.L.) (Sup. Ct. Jus.), rev'd on other grounds (2002) 155 O.A.C. 355. Pitt J. struck the allegations of unlawful interference with economic relations that relied on a s. 79 infraction as an unlawful act. He followed earlier decisions, including *Chadha*, holding that reviewable practices under the *Competition Act* may not be relied upon as a basis for civil liability.

[37] The Plaintiffs proffer two arguments in response to these decisions. First, they say that there is authority to the contrary, the existence of which is sufficient to support their pleadings for the purposes of Rule 19(24). Second, they say that the decisions are distinguishable because the Competition Tribunal has deferred to the U.S. authorities, which declared Microsoft's conduct to be illegal.

[38] Two of the authorities relied upon by the Plaintiffs in this regard are *Pindoff Record Sales v. CBS Music Products* (1989), 27 C.P.R. (3d) 380 (Ont. Gen. Div.) and *R.D. Belanger & Associates Ltd. v. Stadium Corp.* (1991), 5 O.R. (3d) 778 (C.A.). In *Pindoff Record Sales*, Montgomery J. declined to decide whether conduct which contravenes Part VIII of the *Competition Act prima facie* constitutes "unlawful means", which is an element of the tort of conspiracy. After reviewing the English cases, *Daily Mirror Newspapers* and *Brekkes v. Cattel* (which were subsequently distinguished in *Harbord Insurance Services)*, he simply stated that it should not be the function of a motions court judge at a preliminary stage to make a determination which might restrict the plaintiff's claim, when there were other triable issues to be dealt with. I note that other Ontario judges did not have the same reluctance in the later decisions of *Chadha* and *Ice Fashionable Accessories.*

[39] In *Belanger*, the plaintiffs claimed against the defendants in both contract and tort. The tort claims were conspiracy and interference with economic

relations. One of the illegalities relied upon by the plaintiffs was alleged contraventions of ss. 77 and 79 of the *Competition Act*. Motions were made to have questions of law determined and to strike out a pleading on the ground that it disclosed no reasonable cause of action. The motions judge answered all of the questions of law and dismissed the action. In allowing the plaintiffs' appeal, the Ontario Court of Appeal held that the Ontario equivalent to Rule 19(24) required the court to decide whether the statement of claim, when read as a whole, failed to disclose any reasonable cause of action. As the plaintiffs had also pleaded that they suffered loss or damage as a result of conduct contrary to Part VI of the *Competition Act*, the statement of claim did disclose a cause of action. The Court of Appeal held that the defendants were not entitled to have their case "tried by inches".

[40] I do not regard either *Pindoff* or *Belanger* to be contrary to the authorities relied upon by the Defendants. Both of the decisions turned on the fact that the statement of claim disclosed other triable issues, and the Courts held that it was therefore inappropriate to decide the issue of whether conduct of the nature described in Part VIII of the *Competition Act* can be considered unlawful or constitute illegal means for the purposes of the torts of interference with economic relations and conspiracy. Rule 19(24) specifically provides that a part of a pleading may be ordered struck out. The fact that I hold that the Statement of Claim does properly plead another cause of action is not a basis upon which I can decline to order the striking out of a claim for interference with economic relations.

[41] The Plaintiffs next say that contrary authority is found in the decisions of *No. 1 Collision Repair and Painting (1982) Ltd. v. I.C.B.C.* (2000), 80 B.C.L.R. (3d) 62 (C.A.) and *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.). The Plaintiffs rely on the following passage from the dissenting judgment of Lambert J.A. in *No. 1 Collision*:

> Lord Denning has defined [in *Torquay Hotel*] the unlawful act for the purposes of the tort [of interference with economic relations] as an act which a person is not at liberty to commit. By that, I understand that what is meant is that the act is one which the law will recognize as being wrong in the sense that the

> law is capable of granting a remedy of some kind in relation to that wrong, whether the remedy would be granted or not in a particular case. (¶ 118)

In the case of conduct of the nature described in Part VIII of the *Competition Act*, however, Parliament decided in s. 36 of the *Act* that a remedy is available in a court of competent jurisdiction only when the Competition Tribunal has made an order prohibiting the conduct and there has been non-compliance with the order.

[42] Although Lambert J.A. made reference later in ¶ 118 to administrative law wrongs, he did so after referring to the decision in *Gershman v. Manitoba (Vegetable Producers' Marketing Board)*, [1976] 4 W.W.R. 406 (Man. C.A.). He was referring to wrongs committed by administrative tribunals, not remedies which can be granted by such tribunals. The comments of Lambert J.A. cannot properly be interpreted to mean within the context of this action that the second element of the tort is satisfied if the court concludes that the conduct of the defendant is of the nature described in Part VIII. In order to do so, the court would have to trespass upon the exclusive jurisdiction of the Competition Tribunal, which is something it is not entitled to do.

[43] In *Reach M.D.*, a trade association incorrectly told its members that advertising in the plaintiff's calendar would contravene the association's code of marketing practices. The Ontario Court of Appeal held that the trade association had unlawfully interfered with the plaintiff's economic relations. In its decision, the Court discussed the scope of the requirement that the interference be by illegal or unlawful means. Laskin J.A. said the following:

> The case law reflects two different views of "illegal or unlawful means", one narrow, the other broad. The narrow view confines illegal or unlawful means to an act prohibited by law or by statute. See *Dunlop v. Woollahra Municipal Council*, [1981] 1 All E.R. 1202 (P.C.) ...
>
> The broader view, however, extends illegal or unlawful means to an act the defendant "is not at liberty to commit" – in other words, an act without legal justification. Lord Denning espoused this broader in *Torquay Hotel* ...
>
> (¶s 49 and 50)

After referring to the fact that several Canadian appellate courts have taken the broader view, Laskin J.A. continued as follows:

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

[44] The Plaintiffs also point to the fact that Microsoft's conduct was found to be illegal in the United States and that the Commissioner of Competition has publicly stated that she had decided to await the outcome of the U.S. proceedings and did not take action in Canada.

[45] In my view, the broader view of illegal or unlawful means expressed in *Reach M.D.* does not result in the conclusion that conduct of the nature described in Part VIII of the *Competition Act* is unlawful. Microsoft was at liberty to engage in such conduct unless the Competition Tribunal had made an order prohibiting it. This is not affected by the fact that the Commissioner of Competition may have decided to defer to the U.S. authorities and did not make an application to the Competition Tribunal.

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

[47] It is possible, however, that such conduct may be considered unlawful for another reason. In the course of reflecting upon the parties' submissions and preparing these Reasons for Judgment, I gave consideration to whether Microsoft's conduct should be considered illegal or unlawful for the purposes of the tort of

interference with economic relations as a result of the fact that the conduct has been alleged in the Statement of Claim to have been illegal in the United States, where it appears most of the conduct occurred. The issue which presents itself is whether Microsoft's actions should be considered legal and lawful for the purposes of the tort because they were not illegal or unlawful under Canadian law despite the fact that they were illegal in the United States. Put another way within the context of this application, is it plain and obvious that illegal conduct under the laws of the United States cannot found the requirement of the tort for illegal or unlawful means if the conduct was not illegal or unlawful under Canadian law?

[48] Counsel did not specifically address this issue in their submissions. Although the Statement of Claim makes reference to conduct of Microsoft being found to be illegal in the United States, it does not specifically rely on these findings in the section of the Statement of Claim dealing with the tort of interference with economic interests. What paragraph 102 of the Statement of Claim does specifically rely upon as unlawful conduct is (a) an offence under Part VI, (b) a restricted trade practice contrary to Part VIII, and (c) an unlawful restraint of trade at common law. In view of the present wording of the Statement of Claim and the absence of submissions from counsel on the point, I have decided that it would not be appropriate for me to decide the issue at this time.

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

(iii) Restraint of Trade

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

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

> If an act in restraint of trade is a wrong rectifiable, in relation to the time after the hearing, by the remedy of an injunction, then, in my opinion, that wrong ought, in appropriate circumstances, to be compensated for, with respect to the period from when the wrong was committed until the court hearing, by a money award, call it equitable compensation or call it damages, as you will. What is more, having been identified as a wrong, that is, an unlawful act which the perpetrator was not at liberty to commit, then, subject only to arguments about justification, the wrongful restraint of trade supports, in my opinion, a claim for the tort of deliberate unlawful interference with economic interests.
>
> I realize that the conclusion that I have reached in that respect is not yet independently supported by Canadian authority, or, for so far I know, by direct Commonwealth authority. But once the principles about mingling law and equity in their remedies, as enunciated by the majority of the Supreme Court of Canada in *Canson v. Boughton & Co.* have been applied to wrongful restraint of trade, those principles support the wrongful restraint of trade as being compensable by a money award, compensation or damages, and so lead to the view that as a deliberate unlawful act it will also support the tort of interference with economic interests.
>
> (¶s 183 and 184)

[52] The comments of Lambert J.A. were made in a dissenting judgment and were not addressed by the majority, who decided the appeal on other grounds. Hence, the comments are not binding on me and constitute no more than a novel argument unsupported by authority. However, Lambert J.A. is a distinguished jurist

and his views are deserving of respect. While it is a novel argument, it is one deserving of consideration upon all of the relevant evidence. Under *Hunt*, it is not an argument which should be rejected on a Rule 19(24) application.

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

(b) Conspiracy

[54] In addition to relying on an alleged conspiracy under s. 45 of the *Competition Act* for the purpose of satisfying the second element of the tort of interference with contractual relations, the Plaintiffs plead in paragraphs 105 to 111 of the Statement of Claim that the Defendants committed a tortious conspiracy to injure them.

[55] The Defendants say that, in addition to making a claim for damages based on the tort of conspiracy, the Plaintiffs appear to be advancing a claim for damages pursuant to s. 36(1)(a) of the *Competition Act* based on an alleged violation of s. 45. Unlike the allegation in paragraph 12 of the Statement of Claim supporting the Plaintiffs' claim for interference with contractual relations, paragraphs 105 to 111 of the Statement of Claim do not allege a conspiracy between any persons other than the two Defendants. In their submissions replying to the Defendants, the Plaintiffs stated that while it is no doubt true under s. 45(8) that a parent and a subsidiary cannot conspire together, it is not true at common law. I infer that if the Plaintiffs had intended to advance a claim for damages pursuant to s. 36(1)(a) based on a breach of s. 45, they concede that such a claim cannot succeed in view of the exclusion contained in s. 45(8).

[56] The elements of the tort of conspiracy at common law were described by the Supreme Court of Canada in *Canada Cement LaFarge Ltd. v. Ocean Construction Supplies Limited*, [1983] 1 S.C.R. 452 as follows:

> ... I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. (pp. 471-2)

[57] With respect to the second branch of the tort (i.e., situation (2) described in the above passage), the Defendants say that no unlawful means has been properly pleaded. The unlawful means relied upon by the Plaintiffs in paragraph 109 of the Statement of Claim are that the conduct of the Defendants constituted an offence in relation to competition contrary to (a) Part VI of the *Competition Act*, and (b) Part VIII of the *Competition Act*.

[58] The potential offence under Part VI relates to s. 45. In view of s. 45(8), it was not an offence for Microsoft Corporation and Microsoft Canada to conspire to do any of the things listed in s. 45(1). Hence, the pleading of Part VI does not support the tort of conspiracy and should be struck.

[59] The pleading of Part VIII also does not support the tort of conspiracy and should be struck. In accordance with my reasons relating to the tort of interference with economic relations, conduct of the nature described in Part VIII is not unlawful in the absence of an order of the Competition Tribunal prohibiting the conduct. No such order has been pleaded.

[60] With respect to the first branch of the tort (i.e., situation (1) described in the above passage), the Defendants say that (a) the Plaintiffs have not pleaded that the predominate purpose of the Defendants was to injure them, and (b) a parent and a wholly owned subsidiary are not "two or more persons" and cannot conspire together at common law.

[61] Paragraph 107 of the Statement of Claim does include an allegation that the predominant purpose of the Defendants was to harm the Plaintiffs. While I can foresee some difficulties in proving this allegation, it is not the function of the court on this type of application to make a finding of fact. The court must assume the truthfulness of the allegations contained in the pleadings. It is not plain and obvious on the pleadings that there is no cause of action based on the tort of conspiracy as a result of the requirement that the plaintiff(s) prove that the predominant purpose of the defendants was to harm the plaintiff(s).

[62] The Defendants say that there is no authority in Canada deciding whether affiliates are "two or more persons" for the purpose of the tort of conspiracy. They argue that the scope of the tort should be restricted because the tort is considered an anomaly and Parliament has expressed a public policy view in s. 45(8) that affiliates should not be considered as separate persons for the purpose of a conspiracy.

[63] However, after the Defendants prepared their initial written submissions, a decision on point was issued. In *Smith v. National Money Mart. Co.*, [2006] O.J. No. 1807 (Q.L.) (C.A.), the application before the Court was whether there was a real and substantial connection to Ontario justifying the jurisdiction of the Ontario courts to hear the action. The defendant submitted that the Ontario courts should not take jurisdiction because there was not a good, arguable legal case against it based on the pleaded causes of action, one of which was conspiracy alleged between a parent corporation and its wholly owned subsidiary.

[64] In concluding that there was an arguable case for the tort of conspiracy between the parent and its subsidiary, the Ontario Court of Appeal said the following:

> [The motion judge] was satisfied that there was sufficient evidence of a good, arguable case that the two defendants conspired together to carry out the breach of s. 347(1) of the *Code*. Contrary to the submission of the appellant, there can be a conspiracy between a parent and a subsidiary corporation. The appellant submits that if Money Mart was controlled by Dollar Financial to the extent alleged in the action, then it follows that any agreement between them would be tantamount to an agreement with oneself, and one cannot conspire with oneself. Although that is an interesting analysis, the appellant's position is that the two companies are independent of each other and do not operate as one. Either way, where one controls the other, as two separate legal entities each remains responsible in law for its own actions, even if Dollar Financial is also responsible for some or all of the actions of its subsidiary. Nor is this an allegation of a conspiracy under the *Competition Act*, where s. 45(8) does not recognize a conspiracy with an affiliated corporation. (¶ 19)

In their reply submissions, the Defendants emphasize the last sentence of this passage and say that the *National Money Mart* decision supports their position that s. 45(8) precludes the conspiracy claims against the Defendants.

[65] *National Money Mart* does support the Defendants' position on the second branch of the tort (i.e., situation (2) described in *Canada Cement LaFarge*), but I am here addressing the first branch of the tort (i.e., situation (1) described in *Canada Cement LaFarge*), which was the same branch addressed in *National Money Mart*. In the last sentence of the above passage, the Ontario Court of Appeal was making the observation that the conspiracy tort being advanced in that case did not rely upon the *Competition Act* (in particular, s. 45). Similarly, the Plaintiffs are not relying upon s. 45 under the first branch of the tort, in respect of which it is not necessary to prove unlawful means.

[66] In summary, I order that the portions of the Statement of Claim advancing the second branch of the tort of conspiracy (i.e., situation (2) described in *Canada Cement LaFarge*) be struck out. It is not plain and obvious that the portions

of the Statement of Claim advancing the first branch of the tort do not disclose a cause of action, and I do not order them to be struck out.

(c) Unjust Enrichment

[67] The following are the three elements of the cause of action for unjust enrichment:

(a) an enrichment of the defendant;

(b) a corresponding deprivation of the plaintiff; and

(c) an absence of juristic reason for the enrichment.

This test was most recently articulated by the Supreme Court of Canada in *Garland v. Consumers' Gas Co.*

[68] The Defendants say that the Statement of Claim does not disclose a reasonable claim for unjust enrichment for two reasons. The first is that the alleged benefit was not conferred directly by the Plaintiffs onto the Defendants, but rather through intermediaries. The second reason is that there is a juristic reason for the enrichment.

[69] The Defendants base their first submission on the following passage from *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762:

> While not much discussed by common law authorities to date, it appears that a further feature which the benefit must possess if it is to support a claim for unjust enrichment, is that it be more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits 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 (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. See, for example, Fridman and McLeod, *supra*, at p. 361; Maddaugh and McCamus, *supra*, at p. 717; and, Gautreau, *supra*, at pp. 265 *et seq.* It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant. This limit is also recognized in other jurisdictions. For example, German restitutionary law confines recovery

> to cases of direct benefits: Zwiegert and Kötz, *Introduction to Comparative Law*, vol. II (2nd ed. 1987), at pp. 234-35. (p. 797)

[70] There are conflicting authorities which address this passage. In *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44 (C.A.), the Ontario Court of Appeal relied on this passage to strike out a claim for unjust enrichment on the basis that the plaintiff sought reimbursement of the amount paid by her to the retailer from which she purchased the product, not to the manufacturer of the product she was suing. The Court stated that any benefit to the manufacturer was indirect and only incidentally conferred on it.

[71] *Boulanger* was followed by this Court in *Reid v. Ford Motor Co.*, 2006 BCSC 712. Gerow J. held that a claim for unjust enrichment could not be sustained because the plaintiff's deprivation was in the form of monies paid to repair shops or parts dealer and the defendant's enrichment was indirect and only incidentally conferred on it.

[72] In contrast, Gray J. refused an application to dismiss an action on this basis in *Innovex Foods 2001 Inc. v. Harnett*, 2004 BCSC 928. The plaintiff had allegedly overpaid two companies by mistake and was suing the shareholders of the companies because the overpayment had been distributed to them. Gray J. held that *Peel* did not stand for the proposition that the plaintiff must give the defendant the enrichment directly and that the concern expressed in *Peel* related to incidental collateral benefits.

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

incidental collateral benefit. In this case, however, the pleadings allege that the manufacturers of the personal computers were required to pay a royalty to the Defendants. The evidence may establish that the Defendants did receive more than an incidental collateral benefit from the sale of the personal computers purchased by the Plaintiffs.

[74] The Defendants' second argument in relation to this cause of action is that there is a juristic reason for the alleged enrichment. They rely on the decision in *Harris v. Nugent* (1996), 141 D.L.R. (4th) 410 (Alta. C.A.) for the proposition that a contract is a juristic reason for any enrichment or deprivation. It is common ground that there were contracts between the Plaintiffs and the retailers from whom they purchased their personal computers and that there were contracts between the Defendants and the manufacturers who constructed the computers and loaded Microsoft's operating system and applications on them.

[75] The Plaintiffs submit that the contracts between Microsoft and the manufacturers cannot be relied upon as a juristic reason. They say that the contracts are void because they are in restraint of trade and violate the *Competition Act*. However, the Plaintiffs have not pleaded that these contracts are void and the facts presently pleaded in the Statement of Claim do not support a claim that the contracts are void. I do not have knowledge of all of the provisions of those contracts and am not in a position to determine whether the Plaintiffs can properly plead the contracts to be void.

[76] On the basis of the pleadings as they presently stand, it is plain and obvious that a claim for unjust enrichment cannot succeed because there is juristic reason for the deprivation/enrichment. I order that the portions of the Statement of Claim advancing the claim for unjust enrichment be struck out unless the Plaintiffs are able to properly amend the Statement of Claim to assert that the contracts between the Defendants and the manufacturers are void.

(d) Waiver of Tort

[77] In the section of the Statement of Claim dealing with unjust enrichment, the Plaintiffs plead in the alternative to the previously pleaded causes of action that they are entitled to recover the unjust enrichment accruing to the Defendants. The Statement of Claim then states that in the further alternative the Plaintiffs waive the tort and plead that they are entitled to recover the unjust enrichment accruing to the Defendants rather than their tort damages. The Defendants submit that the doctrine of waiver of tort is not an independent cause of action and that this claim should be struck.

[78] In general terms, the doctrine of waiver of tort allows a plaintiff to waive their claim for damages caused by a tort and to require the defendant to disgorge the gains they acquired through wrongful conduct. There are two aspects of the doctrine in respect of which the law appears unsettled.

[79] The first unsettled aspect is whether waiver of tort is simply a form of remedy or an independent cause of action. This becomes important where proof of damage is an element of the cause of action in tort; for example, negligence. If waiver of tort is not an independent cause of action, the plaintiff will be required to prove damage in order to establish the existence of a tort before the plaintiff will be able to "waive the tort" and seek the benefit obtained by the defendant from the commission of the tort. On the other hand, if waiver of tort is an independent cause of action, the plaintiff will not need to prove damage as an element of a tort before being entitled to seek the benefit received by the defendant.

[80] In support of the proposition that waiver of tort is not an independent cause of action, the Defendants cite *Reid v. Ford Motor Company, Transit Trailer Leasing Ltd. v. Robinson* (2004), 30 C.C.L.T. (3d) 227 (Ont. S.C.J.), *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.), *Ross v. HVLD Systems (1997) Ltd.* (1999), 170 D.L.R. (4th) 600 (Sask. C.A.) and *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61 (Ont. S.C.J.). In response, the Plaintiffs cite *Reading v.*

Attorney-General, [1951] 1 All E.R. 617 (H.L.), *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments, Ltd.*, [1952] 1 All E.R. 796 (C.A.), *Penarth Dock Engineering Company, Ltd. v. Pounds*, [1963] 1 L.L.L.R. 359 (Q.B.), *Amertek Inc. v. Canadian Commercial Corp.*, [2003] O.J. No. 3177 (Q.L.) (S.C.J.), rev'd (2005) 76 O.R. (3d) 241 (C.A.) and *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.), aff'd 2006 CarswelOnt 3705 (Div. Ct.).

[81] In my opinion, it is not necessary for me to deal with the issue of whether waiver of tort is an independent cause of action. I am not striking out all other pleaded causes of action and the Plaintiffs will not necessarily be relying on waiver of tort as an independent cause of action. If the Plaintiffs are successful in proving one of the alleged torts, they will be in a position to argue that they can waive their damages and obtain disgorgement of the Defendants' benefit. In addition, the Plaintiffs have pleaded that they have suffered damages and they are not in the situation of having failed to plead damage as an element of a tort. As a result, their pleading of waiver of tort is appropriate and should not be struck out.

[82] The other uncertainty in relation to waiver of tort is whether a plaintiff must establish all of the elements of unjust enrichment before being entitled to waive their claim for damages and seek payment of the defendant's benefit. It is necessary for me to deal with this issue in view of my holding that the Statement of Claim in its present form is not sufficient to support a claim for unjust enrichment.

[83] Two recent decisions came to different conclusions on this point. In *Reid v. Ford Motor Co.*, Gerow J. held that a claim for waiver of tort could not be sustained because the plaintiff had not pleaded, and could not satisfy, the three elements of unjust enrichment.

[84] The application in *Reid v. Ford Motor Co.* was heard on March 3, 2006 and the decision was issued on May 3, 2006. The decision in *Lewis v. Cantertrot Investments Ltd.*, [2006] O.J. No. 1061 (Q.L.) (S.C.J.) was issued in between those dates and was not referred to in *Reid v. Ford Motor Co.* The issue in *Lewis* was

whether the Court should certify the proceedings under the *Class Proceedings Act* on the basis of a statement of claim which included a claim for waiver of tort. Cullity J. said the following in allowing the claim for waiver of tort to remain in the statement of claim:

> It was central to Mr Nadler's submissions that the availability of the remedy of waiver of tort and, I think, the other restitutionary remedies would require a finding of unjust enrichment and that this, in turn, would require the three-pronged test discussed in cases such as *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 and *Pettkus v. Becker*, [1980] 2 S.C.R. 834 to be satisfied. In particular, he submitted that it was plain and obvious that there would be a juristic reason for any enrichment of a defendant that arose from the facts pleaded.
>
> On the present state of the authorities - and, in particular, to those that relate to waiver of tort and restitution in cases of breach of contract - I do not believe that this is necessarily correct. The Supreme Court of Canada held in *Soulos v. Kirkontzilas*, [1997] 2 S.C.R. 217 that the restitutionary remedy of constructive trust may be available in cases of wrongful conduct without unjust enrichment in the sense relied on by Mr Nadler. In my opinion, the law relating to waiver of tort and restitution for breach of contract is, at present, too undeveloped and uncertain to permit a decision - in the context solely of the pleadings - that the availability of either remedy will require the plaintiffs to establish that the three-pronged test of unjust enrichment is satisfied: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.) *R.D. Belanger & Associates Ltd v. Stadium Corp of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.).
>
> (¶s 6 & 7)

[85] As in *Lewis*, the absent element of unjust enrichment in the present case is the requirement that there be a lack of juristic reason for the enrichment. *Reid v. Ford Motor Co.* is distinguishable because Gerow J. held there that the flaw in the claim for unjust enrichment was an absence of the required enrichment. It may well be concluded that a plaintiff seeking to rely on the doctrine of waiver of tort is not required to prove the absence of a juristic reason for the enrichment because the plaintiff will have been successful in proving that the defendant did commit a wrong that resulted in the enrichment. In my opinion, it is not plain and obvious that the Plaintiff will have to establish all elements of unjust enrichment (and, in particular, the absence of a juristic reason for the enrichment) before being entitled to rely on the doctrine of waiver of tort.

[86] I conclude that the test for striking out the pleading of waiver of tort has not been met.

(e) Constructive Trust

[87] The Plaintiffs plead in the Statement of Claim that the Defendants are constructive trustees in their favour for the "Overcharge". The term "Overcharge" is defined in the Statement of Claim to mean "the difference between the prices the defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the defendants would have been able to charge in the absence of their wrongdoing".

[88] The Defendants say that the remedy of a constructive trust can only be granted if there is a proper claim for unjust enrichment and that the circumstances of this action do not permit the imposition of an institutional constructive trust. The position of the Plaintiffs is that a constructive trust can be imposed for wrongful acts in addition to being a remedy for unjust enrichment.

[89] In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, the Supreme Court of Canada addressed the issue of whether a constructive trust is available when there has not been an unjust enrichment. The Court ruled that the wife of a real estate broker held a property on a constructive trust for the vendor of the property as a result of a breach of the broker's duty of loyalty. A claim of unjust enrichment could not succeed on the facts of the case because a decrease in the value of the property meant that there was no enrichment.

[90] McLachlin J. held that the use of a constructive trust as a remedy for unjust enrichment by Canadian courts over the past few decades has not expunged the use of constructive trusts in circumstances where they were traditionally available. She expressed her view in this regard as follows:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have

> traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case. (¶ 34)

The Plaintiffs rely particularly on the following passage:

> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate. (¶ 43)

The Plaintiffs effectively submit that constructive trusts can be imposed for any type of wrongful act so long as good conscience requires it. Thus, they say it is not plain and obvious that their claim for a constructive trust cannot succeed.

[91] The comments of McLachin J. in ¶ 43 must be read within the context of her reasons as a whole. She was not indicating that constructive trusts are available for all types of wrongful acts. Her comments at ¶ 34 indicate that one of the purposes of a constructive trust based on "good conscience" is to maintain the integrity of institutions dependent on trust-like relationships. This is made clear by the first two of the four conditions that McLachlin J. identified at ¶ 45 as prerequisites for a constructive trust based on wrongful conduct (as opposed to unjust enrichment):

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

It is clear in the present case that the Defendants were not under any equitable obligation and that the monies representing the "Overcharge" did not result from any type of agency activities of the Defendants.

[92] It is plain and obvious that the Plaintiffs are not entitled to the remedy of constructive trust based on unjust enrichment because I have struck out the claim of unjust enrichment on the basis of the present pleadings. It is also plain and obvious that the Plaintiffs are not entitled to claim a constructive trust based on the "good conscience" rational because the "Overcharge" did not result from agency type activities of the Defendants in breach of an equitable obligation.

[93] Accordingly, I order that the portion of the Statement of Claim claiming a constructive trust be struck out. If the Plaintiffs are able to properly plead that the contracts between the Defendants and the manufacturers of the computers purchased by the Plaintiffs are void, their claim for unjust enrichment will be able to remain in the Statement of Claim, and the Plaintiffs will be entitled to claim a constructive trust as a remedy for unjust enrichment.

(f) Spoliation

[94] The Plaintiffs have pleaded in the Statement of Claim that they are entitled to judgment because the Defendants have destroyed evidence. The Defendants say that spoliation is not a cause of action and the claim in relation to it should be struck out of the Statement of Claim.

[95] The Defendants rely on the decision of the B.C. Court of Appeal in *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90 (C.A.), where it was held that the law in Canada is that the destruction of documents carries a procedural remedy, not a substantive remedy, and that spoliation is not an independent tort.

[96] The Plaintiffs point out that leave to appeal the decision in *Endean* was granted by the Supreme Court of Canada ((1998), 235 N.R. 400 (S.C.C.)), although

the appeal was never heard as a result of a settlement. They rely on the decision in *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (C.A.), where the Court did not strike out a claim based on spoliation. The Supreme Court of Canada refused leave to appeal that decision ((2001), 269 N.R. 394). In addition, the Plaintiffs cite *Carley Estate v. Allied Signal Inc.* (1997), 35 B.C.L.R. (3d) 54 (C.A.) for the proposition that decisions of whether pleadings disclose a cause of action should be analyzed from the perspective of appellate courts.

[97] I do not disagree that appellate courts should analyze Rule 19(24) applications from the perspective of an appellate court. For example, an appellate court may consider that one of the court's earlier decisions has been brought into question and should be given further consideration after the evidence is heard.

[98] This does not mean, however, that a trial judge is entitled to ignore the principle of *stare decisis*. The decision in *Endean* is binding upon me and it is not open to me as a trial judge to question its correctness. That must be left to the B.C. Court of Appeal and the Supreme Court of Canada.

[99] As I am bound by *Endean*, I hold that it is plain and obvious that spoliation is not an independent tort. I strike out the portions of the Statement of Claim advancing the claim of spoliation.

(g) Abuse of Process

[100] In paragraphs 83 through 100 of the Statement of Claim, the Plaintiffs plead facts relating to proceedings taken against Microsoft in the United States and the European Union. They plead that it would be an abuse of process for Microsoft to deny the findings of fact and conclusions made in those proceedings.

[101] The Defendants do not claim that it is plain and obvious that the Plaintiffs cannot rely on the doctrine of abuse of process in this regard. Rather, they say that the Plaintiffs should only plead the facts upon which they rely and should not plead the evidence upon which they intend to introduce at trial in order to prove

those facts. The Defendants also say that the pleading at paragraph 100 of the Statement of Claim, setting out the amount paid by Microsoft to settle claims against it, is irrelevant and prejudicial.

[102] It is a well established principle, embodied in Rule 19(1) of the *Rules of Court*, that pleadings should state facts, not evidence. The principle was applied in *Jones v. Keystone Air Service Ltd.*, 2005 MBQB 184, where the statement of defence to a crossclaim pleaded details of violations of the Canadian Aviation Regulations and penalties imposed in respect of those violations. Oliphant J. struck the subject paragraphs from the statement of defence to the crossclaim and granted leave for an amended statement of defence to be filed.

[103] I agree with the Defendants that the Statement of Claim does plead evidence in this regard. What should be properly pleaded are the facts relied upon by the Plaintiffs, not the manner in which they propose to prove those facts. I also agree with the Defendants that settlement amounts paid by Microsoft are irrelevant.

[104] I strike paragraphs 83 through 100 of the Statement of Claim, with leave to the Plaintiffs to file an amended Statement of Claim setting out the facts flowing from the foreign proceedings upon which they rely.

(h) Overcharge

[105] The Plaintiffs are claiming payment of the Overcharge, together with punitive damages expressed as a percentage of the Overcharge. The Defendants say that the term Overcharge is defined as a result of Microsoft alleged "wrongdoing" in the "personal computer market". They submit that Microsoft is in the software business, not the personal computer business, and that the facts alleged in the Statement of Claim relate to the software business. Thus, they say that the facts relied upon by the Plaintiffs underlying their claim to the Overcharge do not fall within the definition of Overcharge and that the "Overcharge" claims should be struck out of the Statement of Claim.

[106] I repeat the definition of the term "Overcharge" for ease of reference. It is defined to mean "the difference between the prices the defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the defendants would have been able to charge in the absence of their wrongdoing".

[107] I disagree with the submission of the Defendants that the term Overcharge is defined in terms of Microsoft's alleged wrongdoing in the personal computer market. It is pleaded by the Plaintiffs that Microsoft's software was pre-installed on the personal computers purchased by them (and other members of the proposed class). They assert that they were required to pay more for the software component of their purchase as a result of Microsoft's anti-competitive actions. The definition of the term Overcharge is not based on any wrongdoing by Microsoft in the personal computer market. Rather, it is based on alleged wrongdoings by Microsoft in the software market resulting in the Plaintiffs paying more for the software pre-installed on computers sold in the PC market in Canada.

CONCLUSION

[108] I order that the following portions of the Statement of Claim be struck out:

(a) the portions of the Statement of Claim alleging that conduct of the nature described in Part VIII of the *Competition Act* was illegal or unlawful;

(b) the portions of the Statement of Claim advancing the second branch of the tort of conspiracy (i.e., situation (2) described in *Canada Cement LaFarge*);

(c) subject to a proper pleading that the contracts between the Defendants and the manufacturers of the computers purchased by the Plaintiffs are void, the portions of the Statement of Claim advancing the claim of unjust enrichment;

(d) the portions of the Statement of Claim claiming a constructive trust, provided that if there is a proper pleading that the contracts between the

Defendants and the manufacturers of the computers purchased by the Plaintiff are void, the claim for a constructive trust as a remedy for unjust enrichment may remain in the Statement of Claim;

(e) the portions of the Statement of Claim advancing the claim of spoliation; and

(f) paragraphs 83 through 100 of the Statement of Claim.

The Plaintiffs are to file a further amended Statement of Claim in accordance with these Reasons for Judgment. As alluded to by counsel during the course of submissions, it may be appropriate to have a further hearing before me to discuss the revisions to the Statement of Claim flowing from these Reasons for Judgment.

[109] The balance of the Defendants' application, including the application to dismiss this action, is dismissed.

"D. Tysoe, J."