SUPREME COURT OF CANADA

CITATION: Pro-Sys Consultants Ltd. *v.* Microsoft Corporation, 2013 SCC 57

DATE: 20131031
DOCKET: 34282

BETWEEN:

Pro-Sys Consultants Ltd. and Neil Godfrey
Appellants
and
Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE
Respondents
- and -
Attorney General of Canada
Intervener

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

REASONS FOR JUDGMENT: (paras. 1 to 143)

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

Pro-Sys Consultants Ltd. and
Neil Godfrey *Appellants*

v.

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

and

Attorney General of Canada *Intervener*

Indexed as: Pro-Sys Consultants Ltd. *v.* Microsoft Corporation

2013 SCC 57

File No.: 34282.

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 — Indirect purchasers — Plaintiffs suing defendants for unlawful conduct in overcharging for its PC operating systems and PC applications software — Plaintiffs seeking certification of action as class proceeding under provincial class action legislation — Whether indirect purchaser actions are available as a matter of law in Canada — Whether certification requirements are met — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).

P brought a class action against M, alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software. P sought certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"). The proposed class is made up of ultimate consumers, known as "indirect purchasers", who acquired M's products from re-sellers.

The British Columbia Supreme Court found that the certification requirements set out in s. 4(1) of the *CPA* were met and certified the action. The majority of the Court of Appeal allowed M's appeal, set aside the certification order and dismissed the action, determining that indirect purchaser actions were not available as a matter of law in Canada and therefore that the class members had no cause of action under s. 4(1)(a) of the *CPA*.

Held: The appeal should be allowed.

Indirect purchasers have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured the indirect purchasers as a result of the overcharge being "passed on" to them through the chain of distribution. The argument that indirect purchasers should have no cause of action because passing on has been rejected as a defence in Canada should fail.

The passing-on defence, which was typically advanced by an overcharger at the top of a distribution chain, was invoked under the proposition that if the direct purchaser who sustained the original overcharge then passed that overcharge on to its own customers, the gain conferred on the overcharger was not at the expense of the direct purchaser because the direct purchaser suffered no loss. As such, the fact that the overcharge was "passed on" was argued to be a defence to actions brought by the direct purchaser against the party responsible for the overcharge. This defence has been rejected by this Court in *Kingstreet Investments Ltd. v. New Brunswick (Deparment of Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, and that rejection is not limited to the context of the imposition of *ultra vires* taxes; the passing-on defence is rejected throughout the whole of restitutionary law.

However, the rejection of the passing-on defence does not lead to a corresponding rejection of the offensive use of passing on. Therefore, indirect purchasers should not be foreclosed from claiming losses passed on to them. The risk of double or multiple recovery where actions by direct and indirect purchasers are

pending at the same time or where parallel suits are pending in other jurisdictions can be managed by the court. Furthermore, indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages. In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss, and whether they have met their burden of proof is a factual question to be decided on a case-by-case basis. In addition, allowing the offensive use of passing on will not frustrate the deterrence objectives of Canadian competition laws. Indirect purchaser actions may, in some circumstances, be the only means by which overcharges are claimed and deterrence is promoted. Finally, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than reserving these actions for direct purchasers who may have in fact passed on the overcharge.

The first requirement for certification at s. 4(1) of the *CPA* requires that the pleadings disclose a cause of action. 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. In the case at bar, the pleadings disclose causes of action that should not be struck out at this stage of the proceedings.

First, it cannot be said that the pleadings do not disclose a cause of action under s. 36 of the *Competition Act*. The contention that the s. 36 cause of action is not properly pleaded because it was not included in the statement of claim and that

any attempt to add it now would be barred by the two-year limitation period contained in s. 36(4) of the Act is purely technical and should be rejected. The argument that the Competition Tribunal should have jurisdiction over the enforcement of the competition law should also be rejected, since s. 36 expressly confers jurisdiction on the court to entertain the claims of any person who suffered loss by virtue of a breach of Part VI of the Act.

Next, it is not plain and obvious that the claim in tort for predominant purpose conspiracy cannot succeed. The contention that the tort of predominant purpose conspiracy is not made out because the statement of claim fails to identify one true predominant purposes and instead lists overlapping purposes should fail at this stage of the proceedings. Similarly, the argument that the predominant purpose conspiracy claim should be struck as it applies to an alleged conspiracy between a parent corporation and its subsidiaries should fail because it is not plain and obvious that the law considers parent and wholly-owned subsidiary corporations to always act in combination.

Similarly, at this point, it is not plain and obvious that there is no cause of action in tort for unlawful means conspiracy or intentional interference with economic interests. These alleged causes of action must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v.

Depending on the decision of this Court in *Bram*, it will be open to M to raise the matter at trial should it consider it advisable to do so.

With respect to the restitutionary claim in unjust enrichment, it is not plain and obvious that it cannot succeed. With respect to the argument that any enrichment received by M came from the direct purchasers and not from the class members, and that this lack of a direct connection between it and the class members forecloses the claim of unjust enrichment, it is not plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct. The question of whether the contracts between M and the direct purchasers and the contracts between the direct purchasers and the indirect purchasers, which could constitute a juristic reason for the enrichment, are illegal and void should not be resolved at this stage of the proceedings and must be left to the trial judge.

The pleadings based on constructive trust must be struck. In order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property. In the present case, there is no referential property. P makes a purely monetary claim. As the claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that this claim cannot succeed.

Finally, it is not plain and obvious that a cause of action in waiver of tort would not succeed. There is contradictory law as to the question of whether the underlying tort needs to be established in order to sustain an action in waiver of tort. This appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded.

The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158: the class representative must show some basis in fact for each of the certification requirements set out in the provincial class action legislation, other than the requirement that the pleadings disclose a cause of action. The certification stage is not meant to be a test of the merits of the action, rather, this stage is concerned with form and with whether the action can properly proceed as a class action. The standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. Although evidence has a role to play in the certification process, the standard of proof does not require evidence on a balance of probabilities. The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action, rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification

have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements not having been met.

In the case at bar, the applications judge's finding that the claims raised common issues is entitled to deference. In order to establish commonality, evidence that the acts alleged actually occurred is not required, rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members. With respect to the common issues that ask whether loss to the class members can be established on a class-wide basis, they require the use of expert evidence in order for commonality to be established. The expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement — it must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question, and there must be some evidence of the availability of the data to which the methodology is to be applied. Resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification.

The applications judge's decision to certify as common issues whether damages can be determined on an aggregate basis and if so, in what amount, should

not be disturbed. The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue should only be determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge. The failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate.

The applications judge's finding that the class action is the preferable procedure should not be interfered with. In the present case, there are common issues related to the existence of the causes of action and there are also common issues related to loss to the class members. The loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of M's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover in this case, a resolution of the common issues would significantly advance the action.

Cases Cited

Referred to: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55, aff'd 2013 SCC 58; *Infineon Technologies AG v.*

Option consommateurs, 2013 SCC 59; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74; *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22; *California v. ARC America Corp.*, 490 U.S. 93 (1989); *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306; *Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81, leave to appeal refused, [2006] 1 S.C.R. xii; *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1; *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1; *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665; *National Trust Co. v. Gleason*, 77 N.Y. 400 (1879);

Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc., 268 F. 575 (1920); *Mahesan v. Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374; *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*, [1983] A.C. 366; *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61; *Reid v. Ford Motor Co.*, 2006 BCSC 712 (CanLII); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272, rev'g 2008 BCSC 575 (CanLII); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401; *In re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (2008); *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358, leave to appeal refused, 2010 ONSC 2705, 103 O.R. (3d) 296; *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (2002); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011); *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 329 D.L.R. (4th) 389; *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 1 "common issues", 4(1), (2), 5(4), (7), 10(1), 29(1), (2).

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 24.

Competition Act, R.S.C. 1985, c. C-34, ss. 36, Part VI, 45(1), 52(1).

Authors Cited

Antitrust Modernization Commission. *Antitrust Modernization Commission: Report and Recommendations*. Washington, D.C.: The Commission, 2007 (online: http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm).

Beatson, J. *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution*. Oxford: Clarendon Press, 1991.

British Columbia. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, p. 15078.

Cullity, Maurice. "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407.

Eizenga, Michael A., et. al. *Class Actions Law and Practice*, 2nd ed. Markham, Ont.: LexisNexis, 2009 (loose-leaf updated March 2013, release 21).

Friedmann, Daniel. "Restitution for Wrongs: The Basis of Liability", in W. R. Cornish, et al., eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones*. Oxford: Hart Publishing, 1998, 133.

Gavil, Andrew I. "Thinking Outside the *Illinois Brick* Box: A Proposal for Reform" (2009), 76 *Antitrust L.J.* 167.

Glover, J. Maria. "The Structural Role of Private Enforcement Mechanisms in Public Law" (2012), 53 *Wm. & Mary L. Rev*. 1137.

Harris, Robert G., and Lawrence A. Sullivan. "Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis" (1979), 128 *U. Pa. L. Rev*. 269.

Landes, William M., and Richard A. Posner. "Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*" (1979), 46 *U. Chi. L. Rev*. 602.

Landes, William M., and Richard A. Posner. "The Economics of Passing On: A Reply to Harris and Sullivan" (1980), 128 *U. Pa. L. Rev*. 1274.

Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution*. Aurora, Ont.: Canada Law Book, 2004 (loose-leaf updated September 2005).

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

O'Connor, Kevin J. "Is the *Illinois Brick* Wall Crumbling?" (2001), 15:3 *Antitrust* 34.

Osborne, Philip H. *The Law of Torts*, 4th ed. Toronto: Irwin Law, 2011.

Thimmesch, Adam. "Beyond Treble Damages: *Hanover Shoe* and Direct Purchaser Suits After *Comes v. Microsoft Corp.*" (2005), 90 *Iowa L. Rev.* 1649.

Van Cott, Charles C. "Standing at the Fringe: Antitrust Damages and the Fringe Producer" (1983), 35 *Stan. L. Rev.* 763.

Werden, Gregory J., and Marius Schwartz. "*Illinois Brick* and the Deterrence of Antitrust Violations — An Economic Analysis" (1984), 35 *Hastings L.J.* 629.

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Lowry and Frankel JJ.A.), 2011 BCCA 186, 304 B.C.A.C. 90, 331 D.L.R. (4th) 671, 513 W.A.C. 90, [2011] B.C.J. No. 688 (QL), 2011 CarswellBC 930, setting aside a decision of Myers J., 2010 BCSC 285 (CanLII), [2010] B.C.J. No. 380 (QL), 2010 CarswellBC 508, and decisions of Tysoe J., 2006 BCSC 1738, 59 B.C.L.R. (4th) 111, [2007] 1 W.W.R. 541, 44 C.C.L.T. (3d) 146, [2006] B.C.J. No. 3035 (QL), 2006 CarswellBC 2892, and 2006 BCSC 1047, 57 B.C.L.R. (4th) 323, [2006] 11 W.W.R. 688, 40 C.C.L.T. (3d) 45, [2006] B.C.J. No. 1564 (QL), 2006 CarswellBC 1691. Appeal allowed.

J. J. Camp, Q.C., *Reidar Mogerman*, *Melina Buckley* and *Michael Sobkin*, for the appellants.

Neil Finkelstein, *James Sullivan*, *Catherine Beagan Flood* and *Brandon Kain*, for the respondents.

John S. Tyhurst, for the intervener.

The judgment of the Court was delivered by

ROTHSTEIN J. —

TABLE OF CONTENTS

I. Introduction

[1] It is no simple task to assess liability and apportion damages in situations where the wrongdoer and the harmed parties are separated by a long and complex chain of distribution, involving many parties, purchasers, resellers and intermediaries. Such is the problem presented by indirect purchaser actions in which downstream

individual purchasers seek recovery for alleged unlawful overcharges that were passed on to them through the successive links in the chain.

[2] The complexities inherent in indirect purchaser actions are magnified when such actions are brought as a class proceeding. When that happens, the courts are required to grapple with not only the difficulties associated with indirect purchaser actions, but are also then asked to decide whether the requirements for certification of a class action are met. These are the questions the Court is faced with in this appeal.

II. Background

[3] The representative plaintiffs in this action, Pro-Sys Consultants Ltd. and Neil Godfrey (collectively "Pro-Sys"), brought a class action against Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE (collectively "Microsoft") alleging that beginning in 1988, Microsoft engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software. Pro-Sys claims that as a direct consequence of Microsoft's unlawful conduct, it and all the class members paid and continue to pay higher prices for Microsoft operating systems and applications software than they would have paid absent the unlawful conduct.

[4] Pro-Sys sought certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*").

[5] The proposed class is made up of ultimate consumers who acquired Microsoft products from re-sellers, re-sellers who themselves purchased the products either directly from Microsoft or from other re-sellers higher up the chain of distribution. These consumers are known as the "indirect purchasers". The proposed class was defined in the statement of claim as

> all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing.
>
> (2010 BCSC 285 (CanLII), at para. 16)

III. The Proceedings Below

A. *Certification Proceedings in the British Columbia Supreme Court*

[6] Pro-Sys filed its original statement of claim in the British Columbia Supreme Court ("BCSC") in December 2004. Thereafter numerous amendments to the Statement of Claim were made with the approval of Tysoe J., ultimately resulting in the Third Further Amended Statement of Claim. A Fourth Further Amended Statement of Claim has not officially been filed.

[7] In 2006, Microsoft sought an order striking out the claim altogether and an order dismissing the action. In the alternative, it sought to strike out only portions of the claim. The parties agreed that the outcome of the application to strike would

be determinative of the certification requirement under s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action.

[8] Tysoe J. found causes of action under s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, in tort for conspiracy and intentional interference with economic interests and in restitution for waiver of tort (2006 BCSC 1047, 57 B.C.L.R. (4th) 323). He ordered that the portions of the pleadings dealing with unjust enrichment and constructive trust should be struck out as they were not sufficient to support such claims, unless they were amended by Pro-Sys. Upon further motion to amend the claims (2006 BCSC 1738, 59 B.C.L.R. (4th) 111), Tysoe J. allowed amendments to support the claims of unjust enrichment and constructive trust.

[9] Following his rulings on the applications to strike and to amend, Tysoe J. was appointed to the British Columbia Court of Appeal ("BCCA"), and Myers J. assumed management of the case. Myers J. assessed the remaining certification requirements set out in s. 4(1) of the *CPA*, namely (i) whether there was an identifiable class (s. 4(1)(b)); (ii) whether the claims of the class members raised common issues (s. 4(1)(c)); (iii) whether the class action was the preferable procedure (s. 4(1)(d)); and (iv) whether Pro-Sys and Neil Godfrey could adequately represent the class (s. 4(1)(e)). Myers J. certified the action, finding that all four of the remaining requirements for certification were met (2010 BCSC 285 (CanLII)). The common issues certified by Myers J. are listed in the appendix to these reasons.

B. *Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 186, 304 B.C.A.C. 90*

[10] Microsoft appealed from the decisions of Tysoe and Myers JJ. The majority of the BCCA, *per* Lowry J.A. (Frankel J.A. concurring), allowed the appeal, set aside the certification order and dismissed the action, finding it plain and obvious that the class members had no cause of action under s. 4(1)(a) of the *CPA*. The majority reached this conclusion after determining that indirect purchaser actions were not available as a matter of law in Canada. As such, it did not consider the other certification requirements.

[11] Donald J.A., dissenting, would have dismissed the appeal and certified the action, finding indirect purchaser actions to be permitted in Canada, and finding sufficient grounds for the action.

[12] In the BCCA, the present case was heard together with another case dealing with substantially similar issues (*Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2011 BCCA 187, 305 B.C.A.C. 55). Counsel for the plaintiffs was the same in both appeals and the appeals were heard by the same panel of judges. As in the present appeal, in *Sun-Rype*, the issue of whether indirect purchaser actions are available in Canada was determinative. In reasons released simultaneously with the reasons in this appeal, the majority of the BCCA disposed of *Sun-Rype* in the same manner, decertifying and dismissing the indirect purchasers' class action on the basis

that indirect purchaser actions were not available under Canadian law. Donald J.A. dissented, finding, as in this appeal, that indirect purchaser actions were permitted.

[13] Leave to appeal was granted in both cases by this Court. They were heard with another indirect purchaser class action originating in Quebec, *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, which this Court has addressed in separate reasons, *per* LeBel and Wagner JJ. Reasons in *Sun-Rype* can be found at 2013 SCC 58.

IV. Analysis

[14] The issues are addressed in the following order:

(1) Did the majority of the BCCA err in finding that indirect purchaser actions were not available as a matter of law in Canada?

(2) Were the findings of Tysoe J. as to the requirement that the pleadings disclose a cause of action under s. 4(1)(a) of the *CPA* correct?

(3) Were the findings of Myers J. as to the balance of the certification requirements under s. 4(1) of the *CPA* correct?

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

[15] In this appeal, the parties have introduced numerous issues. The one occupying the largest portion of the factums and the oral argument was the question of whether indirect purchasers have the right to bring an action to recover losses that were passed on to them. Some sources have treated this issue as one of standing. I think it more appropriate to treat it as a threshold issue to be determined before moving into the specific causes of action alleged in the certification application.

[16] As I have described above, indirect purchasers are consumers who have not purchased a product directly from the alleged overcharger, but who have purchased it either from one of the overcharger's direct purchasers, or from some other intermediary in the chain of distribution. The issue is whether indirect purchasers have a cause of action against the party who has effectuated the overcharge at the top of the distribution chain that has allegedly injured them indirectly as the result of the overcharge being "passed on" down the chain to them.

[17] Microsoft argues that indirect purchasers should have no such cause of action. Its submits that permitting indirect purchasers to bring an action against the alleged overcharger to recover loss that has been "passed on" would be inconsistent with this Court's jurisprudence, which it says rejected passing on as a defence. Microsoft says that the rejection of the "passing-on" *defence* necessarily entails a rejection of the *offensive* use of passing on by indirect purchasers to recover overcharges that were passed on to them. I begin with a description of the passing-on defence and then deal with its impact on indirect purchaser actions.

(1) Rejection of Passing On as a Defence

[18] The passing-on defence was typically advanced by an overcharger at the top of a distribution chain. It was invoked under the proposition that if the direct purchaser who sustained the original overcharge then passed that overcharge on to its own customers, the gain conferred on the overcharger was not at the expense of the direct purchaser because the direct purchaser suffered no loss. As such, the fact that the overcharge was "passed on" was argued to be a defence to actions brought by the direct purchaser against the party responsible for the overcharge.

[19] The passing-on defence has been rejected in both Canadian and U.S. jurisprudence. It was first addressed by the Supreme Court of the United States in 1968 in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In that case, Hanover sued United for damages under U.S. antitrust laws because United would only lease, not sell, its shoe machinery, which Hanover claimed resulted in an overcharge to it. United argued that Hanover had passed on the overcharge to its own customers and had therefore suffered no harm. The U.S. Supreme Court (*per* White J., Stewart J. dissenting) rejected the passing-on defence to overcharging. It cited difficulties in ascertaining the nature and extent of the passing on of the overcharge as the reason for rejecting the defence:

> Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or

> maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. [p. 493]

[20] The court added that to leave the only actionable causes in the hands of the indirect purchasers who "have only a tiny stake in a lawsuit and little interest in attempting a class action", would mean that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality" (*Hanover Shoe*, at p. 494). The court thus rejected the passing-on defence. Since *Hanover Shoe*, defendants who effectuate illegal overcharges have been precluded from employing the passing-on defence as a means of absolving themselves of liability to their direct purchasers.

[21] The passing-on defence was rejected in Canada in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, in the context of a claim for the recovery of taxes paid pursuant to *ultra vires* legislation. The dispute in that case arose out of a claim for the recovery of *ultra vires* user charges on liquor levied by the province of New Brunswick against Kingstreet Investments, whose business, among other things, involved the operation of night clubs. Bastarache J., writing for a unanimous Court, held that a public authority who had illegally overcharged a taxpayer could not reduce its liability for the overcharge simply by establishing that some or all of the overcharge was passed on to the taxpayer's customers.

[22] Bastarache J. found the passing-on defence to be inconsistent with the basic premise of restitution law. Basic restitutionary principles "provide for restoration of 'what has been taken or received from the plaintiff without justification'. . . . Restitution law is not concerned by the possibility of the plaintiff obtaining a windfall precisely because it is not founded on the concept of compensation for loss" (*Kingstreet*, at para. 47, quoting *Commissioner of State Revenue (Victoria) v. Royal Insurance Australia Ltd.* (1994), 182 C.L.R. 51 (H.C.A.) at p. 71). Accordingly, "[a]s between the taxpayer and the Crown, the question of whether the taxpayer has been able to recoup its loss from some other source is simply irrelevant" (*Kingstreet*, at para. 45, quoting P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf updated September 2005), at p. 11-45).

[23] Bastarache J. also found the passing-on defence to be "economically misconceived" (*Kingstreet*, at para. 48). By this he accepted that the task of determining the ultimate location of the harm of the overcharge is "exceedingly difficult and constitutes an inappropriate basis for denying relief" (para. 44). Echoing the misgivings expressed in *Hanover Shoe*, he cited the inherent difficulty in accounting for the effects of market elasticities on the prices charged by direct purchasers as the basis for this conclusion. He found these complexities made it impossible to tell what part, if any, of the overcharge was actually passed on (*Kingstreet*, at para. 48).

[24] Pro-Sys says that *Kingstreet* stands only for the rejection of the defence in the context of *ultra vires* taxes. In my view, however, there are three reasons that lead to the conclusion that Bastarache J.'s rejection of the passing-on defence in *Kingstreet* was not limited to that context.

[25] First, this Court's jurisprudence supports the broader rejection of the passing-on defence. In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 ("*Canfor*"), the Crown claimed "diminution of the value of the timber" that it sold, following a forest fire caused largely by Canfor. Though the Court ultimately held in that case that the Crown had not in fact suffered loss because it was able to recover its damages through the regulatory scheme it had instituted, Binnie J. stated (albeit in *obiter*) that "[i]t is not generally open to a wrongdoer to dispute the existence of a loss on the basis it has been 'passed on' by the plaintiff" because this would burden courts with "the endlessness and futility of the effort to follow every transaction to its ultimate result" (para. 111, quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), at p. 534). Likewise, in the same decision LeBel J., dissenting, though not on this point, said that "the passing-on defence, on the facts of this case and generally, must not be allowed to take hold in Canadian jurisprudence" (para. 197). To allow otherwise, LeBel J. indicated, would force a difficult burden of proof on the plaintiff to demonstrate not only that it had suffered a loss, but that it did not engage in any other transactions that would have offset the loss (para. 203).

[26] In *Kingstreet*, Bastarache J. endorsed the reasons for rejecting the passing-on defence advanced by LeBel J. in the tort law context in *Canfor*, saying such rejection was of equal if not greater consequence in restitution law (para. 49).

[27] Second, in *Kingstreet*, Bastarache J. found that the rejection of the passing-on defence was consistent with basic restitutionary law principles. Specifically, the rejection of the defence accords with the principle against unjust enrichment or *nullus commodum capere potest de injuria sua propria* (barring wrongdoers from benefiting from their unlawful actions). Preventing defendants from invoking passing on as a defence helps to ensure that wrongdoers are not permitted to retain their ill-gotten gains simply because it would be difficult to ascertain the precise extent of the harm. Likewise, it is important as a matter of restitutionary law to ensure that wrongdoers who overcharge their purchasers do not operate with impunity, on the grounds that complexities in tracing the overcharge through the chain of distribution will serve to shield them from liability.

[28] Finally, there is support in the academic commentary for the broader rejection of the passing-on defence. Maddaugh and McCamus have stated that *Kingstreet* was an "authoritative and apparently comprehensive rejection" of the passing-on defence in Canada, and that "[i]n reaching this conclusion, the Supreme Court reflected a broad international consensus with respect to the unsuitability of this defence" (p. 11-46 of 2013 update).

[29] For these reasons, I conclude that the rejection of the passing-on defence in *Kingstreet* is not limited to the context of the imposition of *ultra vires* taxes. There is no principled reason to reject the defence in one context but not another; the passing-on defence is rejected throughout the whole of restitutionary law.

(2) Significance of the Passing-On Defence in This Appeal

[30] As described above, the offensive use of passing on would provide the basis for indirect purchaser actions. Microsoft argues that this Court's rejection of the passing-on defence carries, as a necessary corollary, a corresponding rejection of the offensive use of passing on. The rationale is that the rejection should apply equally so that if overchargers are not permitted to rely on passing on in their own defence, indirect purchasers should also not be able to invoke passed on overcharges as a basis for their cause of action.

[31] Microsoft relies on the 1977 decision of the U.S. Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Illinois Brick manufactured concrete block and sold it to masonry contractors who in turn provided their services to general contractors. The general contractors incorporated the concrete block into buildings and sold the buildings to customers such as the State of Illinois. The State was therefore an indirect purchaser of the products of Illinois Brick (p. 726). The State alleged that Illinois Brick had engaged in a conspiracy to fix the prices of concrete block, contrary to U.S. antitrust legislation, and brought an indirect purchaser action against the company (p. 727).

[32] The U.S. Supreme Court found against the State of Illinois. It held that since, according to *Hanover Shoe*, passing on may not be used defensively, it should not be available to indirect purchasers to use offensively by bringing an action alleging that an overcharge was passed down to them. The court explained that "whatever rule [was] to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants" (*Illinois Brick*, at p. 728).

[33] Microsoft argues that, just as the prohibition on the offensive use of passing on in *Illinois Brick* was considered a necessary corollary to the rejection of the passing-on defence in *Hanover Shoe*, the same result should flow in Canada from the rejection of the passing-on defence in *Kingstreet*. The passing on issue was not raised before either of the applications judges because those decisions were released prior to *Kingstreet*. However, the majority of the BCCA accepted this argument in dismissing the Pro-Sys claim.

(3) Analysis of the "Necessary Corollary" Argument

[34] As I will explain, despite the rejection of the passing-on defence, the arguments advanced by Microsoft as to why there should be a corresponding rejection of the offensive use of passing on are not persuasive. Symmetry for its own sake without adequate justification cannot support the "necessary corollary" argument. In my view, the arguments advanced by Microsoft do not provide such justification.

(a) *Double or Multiple Recovery*

[35] Microsoft submits that the offensive use of passing on through indirect purchaser actions leaves it exposed to liability from all purchasers in the chain of distribution. It says that its inability to employ the passing-on defence means that direct purchasers would be able to seek recovery for the entire amount of the overcharge. If, at the same time, indirect purchasers bring actions, this would result in both direct and indirect purchasers seeking recovery of the same amount. Microsoft argues that this potential for double or even multiple recovery should be a sufficient reason to reject the offensive use of passing on.

[36] In *Illinois Brick*, the U.S. Supreme Court considered multiple recovery to be a "serious risk" and said that it was "unwilling to 'open the door to duplicative recoveries'" (pp. 730-31, *per* White J.):

> A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications — and therefore of unwarranted multiple liability for the defendant — by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff . . . . [Emphasis deleted; p. 730.]

[37] This concern cannot be lightly dismissed. However, in my view, there are countervailing arguments to be considered. Practically, the risk of duplicate or multiple recoveries can be managed by the courts. Brennan J., dissenting in *Illinois Brick*, indicated that the risk of overlapping recovery exists only where additional suits are filed after an award for damages has been made or where actions by direct

and indirect purchasers are pending at the same time. In both cases, he said, the risk is remote (pp. 762-64).

[38] In the first situation, Brennan J. stated that the complex and protracted nature of antitrust actions, coupled with the short four-year statute of limitations, "make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit" (*Illinois Brick*, at p. 764). With respect to actions under the *Competition Act*, the same reasoning would apply in Canada where our competition actions are similarly complex and where legislation restricts individual recovery for damages for violations to just two years (see *Competition Act*, at s. 36(4)(*a*)).

[39] As for the risk of double recovery where actions by direct and indirect purchasers are pending at the same time, it will be open to the defendant to bring evidence of this risk before the trial judge and ask the trial judge to modify any award of damages accordingly. In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, in discussing the risk of a plaintiff seeking double recovery under separate legal provisions, Dickson J. (as he then was), writing for the majority, held that

> [t]he courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions. . . . [t]he Court at the final stage of finding and quantifying liability could prevent double recovery if in fact compensation and an accounting had already been made by a defendant. No court would permit double recovery. [p. 191]

If the defendant is able to satisfy the judge that the risk is beyond the court's control, the judge retains the discretion to deny the claim.

[40] Likewise, if the defendant presents evidence of parallel suits pending in other jurisdictions that would have the potential to result in multiple recovery, the judge may deny the claim or modify the damage award in accordance with an award sought or granted in the other jurisdiction in order to prevent overlapping recovery.

[41] In view of these practical tools at the courts' disposal, I would agree with Donald J.A. of the BCCA, dissenting in *Sun-Rype*, that "the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided" (para. 30). At this stage of the proceeding, Microsoft has not produced evidence to demonstrate that the courts in B.C. could not preclude double or multiple recovery. I would thus not reject indirect purchaser actions because of the risk of multiple recovery.

(b) *Remoteness and Complexity*

[42] Microsoft's second argument is that the remoteness of the overcharge and the complexities associated with tracing the loss constitute "'serious' and 'inherent' difficulties of proof associated with pass-on" (R.F., at para. 20). These difficulties are said to give rise to confusion and uncertainty and place a burden on the institutional capacities of the courts tasked with following each overcharge to its ultimate result.

[43] Microsoft relies on the reasoning of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22. In *Chadha*, that court denied certification of an indirect purchaser action citing "the many problems of proof facing the appellants . . . , including the number of parties in the chain of distribution and the 'multitude of variables' which would affect the end-purchase price" (para. 45 (adopting the findings of the Divisional Court)). Microsoft argues that if any part of the overcharge was absorbed by any party in the chain, "the chain would be broken" and the extent of the overcharge would become increasingly difficult to trace (R.F., at para. 22, quoting *Chadha*, at para. 45). The reasons on this point in *Illinois Brick*, on which Microsoft relies heavily, point out that there are significant "uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model'" (pp. 731-32). The court lamented the "costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom" (p. 732).

[44] Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However, Brennan J., dissenting in *Illinois Brick*, observed that these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case:

> Admittedly, there will be many cases in which the plaintiff will be unable to prove that the overcharge was passed on. In others, the portion of the

> overcharge passed on may be only approximately determinable. But again, this problem hardly distinguishes this case from other antitrust cases. Reasoned estimation is required in all antitrust cases, but "while the damages [in such cases] may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." . . . Lack of precision in apportioning damages between direct and indirect purchasers is thus plainly not a convincing reason for denying indirect purchasers an opportunity to prove their injuries and damages. [Text in brackets in original; pp. 759-60.]

[45] In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss. This task may well require expert testimony and complex economic evidence. Whether these tools will be sufficient to meet the burden of proof, in my view, is a factual question to be decided on a case-by-case basis. Indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages.

(c) *Deterrence*

[46] A third argument, which was not raised by Microsoft, but which was discussed in *Illinois Brick* and is particularly relevant to competition actions, is that allowing the offensive use of passing on frustrates the enforcement of competition laws, thus reducing deterrence. While enforcement of competition laws is generally a question for the government, private individuals are engaged in the enforcement by way of s. 36 which gives them a right of recovery for breaches of Part VI of the *Competition Act*.

[47] The majority in *Illinois Brick* understood *Hanover Shoe* to stand for the proposition that "antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it" (p. 735). The majority in *Illinois Brick* agreed, finding that direct purchasers would be in the best position to bring an action because the "massive evidence and complicated theories" that are characteristic of indirect purchaser actions impose an unacceptable burden on those plaintiffs, making success of such actions unlikely and thereby defeating the deterrence objectives of antitrust laws (p. 741).

[48] In my opinion, allowing the offensive use of passing on should not frustrate the deterrence objectives of Canadian competition laws. I agree with Brennan J., dissenting in *Illinois Brick*, that the offensive use of passing on, unlike the passing-on defence, creates little danger that the overcharger will escape liability and frustrate deterrence objectives but, "[r]ather, the same policies of insuring the continued effectiveness of the [antitrust] action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them" (p. 753). The rationale for rejecting the passing-on defence because it frustrates enforcement is not a reason for denying an action to those who have a valid claim against the overcharger.

[49] Further, despite evidence advanced by the respondents in the *Sun-Rype* appeal that direct purchasers are often the parties most likely to take action against the overchargers, there may be some situations where direct purchasers will have been overcharged but will be reticent to bring an action against the offending party for fear of jeopardizing a valuable business relationship. In this case, it is alleged that Microsoft's direct purchasers are parties to the overcharging arrangements and would themselves not be likely plaintiffs. Indirect purchaser actions may, in such circumstances, be the only means by which overcharges are claimed and deterrence is promoted. The rejection of indirect purchaser actions in such cases would increase the possibility that the overcharge would remain in the hands of the wrongdoer. For these reasons, I would be of the view that an absolute bar on indirect purchaser actions, thus leaving any potential action exclusively to direct purchasers, would not necessarily result in more effective deterrence than exclusively direct purchaser actions.

(d) *Restitutionary Principles*

[50] Restitution law is remedial in nature and is concerned with the recovery of gains from wrongdoing (see Maddaugh and McCamus, at pp. 3-1 to 3-3). In my view, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge.

(e) *Departure From the Rule in Illinois Brick in the United States*

[51] Although *Illinois Brick* remains the law at the federal level, it has been made inapplicable at the state level in many states through so-called "repealer statutes" or by judicial decisions. In 2007, the Antitrust Modernization Commission issued a report to Congress indicating that "more than thirty-five states permit indirect, as well as direct, purchasers to sue for damages under state law" (*Antitrust Modernization Commission: Report and Recommendations* (2007) (online), at p. 269). It recommended to Congress that the rule in *Illinois Brick* be statutorily repealed at the federal level (p. 270). The validity of the "repealer statutes" came before the U.S. Supreme Court in *California v. ARC America Corp.*, 490 U.S. 93 (1989). That court held that *Illinois Brick* did not preempt the enactment of state antitrust laws, even if they had the effect of repealing the rule in *Illinois Brick*. These developments cast doubt on the "necessary corollary" approach in *Illinois Brick*.

(f) *Doctrinal Commentary*

[52] Doctrinal discussions of indirect purchaser actions are still shaped by the initial exchange that occurred directly following the release of *Illinois Brick*. Shortly after the judgment was issued, American scholars William M. Landes and Richard A. Posner (now a judge of the U.S. Court of Appeals for the Seventh Circuit) published an article defending the rule barring indirect purchaser actions (see "Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*" (1979), 46 *U. Chi. L. Rev*. 602, at pp. 634-35). They

argued that reserving the right to bring an action against overchargers to the direct purchasers alone would best promote the antitrust laws. They wrote that allowing indirect purchasers to bring actions would have little to no effect on the objectives of compensation and deterrence because direct purchasers would be more likely to discover the overcharges in the first place and would be more likely to have the information and resources required to bring a successful antitrust action. They called the direct purchaser a more "efficient enforcer" of antitrust laws, and opined that with indirect purchasers, apportionment of the damages is so costly that it becomes a disincentive to sue and that sharing the right to sue among multiple parties has the effect of making the claims small and of weakening the deterrence effect (pp. 608-9). As to compensation, they argued that even if indirect purchasers had no independent right of action, they were nonetheless compensated by the ability of direct purchasers to bring an action because the benefit accruing to the direct purchaser as a result of an anticipated successful antitrust action against the overcharger would be reflected in the prices charged by the direct purchasers to the indirect purchasers (p. 605).

[53] Shortly after the publication of Posner and Landes's article, two other antitrust authorities, Robert G. Harris and Lawrence A. Sullivan, expressed an opposing viewpoint (see "Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis" (1979), 128 *U. Pa. L. Rev*. 269, at pp. 351-52). Harris and Sullivan argued that direct purchasers would be reluctant to disrupt valued supplier relationships and would thus be more likely to pass on the overcharge to their own customers. They would not therefore serve as efficient enforcers of the antitrust laws

and, rather, it would be more suitable to vest standing in the indirect purchasers in order to best achieve deterrence.

[54] Posner and Landes published a direct response to Harris and Sullivan the next year (see "The Economics of Passing On: A Reply to Harris and Sullivan" (1980), 128 *U. Pa. L. Rev*. 1274). In response to Harris and Sullivan's argument that direct purchasers would be reticent to sue so as not to compromise valuable commercial relationships, they stated that "any forbearance by the direct purchaser to sue will be compensated. The supplier must pay something to bind the direct purchaser to him and this payment is, functionally, a form of antitrust damages" (p. 1278). In other words, the direct purchaser is receiving a financial inducement to be a part of the conspiracy and this benefit could be passed along to the indirect purchasers.

[55] In the years since the exchange between Posner and Landes and Harris and Sullivan, the literature has reflected an ongoing debate on the issue of indirect purchaser actions and specifically the rule in *Illinois Brick*. A survey of the literature reveals that most recently, however, there is a significant body of academic authority in favour of repealing the decision in *Illinois Brick* in order to best serve the objectives of the antitrust laws.

[56] Some authors, including Gregory J. Werden and Marius Schwartz, joined Harris and Sullivan in their critique of Posner and Landes, stating specifically that the notion that indirect purchasers would see any of the benefits accruing to a direct

purchaser as the result of an anticipated recovery was "quite implausible" ("*Illinois Brick* and the Deterrence of Antitrust Violations — An Economic Analysis" (1984), 35 *Hastings L.J.* 629, at p. 638-39).

[57] The theory that direct purchasers may be unwilling to sue for fear of disrupting an important supplier relationship has also found favour among academics (see e.g. K. J. O'Connor, "Is the *Illinois Brick* Wall Crumbling?" (2001), 15:3 *Antitrust* 34, at p. 38 (noting that indirect purchasers are perhaps more likely to sue than are direct purchasers because they do not risk severing a "direct business relationship with the alleged violator"); A. Thimmesch, "Beyond Treble Damages: *Hanover Shoe* and Direct Purchaser Suits After *Comes v. Microsoft Corp.*" (2005), 90 *Iowa L. Rev.* 1649, at p. 1668 and fn. 127 (stating that in many situations the direct purchaser is in fact dependent upon the supplier and as such would be reticent to sue)). As recently as 2012, the same opinion has been expressed: "This is especially true if direct purchasers are able to pass on any overcharges that result from antitrust violations to consumers. . . . [T]he Supreme Court [of the United States]'s all-or-nothing 'Indirect Purchaser Rule' sweeps too broadly" (J. M. Glover, "The Structural Role of Private Enforcement Mechanisms in Public Law" (2012), 53 *Wm. & Mary L. Rev.* 1137, at p. 1187).

[58] As to the objective of compensation, several authors have commented that the rule in *Illinois Brick* in fact runs contrary to the goal of compensation, with one author calling it "[t]he most far-reaching deviation from the compensatory

rationale" (C. C. Van Cott, "Standing at the Fringe: Antitrust Damages and the Fringe Producer" (1983), 35 *Stan. L. Rev*. 763, at p. 775). Likewise, Andrew I. Gavil, an antitrust scholar, has stated that "providing compensation to all victims of unlawful conduct for the harms inflicted by the wrongdoer is a secondary but also essential goal of a comprehensive remedial system, one that *Illinois Brick* disserves in many common circumstances" ("Thinking Outside the *Illinois Brick* Box: A Proposal for Reform" (2009), 76 *Antitrust L.J.* 167, at p. 170).

[59] As can be seen from this overview, despite initial support from well-reputed antitrust scholars, it cannot be said that the rule in *Illinois Brick* still finds favour in the academic literature.

(4) Conclusion on the Offensive Use of Passing On

[60] Although the passing-on *defence* is unavailable as a matter of restitution law, it does not follow that indirect purchasers should be foreclosed from claiming losses passed on to them. In summary:

(1) The risks of multiple recovery and the concerns of complexity and remoteness are insufficient bases for precluding indirect purchasers from bringing actions against the defendants responsible for overcharges that may have been passed on to them.

(2) The deterrence function of the competition law in Canada is not likely to be impaired by indirect purchaser actions.

(3) While the passing-on defence is contrary to basic restitutionary principles, those same principles are promoted by allowing passing on to be used offensively.

(4) Although the rule in *Illinois Brick* remains good law at the federal level in the United States, its subsequent repeal at the state level in many jurisdictions and the report to Congress recommending its reversal demonstrate that its rationale is under question.

(5) Despite some initial support, the recent doctrinal commentary favours overturning the rule in *Illinois Brick*.

For these reasons, I would not agree with Microsoft's argument that this Court's rejection of the passing-on defence in previous cases and affirmed here precludes indirect purchaser actions.

B. *Certification of the Class Action*

[61] Having answered the threshold question and determined that indirect purchasers may use passing on offensively to bring an action, I turn to the question of whether the present action should be certified as a class action. Because the majority of the BCCA disposed of the appeal based on its finding that indirect purchaser

actions were not available in Canada, it did not consider the certification requirements dealt with by Tysoe J. (causes of action under s. 4(1)(a) of the *CPA*) and Myers J. (balance of the certification requirements under s. 4(1)(b) to (e) of the *CPA*). It therefore remains for this Court to review the certification analysis carried out by the two applications judges. Microsoft contests their findings as to only three of the certification requirements: (1) whether the pleadings disclose a cause of action; (2) whether the claims raise common issues; and (3) whether a class action is the preferable procedure.

(1) The Requirements for Certification Under the British Columbia *Class Proceedings Act*

[62] Section 4(1) of the *CPA* provides:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

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

[63] The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 ("*Alberta Elders*"), this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. That is, 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 Elders*, at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

[64] Pro-Sys has alleged causes of action (1) under s. 36 of the *Competition Act*, (2) in tort for conspiracy and intentional interference with economic interests, and (3) in restitution for unjust enrichment, constructive trust and waiver of tort. For the reasons that follow, I would agree with Tysoe J. that the pleadings disclose causes of action that should not be struck out at this stage of the proceedings.

(a) *Section 36 of the Competition Act*

[65] Under s. 36 of the *Competition Act*, any person who has suffered loss or damage as a result of conduct engaged in by any person contrary to Part VI of the Act may sue for and recover that loss or damage. Section 36 provides:

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

[66] Part VI of the *Competition Act* is entitled "Offences in Relation to Competition". The Part VI offences alleged in this appeal are (1) conspiracy, contrary to s. 45(1), and (2) false or misleading representations, contrary to s. 52(1). At the time of the hearing before Tysoe J., those provisions read as follows:

> **45**. (1) [Conspiracy] 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.
>
> **52.** (1) [False or misleading representations] 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.

[67] The bulk of Microsoft's objections to the cause of action under s. 36 of the *Competition Act* are tied to the theory that offensive passing on is not permitted. In view of my earlier finding that indirect purchaser actions are permitted, those arguments are no longer of consequence in this appeal.

[68] However, Microsoft also argues that the s. 36 cause of action is not properly pleaded before this Court because it was not included in Pro-Sys's statement of claim. It argues that any attempt to add it now would be barred by the two-year limitation period contained in s. 36(4) of the Act. However, Donald J.A., dissenting in the BCCA, found Microsoft's contention to be a purely technical objection, and not one that would form a basis to dismiss the claim. I would agree. The Third Further Amended Statement of Claim alleges that the unlawful conduct was continuing, a fact that must be accepted as being true for the purposes of this appeal. As a result, it cannot be said that the action was not filed in a timely manner.

[69] Moreover, the Third Further Amended Statement of Claim states specifically that "[t]he plaintiffs plead and rely upon . . . . Part VI of the *Competition Act*" (para. 109, A.R., vol. II, at p. 48) and seeks damages accordingly. Although the Third Further Amended Statement of Claim does not expressly refer to s. 36, recovery for breaches under Part VI of the *Competition Act* may only be sought by private individuals through a claim under s. 36. I agree with Donald J.A. that "the parties put their minds to s. 36 at the certification hearing and so no surprise or prejudice can be complained of" (BCCA, at para. 59). For these reasons, I would not accede to Microsoft's argument that the claim should be barred by the limitation provision of the *Competition Act*.

[70] Microsoft made other brief arguments objecting to the cause of action under s. 36. Before Tysoe J., it argued that the Competition Tribunal should have jurisdiction over the enforcement of the competition law. I agree that a number of provisions of the *Competition Act* assign jurisdiction to the Competition Tribunal rather than the courts. However, that is not the case with s. 36, which expressly provides that any person who suffered loss by virtue of a breach of Part VI of the Act may seek to recover that loss. The section expressly confers jurisdiction on the court to entertain such claims.

[71] For all these reasons, it is not plain and obvious that a claim under s. 36 of the *Competition Act* would be unsuccessful. For the purposes of s. 4(1)(a) of the

CPA, it cannot be said that the pleadings do not disclose a cause of action under s. 36 of the *Competition Act*.

(b) *Tort*

[72] Pro-Sys alleges that Microsoft combined with various parties to commit the economic torts of conspiracy (both predominant purpose conspiracy and unlawful means conspiracy) and unlawful interference with economic interests. A conspiracy arises when two or more parties agree "to do an unlawful act, or to do a lawful act by unlawful means" (*Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306, at p. 317). Despite the fact that the tort of conspiracy traces its origins "to the Middle Ages, [it] is not now a well-settled tort in terms of its current utility or the scope of the remedy it affords" (*Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565, 205 B.C.A.C. 54, at para. 42).

[73] Nonetheless, in Canada, two types of actionable conspiracy remain available under tort law: predominant purpose conspiracy and unlawful means conspiracy. I first address the arguments related to predominant purpose conspiracy. I then turn to unlawful means conspiracy and unlawful interference with economic interests and deal with them together, as the arguments against these causes of action relate to the "unlawful means" requirement common to both torts.

(i) Predominant Purpose Conspiracy

[74] Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful (*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-72).

[75] It is worth noting that in *Cement LaFarge*, Estey J. wrote that predominant purpose conspiracy is a "commercial anachronism" and that the approach to this tort should be to restrict its application:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho*, *supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise. [p. 473]

Notwithstanding these observations, whether predominant purpose conspiracy should be restricted so as not to apply to the facts of this case is not a matter that should be determined on an application to strike pleadings.

[76] At para. 91 of its Third Further Amended Statement of Claim, in a section discussing both predominant purpose and unlawful means conspiracy, Pro-Sys states

that "[t]he defendants were motivated to conspire" and then lists the defendants' three "predominant purposes and predominant concerns": (1) to harm the plaintiffs by requiring them to purchase Microsoft products rather than competitors' products; (2) to harm the plaintiffs by requiring them to pay artificially high prices; and (3) to unlawfully increase their profits (A.R., vol. II, at p. 43).

[77] Microsoft argues that the tort of predominant purpose conspiracy is not made out because Pro-Sys's statement of claim fails to identify one true predominant purpose and instead lists several "overlapping purpose[s]" (R.F., at para. 93). Microsoft submits that by pleading that it was "motivated solely by economic considerations" (R.F., at para. 94), Pro-Sys in effect concedes that the predominant purpose of Microsoft's alleged conduct could not have been to cause injury to the plaintiff as required under the law.

[78] There is disagreement between the parties as to what the pleadings mean. Microsoft says that Pro-Sys failed to identify injury to the plaintiffs as the one true predominant purpose. Pro-Sys argues that its pleadings state that Microsoft acted with the predominant purpose of injuring the class members which resulted in, among other things, increased profits. While the pleadings could have been drafted with a more precise focus, I would hesitate on a pleadings application to rule definitively that the predominant purpose conspiracy pleading is so flawed that no cause of action is disclosed. At this stage, I cannot rule out Pro-Sys's explanation that Microsoft's primary intent was to injure the plaintiffs and that unlawfully increasing its profits

was a result of that intention. For this reason, I cannot say it is plain and obvious that Pro-Sys's claim in predominant purpose conspiracy cannot succeed.

[79] Microsoft also argues that this claim should be struck to the extent it applies as between corporate affiliates because "[p]arent and wholly-owned subsidiary corporations always act in combination" (R.F., at para. 95). Pro-Sys says that "[t]his is not true as a matter of law" (appellants response factum, at para. 55). Both parties cite, among other cases, para. 19 of *Smith v. National Money Mart Co.* (2006), 80 O.R. (3d) 81 (C.A.), leave to appeal refused, [2006] 1 S.C.R. xii, which says that "there can be a conspiracy between a parent and a subsidiary corporation". In my view, this statement appears to leave open a cause of action in predominant purpose conspiracy even when the conspiracy is between affiliated corporations. Again, it would not be appropriate on a pleadings application to make a definitive ruling on this issue. In the circumstances, I cannot say it is plain and obvious that the predominant purpose conspiracy claim as it applies to an alleged conspiracy between a parent corporation and its subsidiaries should be struck at this phase of the proceedings.

(ii) Unlawful Means Conspiracy and Intentional Interference With Economic Interests

[80] The second type of conspiracy, called "unlawful means conspiracy", requires no predominant purpose but requires that the unlawful conduct in question be directed toward the plaintiff, that the defendant should know that injury to the

plaintiff is likely to result, and that the injury to the plaintiff does in fact occur (*Cement LaFarge,* at pp. 471-72).

[81] The tort of intentional interference with economic interests aims to provide a remedy to victims of intentional commercial wrongdoing (*Correia v. Canac Kitchens,* 2008 ONCA 506, 91 O.R. (3d) 353, at para. 98; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1). The three essential elements of this tort are (1) the defendant intended to injure the plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the plaintiff suffered economic loss or harm as a result (see P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 336).

[82] Microsoft argues that the claims for unlawful means conspiracy and intentional interference with economic interests should be struck because their common element requiring the use of "unlawful means" cannot be established.

[83] These alleged causes of action must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v. Suffice it to say that at this point it is not plain and obvious that there is no cause of action in unlawful means conspiracy or in intentional interference with economic interests. I would therefore not strike these claims. Depending on the decision of this Court in *Bram*, it will be open to Microsoft to raise the matter in the BCSC should it consider it advisable to do so.

(c) *Restitution*

[84] Pro-Sys makes restitutionary claims alleging causes of action in unjust enrichment, constructive trust and waiver of tort.

(i) Unjust Enrichment

[85] The well-known elements required to establish an unjust enrichment are (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason (such as a contract) for the enrichment (see *Alberta Elders*, at para. 82; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455; *Pettkus v. Becker*, [1980] 2 S.C.R. 834). Pro-Sys says that Microsoft was unjustly enriched by the overcharge to its direct purchasers that was passed through the chain of distribution to the class members.

[86] Microsoft argues that any enrichment it received came from the direct purchasers, and not from the class members, and that this lack of a direct connection between it and the class members forecloses the claim of unjust enrichment. Additionally, it says that the contracts between Microsoft and the direct purchasers and the contracts between the direct purchasers and the indirect purchasers (the existence of which are undisputed) constitute a juristic reason for the enrichment.

[87] In support of its first argument, Microsoft cites *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762. In *Peel*, McLachlin J. (as she then was) held, at p. 797, 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". A claim in unjust enrichment must be based on "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 . . . , and again from the person who reaped an incidental benefit" (*Peel*, at p. 797). The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent that the benefit to Microsoft is an "incidental blow-by" or "collateral benefit". Second, Pro-Sys relies on *Alberta Elders*, which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.

[88] With regard to Microsoft's juristic reason justification, Pro-Sys pleads that these contracts are "illegal and void" because they constitute a restraint of trade at common law, they violate U.S. antitrust law, they are prohibited by Microsoft's own corporate policies and they violate Part VI of the *Competition Act*. It submits that

the contracts cannot therefore constitute a juristic reason for the enrichment. The question of whether the contracts are illegal and void should not be resolved at this stage of the proceedings. These are question that must be left to the trial judge.

[89] I am thus unable to find that it is plain and obvious that the claim in unjust enrichment cannot succeed.

(ii) Constructive Trust

[90] As a remedy for the alleged unjust enrichment, Pro-Sys submits that an amount equal to the overcharge from the sales of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members. In other words, Pro-Sys is asking that Microsoft be constituted a constructive trustee in favour of Pro-Sys.

[91] *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, is the relevant controlling authority on constructive trusts. In *Kerr*, Justice Cromwell explains that in order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property:

> . . . the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the

> property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). [para. 50]

[92] In the present case, there is no referential property; Pro-Sys makes a purely monetary claim. Constructive trusts are designed to "determine beneficial entitlement to property" when "a monetary award is inappropriate or insufficient" (*Kerr*, at para. 50). As Pro-Sys's claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that Pro-Sys's claim that an amount equal to the overcharge from the sale of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members cannot succeed. The pleadings based on constructive trust must be struck.

(iii) Waiver of Tort

[93] As an alternative to the causes of action in tort, Pro-Sys waives the tort and seeks to recover the unjust enrichment accruing to Microsoft. Waiver of tort occurs when the plaintiff gives up the right to sue in tort and elects instead to base its claim in restitution, "thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct" (Maddaugh and McCamus, at p. 24-1). Causes of action in tort and restitution are not mutually exclusive, but rather provide alternative remedies that may be pursued concurrently (*United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), at p. 18). Waiver of tort is based on the theory that "in

certain situations, where a tort has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages" (Maddaugh and McCamus, at pp. 24-1 and 24-2). An action in waiver of tort is considered by some to offer the plaintiff an advantage in that "it may relieve them of the need to prove loss in tort, or in fact at all (Maddaugh and McCamus, at p. 24-4).

[94] Microsoft advances two arguments as to why this claim should be struck. First, it states that Pro-Sys has pleaded waiver of tort as a remedy and not a cause of action, and therefore proof of loss is an essential element. Second, if indeed waiver of tort is pleaded as a cause of action, the underlying tort must therefore be established, including the element of loss. In my view, neither argument provides a sufficient basis upon which to find that a claim in waiver of tort would plainly and obviously be unsuccessful.

[95] In *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (S.C.J. (Div. Ct.)), Epstein J. (as she then was) performed an extensive review of the doctrine of waiver of tort. Her analysis found numerous authorities accepting the viability of waiver of tort as its own cause of action intended to disgorge a defendant's unjust enrichment gained through wrongdoing, as opposed to merely a remedy for unjust enrichment. These authorities differed, however, as to the question of whether the underlying tort needed to be established in order to sustain the action in waiver of tort.

[96] The U.S. and U.K. jurisprudence as well as the academic texts on the subject have largely rejected the requirement that the underlying tort must be established in order for a claim in waiver of tort to succeed (see *Serhan*, at paras. 51-68, citing Maddaugh and McCamus at p. 24-20 of 2005 update; J. Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (1991); D. Friedmann, "Restitution for Wrongs: The Basis of Liability", in W. R. Cornish, et al., eds., *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998), 133; *National Trust Co. v. Gleason*, 77 N.Y. 400 (1879); *Federal Sugar Refining Co. v. United States Sugar Equalization Board, Inc.*, 268 F. 575 (S.D.N.Y. 1920); *Mahesan v. Malaysia Government Officers' Co-operative Housing Society Ltd.*, [1979] A.C. 374 (P.C.); *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation*, [1983] A.C. 366 (H.L.)). Another line of cases would find a cause of action in waiver of tort to be unavailable unless it can be established that the defendant has committed the underlying tort giving rise to the cause of action (see *United Australia*, at p. 18; *Zidaric v. Toshiba of Canada Ltd.* (2000), 5 C.C.L.T. (3d) 61 (Ont. S.C.J.), at para. 14; *Reid v. Ford Motor Co.*, 2006 BCSC 712 (CanLII)). At least one of these cases (*Reid*) suggests that a reluctance to eliminate the requirement of proving loss as an element of the cause of action is part of the reason for requiring the establishment of the underlying tort (para. 17).

[97] Epstein J. ultimately concluded that, given this contradictory law, "[c]learly, it cannot be said that an action based on waiver of tort is sure to fail" and that the questions "about the consequences of identifying waiver of tort as an

independent cause of action in circumstances such as exist here, involv[e] matters of policy that should not be determined at the pleadings stage" (*Serhan*, at para. 68). I agree. In my view, this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.

(3) The Remaining Certification Requirements

[98] The causes of action under s. 36 of the *Competition Act*, in tort and in restitution (except for constructive trust) have met the first certification requirement that the pleadings disclose a cause of action. I now turn to Microsoft's argument that the claims should nevertheless be rejected because they do not meet two of the remaining certification requirements: that the claims of the class members raise common issues and that a class action is the preferable procedure in this case.

(a) *Standard of Proof*

[99] The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted,

however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*") at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50).

[100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).

[101] Microsoft, while accepting the "some basis in fact" standard, argues that "in order for the Plaintiffs to meet the standard of proof, the evidence must establish that the proposed class action raises common issues and is the preferable procedure *on a balance of probabilities*" (R.F., at para. 41 (emphasis in original)). Microsoft relies on the academic writings of Justice Cullity of the Ontario Superior Court of Justice. Cullity J. expressed the view that "[t]o the extent that some basis in fact reflects a concern that certification motions are procedural and should not be concerned with the merits of the claims asserted, there seems no justification for

applying the lesser standard to essential preconditions for certification that will not be within the jurisdiction of the court at trial" ("Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 422). In other words, Cullity J. suggests that because certification requirements are procedural, they will not be revisited at a trial of the common issues. As such, there is no reason to assess them on a standard lower than the traditional civil standard of "balance of probabilities". Microsoft further submits that this Court should endorse the American approach of making factual determinations at the certification stage on a preponderance of the evidence and should require certification judges to weigh the evidence so as to resolve all factual or legal disputes at certification, even if those disputes overlap with the merits (see R.F., at para. 42, citing *In re: Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2008), at p. 307, and para. 43).

[102] I cannot agree with Microsoft's submissions on this issue. Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v.*

Atofina Chemicals Inc. (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).

[103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[105] Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the

success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

(b) *Do the Claims of the Class Members Raise Common Issues?*

[106] The commonality requirement has been described as "[t]he central notion of a class proceeding" (M. A. Eizenga, et al., *Class Actions Law and Practice* (loose-leaf), at p. 3-34.6). It is based on the notion that "individuals who have litigation concerns 'in common' ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings" (*Ibid.*).

[107] Section 4(1)(c) of the *CPA* states that the court must certify an action as a class proceeding if, among other requirements, "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members". Section 1 of the *CPA* defines "common issues" as "(a) common but not necessarily identical issues of fact, or (b) common but not

necessarily identical issues of law that arise from common but not necessarily identical facts".

[108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

(1) The commonality question should be approached purposively.

(2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

(3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

(5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[109] Microsoft argues that the differences among the proposed class members are too great to satisfy the common issues requirement. It argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these acts occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues.

[110] The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[111] Myers J. concluded that the claims raised common issues. I agree that their resolution is indeed necessary to the resolution of the claims of each class member. Their resolution would appear to advance the claims of the entire class and

to answer them commonly will avoid duplication in legal and factual analysis. Those findings are entitled to deference from an appellate court.

[112] The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, "[i]f material differences emerge, the court can deal with them when the time comes" (*Dutton*, at para. 54).

[113] In addition to the common issues relating to scope and existence of the causes of action pleaded, the remaining common issues certified by Myers J. relate to the alleged loss suffered by the class members and as to whether damages can be calculated on an aggregate basis. The loss-related common issues, that is to say the proposed common issues that ask whether loss to the class members can be established on a class-wide basis, require the use of expert evidence in order for commonality to be established. The standard upon which that evidence should be assessed is contested and I turn to it first below. A question was also raised regarding whether the aggregate damages provision can be used to establish liability. I also address this below.

(i) Expert Evidence in Indirect Purchaser Class Actions

[114] One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to

determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.

[115] The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.

[116] The most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis. The BCCA in

Infineon called for the plaintiff to show "only a credible or plausible methodology" and held that "[i]t was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases" (para. 68). This was the standard adopted by Myers J. in the present case. Under this standard, he found the plaintiffs' methodologies to be adequate to satisfy the commonality requirement.

[117] Microsoft submits that the "credible or plausible methodology" standard adopted by Myers J. was too permissive and allowed for a claim to be founded on insufficient evidence. It argues that under s. 5(4) of the *CPA*, the parties are required to file affidavits containing all material facts upon which they intend to rely, and as such Myers J. was under an obligation to weigh the evidence of both parties where a conflict arises. Microsoft alleges that despite this requirement, Myers J. failed to weigh Pro-Sys's expert evidence against Microsoft's expert evidence, merely concluding that Pro-Sys's expert evidence was "not implausible" and that assessing competing evidence was "not something that can and should be done in a certification application" (R.F., at para. 43, citing reasons of Myers J., at para. 144). Microsoft argues that this approach was in error and is inconsistent with the standard required at certification. Once again relying on U.S. case law, Microsoft urges this Court to weigh conflicting expert testimony at certification and to perform this review in a "robust" and "rigorous" manner (R.F., at paras. 45-48, citing *Hydrogen Peroxide*, at p. 323, and *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), at p. 2551).

[118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[119] To hold the methodology to the robust or rigorous standard suggested by Microsoft, for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage. In Canada, unlike the U.S., pre-certification discovery does not occur as a matter of right. Although document production may be ordered at the discretion of the applications judge, Microsoft objected and Myers J. acceded to Microsoft's position and refused to order it in this case (2007 BCSC 1663, 76 B.C.L.R. (4th) 171). Microsoft can hardly argue for rigorous and robust scrutiny when it objected to pre-certification discovery and was successful before the applications judge.

[120] Here, the Pro-Sys expert evidence consists of methodologies proposed by two economists, Professor James Brander and Dr. Janet Netz. Professor Brander's affidavit identified him as the Asia-Pacific Professor of International Business in the

Sauder School of Business at the University of British Columbia and senior consultant in the Delta Economics Group. Dr. Netz's affidavit described her as an economist, a founding partner of ApplEcon LLC, an economics consulting firm based in Ann Arbor, Michigan, a tenured Associate Professor of Economics at Purdue University and a Visiting Associate Professor at the University of Michigan. Dr. Netz acted as expert witness in several similar cases brought against Microsoft in the United States. Dr. Netz's testimony drew heavily from the evidence she had prepared in her role as expert in those U.S. cases.

[121] It is Dr. Netz's evidence that the same methodology that applied in the U.S. would apply equally to the case at bar. She testified that the methodologies can demonstrate the initial overcharges by Microsoft to its direct purchasers as well as the pass-through to the indirect purchasers. Dr. Netz outlines three alternative methods by which harm and damages can be calculated. The first two methods, called the "rate of return method" and the "profit margin method", identify the overcharge at the first level of the distribution chain — that is, the overcharge in the sales made directly by Microsoft to its own customers. The first two models do not on their own establish that the overcharge was passed on but are intended to prove the total amount received by Microsoft as a result of the overcharge. The third methodology, the "price premium method", begins the analysis at the other end of the distribution chain, at the ultimate-purchaser level.

[122] Dr. Netz describes the price premium method as follows:

> Under this method, one calculates the *retail* price premium that Microsoft products have relative to competing products for the products at issue and for a set of benchmark products where there have not been allegations of anticompetitive conduct. The overcharge equals the percentage decrease in the *retail* price of the products at issue such that Microsoft would still realize the same *retail* price premium as it does on the benchmark products (i.e., products in markets not affected by Microsoft's unlawful conduct). [2010 BCSC 285, at para. 26]

[123] Once the retail price overcharge is calculated, the total class member expenditure on the products should then be multiplied by the overcharge percentage in order to arrive at the quantum of damages.

[124] Dr. Netz testified that regression analysis could be employed to ascertain the extent of passing on in order to establish loss at the indirect-purchaser level. Relying on the successful application of the methods in the U.S., Dr. Netz testified that "[t]here is no theoretical reason, in my opinion, why the methods described above cannot be applied to the sales of Microsoft software in Canada" (Netz affidavit, at para. 49 (A.R., vol. II, at p. 177)). Implicit in this evidence is that the data necessary to apply the methodologies in Canada is available.

[125] Myers J. dealt with Microsoft's criticisms of Dr. Netz's testimony at paras. 131-64 of his reasons. Microsoft's criticisms pertained to her alleged failure to take Canadian context into account, the lack of an evidentiary basis for her findings, alleged flaws in the benchmark products she selected, and a lack of workability in her proposed methodology. Myers J. found that despite these criticisms, Dr. Netz had

demonstrated a plausible methodology for proving class-wide loss. He therefore did not proceed to address Professor Brander's proposed methods (para. 164).

[126] It is indeed possible that at trial the expert evidence presented by Microsoft will prove to be stronger and more credible than the evidence of Dr. Netz and Professor Brander. However, resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification (see *Infineon*, at para. 68; *Irving*, at para. 143). The trial judge will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology. For the purposes of certification and having regard to the deference due the applications judge on this issue, I would not interfere with the findings of Myers J. as to the commonality of the loss-related issues.

(ii) Aggregate Assessment of Damages

[127] The issue raised here is whether the question of aggregate assessment of damages is properly certified as a common issue. The aggregate damages provisions in the *CPA* provide for the quantification of the monetary award on a class-wide basis. Sections 29(1) and 29(2) of the *CPA* are relevant:

> **29** (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(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.

(2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

(a) submissions that contest the merits or amount of an award under that subsection, and

(b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[128] In this case, the common issues that were certified are whether damages can be determined on an aggregate basis and if so, in what amount. For the reasons below, I would not disturb the applications judge's decision to certify these common issues. However, while the aggregate damages common issues certified by Myers J. deal only with the assessment of damages and not proof of loss, there is some confusion in his reasons about whether the aggregate damages provisions of the *CPA* may be relied on to establish proof of loss where proof of loss is an essential element of proving liability. That question has been resolved differently by various courts in Ontario and British Columbia, where the aggregate damages provisions are sufficiently similar to allow comparison.

[129] In this case, Myers J. concluded that the aggregate damages provisions can be used to establish what I interpret to be the proof of loss element of proving

liability. He stated that: ". . . the aggregate damages section of the *Class Proceedings Act* allow the harm to be shown in the aggregate to the class as a whole" (para. 126), and also that "the Court of Appeal must be taken to have accepted that for certification of the damage claims, a method of showing harm to all class members need not be demonstrated and, further, that the aggregate damages sections can be used to establish liability" (BCSC, at para. 125).

[130] In finding that the aggregate damages provisions of the *CPA* can be used to establish proof of loss to the class as a whole, Myers J. followed a line of jurisprudence of the British Columbia Court of Appeal. This reasoning appears in *Infineon:*

> In *Knight*, this Court affirmed the certification of an aggregate monetary award under the *CPA* as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct without an antecedent liability finding — rather, the aggregate assessment would establish concurrently both that the defendant benefited from its wrongful conduct and the extent of the benefit. [para. 39]

(see also *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 329 D.L.R. (4th) 389, at paras. 50-52).

[131] With respect, I do not agree with this reasoning. The aggregate damages provisions of the *CPA* relate to remedy and are procedural. They cannot be used to establish liability (*2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.*, 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that

no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the *CPA*. This includes, where required by the cause of action such as in a claim under s. 36 of the *Competition Act*, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability.

[132] I agree with Feldman J.A.'s holding in *Chadha* that aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage" (para. 49). I also agree with Masuhara J. of the BCSC in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "that question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575 (CanLII), at para. 176). Furthermore, I agree with the Ontario Court of Appeal in *Quizno's*, that "[t]he majority clearly recognized that s. 24 [of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6] is procedural and cannot be used in proving liability" (para. 55).

[133] This reasoning reflects the intention of the Attorney General of British Columbia. When he introduced the *CPA* in the British Columbia legislature, he stated that the goal of the legislation was to allow individuals who have similar claims to

come together and pursue those individual claims collectively: "In simple terms, all we are doing here is finding a way to enable the access that individuals have to the court to be an access that individuals combining together can have to the court" (Hon. C. Gabelmann, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, 15078). The *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.

[134] The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge. Further, the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found.

[135] However, as stated above, the determination that the aggregate damages provisions cannot be used to establish proof of loss does not affect Myers J.'s decision to certify aggregate damages as a common issue. Despite his erroneous finding that aggregate damages provisions may be invoked to establish liability, he stated that invoking these provisions for that purpose was not necessary in this case

(see paras. 119-20 and 127). The aggregate damages questions he certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount. Having not actually relied on the proposition that aggregate damages provisions can be used to determine liability, Myers J.'s decision to certify questions related to aggregate damages should not be disturbed.

(c) *Is a Class Action the Preferable Procedure?*

[136] The provision of the *CPA* relevant to the preferable procedure requirement is s. 4(2). It reads:

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

[137] In *Hollick*, this Court said that preferability must be examined in reference to the three principal aims of the class action regime: ". . . judicial economy, access to justice, and behaviour modification" (para. 27).

[138] Microsoft argues that the lack of commonality between the class members and the abundance of individual issues signifies that a class proceeding will not be a "fair, efficient and manageable method of advancing the claim" as required by *Hollick* (R.F., at para. 84, citing *Hollick*, at para. 28). It argues that the access to justice function of class actions will not be served by certifying the action because it will inevitably break down into numerous individual trials, subjecting the class members to delays. It also argues that the tendency of indirect purchaser action to result in *cy-près* awards — made where it would be impractical to distribute the award to the individual plaintiffs — further frustrates the access to justice aim. As to the objective of behaviour modification, Microsoft contends that it is more properly a concern for the Competition Commissioner and that the procedures that can be initiated by that body are the preferable forum in which to deal with the wrongs alleged in this case.

[139] I am unable to accept these arguments. In *Hollick*, McLachlin C.J. was of the view that the plaintiff had not satisfied the certification requirements on the grounds that a class proceeding was not the preferable procedure. In that case, she found that the question of whether or not the defendant had unlawfully emitted methane gas and other pollutants was common to all class members. However, as to

whether loss could be established on a class-wide basis, she found too many differences among the class members to consider loss a common issue. In other words, while she found that there was a common issue related to the existence of the cause of action, she did not consider the loss-related issues to be common to all the class members. She dismissed the class action on the basis that "[o]nce the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action" (*Hollick*, at para. 32).

[140] In the present case, there are common issues related to the existence of the causes of action, but there are also common issues related to loss to the class members. Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of Myers J. that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. I would agree. In the circumstances, I would not interfere with his finding that the class action is the preferable procedure.

[141] It is also premature to assume that the award in this case will result in *cy-près* distribution or that the objective of access to justice will be frustrated on this account. Further, while under the *Competition Act* the Competition Commissioner is the primary organ responsible for deterrence and behaviour modification, the Competition Bureau in this case has said that it will not be pursuing any action against Microsoft. Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives.

(4) Conclusion on the Certification of the Action

[142] I would restore the orders of the applications judges allowing for certification of this action as a class proceeding with the exception that the pleadings based on constructive trust be struck.

V. CONCLUSION

[143] For the above reasons, I would allow the appeal with costs throughout.

APPENDIX: Common Issues Certified by Myers J.

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

(a) Did the Defendants, or either of them, engage in conduct which is contrary to s. 45 and or s. 52 of the *Competition Act*?

(b) Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount?

(c) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Conspiracy

(d) Did the Defendants, or either them, conspire to harm the Class Members?

(e) Did the Defendants, or either of them, act in furtherance of the conspiracy?

(f) Was the predominant purpose of the conspiracy to harm the Class Members?

(g) Did the conspiracy involve unlawful acts?

(h) Did the Defendants, or either of them, know that the conspiracy would likely cause injury to the Class Members?

(i) Did the Class Members suffer economic loss?

(j) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?

(k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Tortious Interference with Economic Interests

(l) Did the Defendants, or either of them, intend to injure the Class Members?

(m) Did the Defendants, or either of them, interfere with the economic interests of the Class Members by unlawful or illegal means?

(n) Did the Class Members suffer economic loss as a result of the Defendants' interference?

(o) What damages, if any, are payable by the Defendants, or either of them, to the Class Members?

(p) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unjust Enrichment, Waiver of Tort and Constructive Trust

(q) Have the Defendants, or either of them, been unjustly enriched by the receipt of an Overcharge? "Overcharge" means the difference between the prices the Defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the Defendants would have been able to charge in the absence of their wrongdoing.

(r) Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge?

(s) Is there a juridical reason why the Defendants, or either of them, should be entitled to retain the Overcharge?

(t) What restitution, if any, is payable by the Defendants, or either of them, to the Class Members based on unjust enrichment?

(u) Should the Defendants, or either of them, be constituted as constructive trustees in favour of the Class Members for the Overcharge?

(v) What is the quantum of the Overcharge, if any, that the Defendants, or either of them, hold in trust for the Class Members?

(w) What restitution, if any, is payable by the Defendants to the Class Members based on the doctrine of waiver of tort?

(x) Are the Defendants, or either of them, liable to account to the Class Members for the wrongful profits, if any, that they obtained on the sale of Microsoft Operating Systems or

Microsoft Applications Software to the Class Members based on the doctrine of waiver of tort?

(y) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

Punitive Damages

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

Interest

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

Distribution of Damages and/or Trust Funds

(bb) What is the appropriate distribution of damages and/or trust funds and interest to the Class Members and who should pay for the cost of that distribution? [A.R., vol. I, at pp. 167-69.]

Appeal allowed with costs throughout.

Solicitors for the appellants: Camp Fiorante Matthews Mogerman, Vancouver.

Solicitors for the respondents: McCarthy Tétrault, Toronto; Blake, Cassels & Graydon, Vancouver and Toronto.

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