IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fairhurst v. Anglo American PLC,* 2014 BCSC 2270

Date: 20141202
Docket: S071269
Registry: Vancouver

Between:

Michelle Fairhurst

Plaintiff

And

Anglo American PLC, Central Holdings, Limited, S.A., De Beers Canada Inc., DB Investments Inc., De Beers S.A., De Beers Consolidated Mines, Ltd., The Diamond Trading Company Limited, CSO Valuations A.G., and De Beers Centenary A.G.

Defendants

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the plaintiff:	R. Mogerman D. Jones N. Kovak
Counsel for the defendants Anglo American PLC; Counsel for Central Holdings Limited, S.A., SCO Valuations A.G., DB Investments, Inc., De Beers Canada Inc., De Beers Centenary A.G., De Beers Consolidated Mines, Ltd., De Beers S.A. and The Diamond Trading Company Limited:	K. Kay D. Royal S. Hennig
Place and Date of Hearing:	Vancouver, B.C. April 7-9, October 8, 2014
Place and Date of Judgment:	Vancouver, B.C. December 2, 2014

INTRODUCTION

[1] The plaintiff applies to certify a proposed class action.

[2] By way of background, the plaintiff says that the defendants and others conspired to and did fix prices so that she and others in the proposed class paid more for diamonds, to the benefit of the defendants. She seeks damages and punitive damages as well as an order that the defendants disgorge their alleged illegal overcharge.

THE REQUIREMENTS FOR CERTIFICATION

[3] Section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*") provides that the court must certify a proceeding as a class proceeding if the following requirements are met:

a. the pleadings disclose a cause of action;

b. there is an identifiable class of two 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.

[4] I will address each of these elements individually.

Do the Pleadings Disclose a Cause of Action?

[5] The plaintiff will meet the requirements of this subsection unless it is plain and obvious that the claim cannot succeed, assuming all facts pleaded to be true.

[6] The defendants say that the pleadings do not disclose a cause of action and that the pleadings are not properly pleaded, or are not viable in light of recent decisions of the British Columbia Court of Appeal and the Supreme Court of Canada.

[7] The plaintiff advances the following causes of action:

1. Breach of the *Competition Act*, R.S.C. 1985, c. C-34;
2. Civil conspiracy;
3. Unlawful Interference with economic interests, also known as the 'unlawful means' tort; and
4. Unlawful restraint of trade; unjust enrichment.

She also pleads waiver of tort and constructive trust. The claim for constructive trust was abandoned.

1. Breach of the Competition Act

[8] With respect to the *Competition Act* claims, the defendant argues that the *Competition Act* claims are statute barred and are deficiently pleaded. Further, the defendant says that a breach of the *Competition Act* cannot found tort and restitutionary claims. The defendants argue that *Wakelam v. Wyeth Consumer Healthcare*, 2014 BCCA 36, leave to appeal to the S.C.C. refused, [2014] S.C.C.A. No. 125 ("*Wakelam*") is binding authority in this jurisdiction for the following propositions:

(a) the *Competition Act* is an exhaustive code, in that it is intended by Parliament to provide exhaustively for the enforcement of, and the remedies available for, the rights, obligations, and prohibitions that it imposes; and

(b) because the *Competition Act* is an exhaustive code, a breach of the statute cannot serve as the basis for claims in equity for restitution, or

> in tort for damages, for example by supplying the element of a wrong or unlawful means that is a prerequisite for the liability at common law or in equity.

[9] The decisions of the British Columbia Court of Appeal in *Wakelam,* and the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 ("*Microsoft* (SCC)") and *A.I. Enterprises v. Bram*, 2014 SCC 12 ("*Bram*") and this Court in *Watson v. Bank of America Corporation*, 2014 BCSC 532 ("*Watson*") have some apparent inconsistencies.

[10] In *Wakelam* at para. 90, Madam Justice Newbury for the British Columbia Court of Appeal said:

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

[11] In *Watson* at para. 189, Bauman C.J.B.C. said:

> [T]he plaintiff's claims under the *Competition Act* cannot constitute the foundation for other causes of action. It is not open to the plaintiff to plead unjust enrichment or waiver of tort to the extent that those pleadings rely on acts that are only unlawful as a result of the *Competition Act.*
>
> [Emphasis added].

[12] However, in *Microsoft* (SCC), the Supreme Court of Canada certified restitutionary claims predicated on a breach of the *Competition Act.*

[13] In *Bram,* the Supreme Court considered the type of wrong that could found a claim for the tort of unlawful means (i.e., interference with economic interests) and said:

> [45] This rationale of the tort supports a narrow definition of "unlawful means": the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party. Thus, criminal offences and breaches of statute would not be *per se* actionable under the unlawful means tort, but the tort would be available if, under common law principles, those acts also give rise to a civil action by the third party and interfered with the

> plaintiff's economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will be therefore no potential liability under the unlawful means tort. This approach avoids "tortifying" the criminal and regulatory law by imposing civil liability where there would not otherwise be any: see *OBG* [*Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1], at paras. 57 and 266. The two core components of the unlawful means tort are thus that the defendant must use unlawful means, in the narrow sense, and that the defendant must intend to harm the plaintiff through the use of the unlawful means.
>
> [Emphasis added].

[14] Mr. Justice Myers in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1280 ("*Microsoft* (BCSC)") considered these cases and the apparent conflict between them and concluded:

> [58] The essence of the Court's reasoning in dismissing these restitutionary claims [in *Wakelam*] with respect to both the *Business Practices and Consumer Protection Act* and the *Competition Act* was that the statutes formed complete codes.
>
> …
>
> [59] While in [*Wakelam* at para.90] Newbury J.A. did refer to tort claims, as I have said, the use of a breach of the *Competition Act* or the *Business Practices and Consumer Protection Act* as a basis for a tort claim, which depends on unlawful means - whether conspiracy or interference with economic relations - was not before the Court.
>
> [Emphasis added].
>
> [60] If *Wakelam* is interpreted to affect tort claims, it would it be in conflict with the combination of the Supreme Court's ruling in this case and *Bram*, which was decided the day after *Wakelam*. At the Supreme Court of Canada, Microsoft argued that the conspiracy claim (as well as the interference with economic relations claim) should be struck because the plaintiff could not establish the required illegal means. The Supreme Court of Canada held, at para. 83, that was not plain and obvious and declined to strike the claim. As stated earlier, *Bram* did not change the law related to unlawful means conspiracy; in other words, according to the Supreme Court, the "not at liberty to commit" standard for conspiracy survives. That standard is wide enough to encompass breaches of the *Competition Act*, including Part VII. If there is a conflict between *Wakelam* and *Bram*, *Bram* must obviously prevail. *Wakelam* cannot affect the certification of the claim certified by the Supreme Court in this case.
>
> [Emphasis added].
>
> [61] Microsoft points to the fact that in *Watson*, Bauman C.J.B.C. applied *Wakelam* and struck the plaintiff's claims for both restitutionary remedies

> arising out of breaches of the *Competition Act*, and the claims of illegal means conspiracy and interference with economic relations.
>
> [62] That is true; however, Bauman C.J.B.C. noted the conflict between the Supreme Court's decision in this case and *Wakelam*:
>
>> [187] *Wakelam* also appears to contradict the result in *Microsoft*, where the Court ultimately certified tortious and restitutionary claims predicated on a breach of the *Competition Act*. However, the issue was not considered by the Court in *Microsoft* and does not appear to have been raised by the parties to that case. Further, the judgment in *Microsoft* was considered by the Court in *Wakelam*, and it was found supportive (*Wakelam* at paras. 79-80 and 91).
>>
>> [188] Pleadings alleging breaches of the *Competition Act* as the basis for tort and restitutionary claims were also not struck and were permitted to proceed to trial by the Court of Appeal in both [*Pro-Sys Consultants Ltd. v.*] *Infineon* [*Technologies AG*, 2009 BCCA 503] and *Steele v. Toyota Canada Inc.*, 2011 BCCA 98. While these cases were cited by the Court in *Wakelam*, this nuance was not expressly noted.
>>
>> [189] In the end, however, I am left with the Court's clear conclusion in *Wakelam*. Referring to s. 36 of the *Competition Act*, the Court held:
>>
>>> [90] ...I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI. It follows in my view that the certification judge did err in finding that the pleading disclosed a cause of action under the *Competition Act* for which a court might grant restitutionary relief; ...
>>
>> Accordingly, the plaintiff's claims under the *Competition Act* cannot constitute the foundation for other causes of action. It is not open to the plaintiff to plead unjust enrichment or waiver of tort to the extent that those pleadings rely on acts that are only unlawful as a result of the *Competition Act*. As previously discussed, this effect of *Wakelam*, combined with a relevant limitation period and repeal of s. 61 of the *Competition Act*, is fatal to the plaintiff's claim under that section. Similarly, even if the plaintiff's claim in unlawful interference with economic relations was otherwise certifiable, the decision in *Wakelam* would be fatal to it.
>
> [63] It is also of note that the inconsistency between *Bram* and *Wakelam* does not appear to have been argued or considered in *Watson*.
>
> [Emphasis added].

[15] I agree with Mr. Justice Myers. *Wakelam* must be read in light of the issues before the court. Otherwise it cannot be reconciled with the Supreme Court of Canada's decision in *Bram*. (Although the Supreme Court has refused leave to

appeal the *Wakelam* decision, the issues before the court in *Wakelam* were limited. The Supreme Court of Canada has not reversed its decision in *Bram*). The *Watson* decision does not consider the conflict between *Wakelam* and *Bram* on this point. If there is a conflict between *Wakelam* and *Bram,* the decision in *Bram* must prevail. Accordingly, I conclude that the plaintiff`s claims for restitution, to the extent that they are based on breaches of the *Competition Act* are not viable. However, I cannot be satisfied that the tort claims based on these breaches are bound to fail. Moreover, in this case, the breaches of the *Competition Act* are not the only wrongs alleged in the tort and restitutionary claims, and so those claims would be viable in any event.

[16] As to the argument that the claims are out of time or are deficiently pleaded, the defendants' argument that the plaintiff's claims under the *Competition Act* are barred by a limitation period is completely met by *Watson* and *Crosslink v. BASF Canada,* 2014 ONSC 1682 ("*Crosslink*"). Those cases concluded that identical limitation arguments were premature:

> Limitations problems like this are so bound up in the facts that they must be left to a later stage of the process.
>
> (*Watson* at para. 119, citing Donald J.A. in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186 at para. 61, dissenting on a different issue).

[17] With respect to the s. 61 claim, in *Watson* the claim was filed more than two years after s. 61 of the *Competition Act* was repealed in 2009. Here, the action was commenced in 2007 when s. 61 was still in force. Therefore, the plaintiff argues that the s. 61 claim discloses a cause of action and is not impacted by a limitation period. I agree that it is not plain and obvious that this claim will fail.

[18] With respect to the adequacy of the pleadings, the defendants say that the plaintiff's claims for breach of sections 45, 47, and 61 of the *Competition Act* lack particularity and are missing material facts. Similar arguments were made in *Watson.* With respect to the s. 45 claim, Bauman C.J.B.C. said at para. 102:

> The defendants argue that the pleadings do not identify, when, where, or through whom any agreements, with the necessary criminal intent, were reached in relation to any or all of the defendants. First I doubt that the

> "where" is relevant at this stage. More substantially, and as before, assuming the facts setting out the alleged conspiracies are true, the failure to plead in the level of specificity desired by the defendants is not fatal. It is not plain and obvious that the claim will fail as a result.
>
> [Emphasis added].

[19] Chief Justice Bauman found that the plaintiff had properly pleaded a cause of action under s. 45 and it would be premature to strike that claim at that time. He also found that the plaintiff had properly pleaded a cause of action under s. 61.

[20] The plaintiff concedes that she has not set out the material elements of her s. 47 claim, but argues that she can amend. Our courts have not refused certification solely due to drafting inadequacies. See *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267.

[21] I am not persuaded that these claims are bound to fail.

2. The Tort of Civil Conspiracy

[22] As Chief Justice Bauman noted in *Watson*:

> [129] The tort of civil conspiracy has two branches (*Cement LaFarge* [*v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452] at 471-472):
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result[.]
>
> In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[23] The defendants say that the conspiracy claims are inadequately pleaded. The defendants do not say that the necessary elements of each type of conspiracy have not been pleaded; rather, they say that the plaintiff must provide careful particularity and has not done so.

[24] A similar argument was made and rejected in *Watson.* The defendants claimed the pleadings were deficient for failing to disclose information such as the identity of every party in the conspiracy, their relationships, date(s) of any alleged agreements, and the specific acts of each defendant. Chief Justice Bauman held:

> [142] I do not consider *Can-Dive* [*Services Ltd. v. Pacific Coast Energy Corp.*, [1993] 96 B.C.L.R. (2d) 156 (C.A.)] to impose those requirements so strictly. They represent an ideal. The Court's conclusion in *Can-Dive* was that pleadings must be *as specific as possible*. The very nature of a claim in conspiracy resists particularization at the early stages (*North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993, (Div. Ct.) at para. 22). It may often not be possible to provide particulars as specific as the date of an agreement in a conspiracy case. Given the nature of conspiracy claims, it would be perverse if the failure to plead a specific date was fatal to a claim that otherwise was not bound to fail.
>
> [Emphasis in the original].

[25] That conclusion applies here as well. It is not plain and obvious that the conspiracy claims are bound to fail.

3. The Tort of Unlawful Interference with Economic Interests ("Unlawful Means" Tort)

[26] The "unlawful means" tort, sometimes called unlawful interference with economic interests was considered in *Bram.* It is an intentional tort that is parasitic, it allows the plaintiff to sue for economic loss resulting from the defendant's unlawful act against a third party. The two core components are that (i) the defendant must use unlawful means, and (ii) the defendant must intend to harm the plaintiff through the use of the unlawful means. The conduct must give rise to a civil cause of action by a third party or would do so if the third party had suffered loss by the conduct. The "unlawfulness" component is not subject to principled exceptions and criminal offences or breaches of statute would be available if those acts would also give rise to a civil cause of action by the third party. See *Bram* at para. 45.

[27] The plaintiff has pleaded each of those elements. She pleads that De Beer's collusive conduct raised the price of gem grade diamonds to other participants in the 'diamond pipeline'. Those other participants are not members of the class. They would be third parties who would have their own cause of action against the

defendants. The plaintiff also pleads that the defendants intended to cause her and the other class members economic loss and that the plaintiff and other members of the class suffered loss.

[28] Although these elements may not be as articulately pleaded as possible, I am satisfied that the claim is not plainly bound to fail.

4. Unlawful Restraint of Trade; Unjust Enrichment

[29] The plaintiff pleads that actions of the defendants were calculated to produce and have produced pernicious monopolies and that these anti-competitive acts have permitted the defendants the opportunity (that they took) to charge and receive artificially inflated and unreasonable prices.

[30] The plaintiff argues that the unlawfulness of restraint of trade is relevant to two issues in this case:

1. to address the juristic reason element of unjust enrichment; and

2. as the unlawful means of unlawful means conspiracy.

[31] Similar pleadings were considered by this Court in *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2006 BCSC 1047, rev'd 2011 BCCA 186, varied 2013 SCC 57. There, Mr. Justice Tysoe (as he then was) said:

> (iii) Restraint of Trade
>
> [50] The Defendants say that conduct amounting to a restraint of trade at common law does not satisfy the second element of illegal or unlawful means of the tort of interference with economic relations. In this regard, they point to the English decision of *Brekkes v. Cattel*, which was distinguished on another ground in *Harbord Insurance Services*. Relying on *Mogul Steamship Co. Ltd. v. McGregor Gow & Co.*, [1892] A.C. 25 (H.L.), Pennycuick V.-C. held that the mere circumstance of restraint of trade at common law does not render an act unlawful for the purpose of the tort of intentional interference with economic interests.
>
> [51] However, a contrary view was advocated by Lambert J.A. in his dissent in *No. 1 Collision*:
>
>> If an act in restraint of trade is a wrong rectifiable, in relation to the time after the hearing, by the remedy of an injunction, then, in my opinion, that wrong ought, in appropriate circumstances, to be

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

> [52] The comments of Lambert J.A. were made in a dissenting judgment and were not addressed by the majority, who decided the appeal on other grounds. Hence, the comments are not binding on me and constitute no more than a novel argument unsupported by authority. However, Lambert J.A. is a distinguished jurist and his views are deserving of respect. While it is a novel argument, it is one deserving of consideration upon all of the relevant evidence. Under *Hunt*, it is not an argument which should be rejected on a Rule 19(24) application.
>
> [53] My conclusion is that it is not appropriate for me to order that the Plaintiffs' pleading of restraint of trade as the illegal or unlawful means of the tort of interference with economic relations be struck out.

[32] On appeal from this decision, Mr. Justice Donald said:

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

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

Mr. Justice Donald addressed the issue in dissent. The judges in majority did not need to address the issue, as they allowed the appeal on other grounds.

[33] The matter was then addressed by the Supreme Court of Canada:

> [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.

[34] In *Bram*, the Supreme Court addressed the requirements for the unlawful means tort. It did not expressly deal with restraint of trade as the unlawful means in unlawful means conspiracy, or in the context of unjust enrichment. Indeed, the court recognized that there was no need for consistency in the unlawful means component of unlawful means conspiracy and the tort of causing loss by unlawful means.

[35] I am left with the decisions in *Microsoft*. At this point, it is not plain and obvious that restraint of trade cannot be the unlawful means in unlawful means conspiracy and cannot negative the juristic reason in unjust enrichment.

[36] The plaintiff pleads that the defendants have been unjustly enriched by the receipt of the artificially inflated charge on the sale of diamonds, that the plaintiff and members of the class suffered a corresponding deprivation, and that the artificially induced overcharge resulted from wrongful or unlawful acts so there can be no

juridical reason for them to retain the overcharge. The plaintiff has pleaded the elements of unjust enrichment.

[37] Citing *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2009 BCCA 503 ("*Infineon*"), *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, and *Wakelam*, Bauman C.J.B.C. in *Watson* held that pleadings for tort and restitutionary claims in the context of the *Competition Act* will not necessarily be struck where they find a basis for their claim in the common law and not only in the statute: paras. 188-191.

[38] The plaintiff's claim is not based solely on breaches of the *Competition Act.* It is not plain and obvious that this claim will fail.

5. Waiver of Tort and Constructive Trust

[39] The plaintiff also 'waives the tort' and seeks recovery on restitutionary principles. Waiver of tort allows a plaintiff to recover the defendants' gains from tortious conduct rather than damages for that conduct. Although the claim is controversial, it has been certified in many cases and is not clearly bound to fail here.

[40] The plaintiff has abandoned the claim for constructive trust and has agreed that the claim period will only extend back to February 22, 2001.

Is There an Identifiable Class of Two or More People?

[41] The plaintiff seeks to certify a class defined as all persons resident in British Columbia who purchased gem grade diamonds from February 22, 2001 to the end of 2011. Although the plaintiff originally sought a longer time period, she has now limited the time period to 2001-2011.

[42] To satisfy this criterion, the class must be capable of clear definition, with objective criteria by which members of the class can be identified.

[43] The defendants argue that this element has not been satisfied because some members of the class may have claims barred by limitation. The defendants refer me

to *Knight v. Imperial Tobacco,* 2006 BCCA 235 where the Court of Appeal restricted the class to those without limitation issues.

[44] The plaintiff says that the behaviours that violate the *Competition Act* are ongoing and as such are not subject to a limitation defence. She also argues that the other claims would have a six year limitation, but that period may be extended because the claimant did not immediately discover the facts necessary to support the cause of action. The plaintiff says that recent cases have refused to consider the limitation issue at certification, citing *Microsoft* (SCC)*, Watson*, and *Crosslink.*

[45] In *Crosslink,* Madam Justice Rady said:

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

I agree.

[46] The definition of the class is otherwise adequate.

Do the Claims of Class Members Raise Common Issues?

[47] In *Microsoft* (SCC) at para.108*,* the Court said:

> 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 "[t]he 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.

[48] It is sufficient if the resolution of the common issue will move the litigation forward. It need not determine liability: see *Harrington v. Dow Corning Corp.,* 2000 BCCA 605; *Stanway v. Wyeth Canada Inc.,* 2012 BCCA 260.

[49] This is an indirect purchaser case. The plaintiff and the proposed class members did not buy their diamonds directly from the defendants. The plaintiff's theory is that the defendants, through their conspiracy, artificially inflated the price of diamonds and that this inflated price was passed through the various levels of purchaser and was ultimately paid by members of the class. The defendants recognize that an indirect purchaser case may be certified but say that to do so, the court must be satisfied of the availability of expert evidence to permit the plaintiff to establish her claim. The defendants say that in this case, the available expert evidence does not meet the test set out by the Supreme Court of Canada in *Microsoft* (SCC).

[50] In *Microsoft* (SCC)*,* the Court determined that:

- The starting point in determining the standard of proof is that 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: paras. 99-100, citing *Hollick v. Toronto (City)*, 2001 SCC 68 ("*Hollick*");

- The certification stage is not meant to be a test of the merits of the action: para. 99, citing *Hollick* at para. 16, *Infineon* at para. 65, *Cloud v. Canada (Attorney General)*, [2005] 73 O.R. (3d) 401 (C.A) at 414;

- The standard of proof does not require evidence on a balance of probabilities: para. 102;

- Each case must be decided on its own facts and there must be sufficient facts to satisfy the applications judge that the case should proceed on a class basis: para. 104;

- In order to establish commonality, the factual evidence required at this stage goes only to establishing whether the questions are common to all the class members: para. 110;

- Realistic expert evidence that is sufficiently credible and plausible to establish some basis in fact for the commonality requirement is required with respect to whether loss to the class members can be established on a class-wide basis: para. 118;

- The expert methodology must be grounded in the facts of the particular case in question and there must be some evidence of the data to which the methodology is to be applied: para. 118; and

- Resolving conflicts between experts is an issue for the trial judge and should not be engaged at the certification stage: para. 126.

[51] The defendants argue that:

1. The plaintiff's methodology cannot prove the existence of an overcharge;
2. The plaintiff's methodology assumes pass-through on pure theory;
3. There is no realistic prospect proving pass-through to all class members; and
4. There is no evidence that the necessary data is available.

[52] The plaintiff has produced affidavits from her proposed expert, Dr. Gary French. Dr. French has provided an opinion that there are economic methods that can be used on a class-wide basis to assess whether the collusive conduct alleged at paras. 23-38 of the statement of claim would have caused economic harm to the proposed class members. He opines that there are economic methods that can be used on a class-wide basis to quantify the economic harm to the proposed class members and to quantify the economic gains obtained by the defendants as a result of any collusive conduct. He says that his conclusions in the matter are based on economic analysis and principles that are not specific to a particular country. He says the diamond industry is global in nature and he knows of no reasons why the principles and data underlying his analysis would not be applicable in Canada.

[53] He says that he proposes to use a benchmark to estimate the initial overcharge imposed by De Beers by comparing actual prices charged by the defendants for rough diamonds during the period from February 2, 1997 to December 31, 2011 with actual prices of rough diamonds after the class damages period. He says that the diamond market has become more competitive during and since 2012.

[54] The defendants have produced their own expert opinions, Dr. Kahwaty and Ms. Sanderson. These experts say that Dr. French's methodology has no realistic prospect of establishing harm on a class-wide basis because of fundamental flaws at each of the three steps of the proposed methodology.

[55] They say that Dr. French's methodology cannot determine the amount of any initial overcharge on rough diamond prices because it lacks a workable competitive benchmark. Without a competitive benchmark, he cannot isolate the effect of the alleged misconduct as opposed to other, unrelated factors.

[56] The defendants argue that Dr. French's conclusion that all class members absorb some portion of any initial overcharge is purely theoretical. They say that he relies on the absorption rates calculated in *Shawn Sullivan v. DB Investments, Inc.,*

(unreported) F. Supp. (2d) WL 8747721 (NJ Dist. Ct. 2008) using data from company B. They say that Dr. French's assumption that data from company B would accurately reflect pass-through for all sellers of polished diamonds and diamond jewellery worldwide is untenable.

[57] They say that Dr. French has not shown that the data needed to apply step three exists. His method of determining BC's share of the global overcharge absorbed at various levels of the pipeline requires knowing the fraction of world-wide sales represented by British Columbia at those levels of the pipeline. The defendants say that they do not have this information and that Dr. French's only proposal for obtaining it is to collect data from individual class members regarding their annual diamond purchases and sales throughout the period. They say there is no evidence that such data would be available from class members.

[58] Finally they say that Dr. French has failed to propose a method to quantify the economic gains obtained by the defendants from the alleged misconduct. They say that Dr. French assumes that his estimate of the overcharge on rough diamonds is equal to the economic gains made by the defendants. They say that Dr. French has not proposed any method for determining how many De Beers diamonds were purchased by class members in British Columbia, which is necessary to determine the gains made by the defendants in relation to gem grade diamonds ultimately sold to class members in British Columbia.

[59] Dr. French responds to each of these criticisms in his affidavit #4, dated January 24, 2014. He says that he "do[es] not find the criticisms made by Dr. Kahwaty and Ms. Sanderson of [his] initial class certification analysis to be valid."

[60] He appends as Exhibit "A" to that affidavit a second economic report and opinion to address the points raised by Ms. Sanderson and Dr. Kahwaty.

[61] In Exhibit "A" at para. 7, he says:

> …I described the regression model I would employ to quantify the extent of overcharges Defendants imposed in the sale of rough diamonds. I selected a competitive benchmark of rough diamond prices since January 1, 2012 to be

> compared to the rough diamond prices during a Class Damages Period from February 22, 1997 through December 31, 2011. The comparison is made using a regression model in which rough diamond prices are explained by the demand for rough diamonds, the cost of rough diamonds, and a binary variable which has a value of one during the Class Damages Period and zero in the more competitive period since the Class Damages Period. A rough diamond overcharge measured as a percent of actual rough diamond prices could be computed from the co-efficient or parameter estimated by the regression for the binary variable, and then applied to the worldwide sales of rough diamonds during the Class Damages Period to obtain the volume of overcharges during this period.

[62] Dr. French concludes:

> Based on my review of the criticisms of my analysis and opinions presented in the Sanderson Affidavit and the Kahwaty Affidavit, I have determined that nothing in these two affidavits causes me to alter the findings and conclusions I reached in the First French Report Regarding Class Certification:
>
> a. There are economic methods that can be used, on a class-wide basis, to assess whether the collusive conduct alleged at paragraphs 23-38 of the Statement of Claim would have caused economic harm to the proposed Class Members.
>
> b. There are economic methods that can be used, on a class-wide basis, to quantify the economic harm to the proposed Class Members as a result of any collusive conduct.
>
> c. There are economic methods that can be used to quantify the economic gains obtained by the Defendants as a result of any collusive conduct.

[63] The ‘some basis in fact’ standard does not require evidence on a balance of probabilities and does not require the court to resolve conflicting opinions and evidence at the certification stage. Rather, the court is ill-equipped to resolve conflicts in the evidence or to engage in a finely calibrated assessment of evidentiary weight. Certification is not meant to be a determination of the viability or strength of an action. The evidentiary threshold for certification is not onerous. At certification, the nature and amount of investigation and testing required to provide a preliminary opinion is not as extensive as would be at trial. The plaintiff need only show a “credible or plausible methodology”. The threshold is a low one and conflicting expert evidence is not to be given the level of scrutiny to which it would be subject to at trial.

[64] I am satisfied that the plaintiff has set out a credible methodology and demonstrated that the necessary data is available. The court is not in a position to assess conflicting affidavit material or to engage in a detailed analysis of expert opinions. This is not the time for the battle of the experts. I agree with Madam Justice Rady in *Crosslink* that this is very complex evidence that requires a considerable degree of sophistication in order to understand it. Part of an expert's role is to assist the court in understanding underlying science, engineering, medicine, or, as in this case, the statistical and economic foundation for the opinion. The motions judge does not have that assistance and is ill-equipped to resolve conflicts. The evidence in this case is sufficient to meet the threshold of "plausible methodology".

[65] The defendants also argue that the plaintiff cannot rely on aggregate damages to establish liability. In *Microsoft* (SCC) at paras. 132-134, the Court said:

> 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 B.C.S.C. in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "[t]hat question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575, 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).
>
> …
>
> 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.
>
> …
>
> 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.

[66] The plaintiff does not take issue with this proposition. The plaintiff says that the aggregate damages issue (issue 14) need not be certified, that this is something

that the trial judge may determine in any event, following a finding of liability. I agree and will not certify issue 14 as a common issue.

[67] Apart from the issue of aggregate damages, the defendant does not take issue with the individual common issues.

[68] I agree with the plaintiff's submissions that the issues raised are issues common to the class: what did the defendants do, when did they do it, was it lawful; how much did the defendants gain from their conduct; but for their conduct, would the class have paid less; how much less? I will certify issues 1-13 as common issues.

Is a Class Action the Preferable Procedure?

[69] Section 4(2) of the *CPA* provides:

> (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.

[70] The court must also consider the three goals of class proceedings: access to justice, judicial economy, and behaviour modification.

[71] The defendants say that a class action is not the preferable procedure and to determine liability would require individual inquiries for each class member and would overwhelm the common questions, making the action inefficient and

unmanageable. They argue that in *Chadha v. Bayer* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to the S.C.C. refused, [2003] 2 S.C.R. vi (note), the Ontario Court of Appeal refused to certify because the access to justice objective was not significant in light of the amounts involved, the goal of judicial economy would not be enhanced, and the criminal sanctions of the *Competition Act* were sufficient to address behaviour modification. They say that the Supreme Court of Canada certified the *Microsoft* (SCC) case primarily because there was a realistic prospect of establishing loss on a class-wide basis. They argue that here there is no prospect of establishing class-wide loss and so a class action is not the preferable procedure.

[72] I am not persuaded that the defendants are correct in their assertion that loss cannot be established class-wide. It may be that the class will need to be broken into sub-classes, but Dr. French asserts that loss can be established class-wide. I can see no difference between this case and *Microsoft* (SCC) as to preferability.

[73] I also agree with the conclusion of this Court in *Watson:*

> [315] The common issues which I have identified clearly go to the heart of the major issues in this case, namely, the fact and form of any anti-competitive behaviour, the existence of two distinct conspiracies in that regard, the harm or loss to the proposed class members, and the remedies available to them in that regard.
>
> [316] In my view, contrary to the defendants' submissions, the common issues overwhelm the potential individual issues. While some of those individual issues may be challenging (although not overly so, according to Dr. Brander's evidence), I note our Court of Appeal's statement in *Infineon* (at para. 76):
>
> > [76] I do not minimize the potential difficulties of proof arising out of the complexities involved in the marketing and distribution of DRAM. However, the *CPA* is a powerful procedural statute. It gives the case management judge flexible tools to deal with such complexities and if, despite this flexibility, it should turn out that a common issues trial is unmanageable, it gives the judge the power to decertify the action.
>
> [317] The defendants, at paragraph 409 of their Joint Submissions, continue their submission that this proceeding is beset by highly individualized issues:
>
> > 409. …Certifying this case would require the court to assess the highly idiosyncratic circumstance of *hundreds of thousands* of merchants who accepted credit cards over a ten-year period to determine whether any of them were harmed, and if so, to what extent…

> [Emphasis in original.]
>
> [318] The defendants then set out at length some 18 issues that they say must be resolved in respect of "each and every merchant class member throughout the Class Period".
>
> [319] These issues largely center on individualized harm enquiries. For the reasons set out above, I have accepted that there is a realistic prospect of resolving the loss-related issues on a class-wide basis as common issues. In my view, in light of these conclusions, the force of the defendants' submissions here, very much falls away. And that is strikingly so with respect to loss and the restitutionary remedies.

Is the Plaintiff an Appropriate Representative Plaintiff?

[74] Section 4(1)(e) of the *CPA* requires that 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.

[75] Ms. Fairhurst deposes that she worked full-time for plaintiff's counsel from September 1996 to January 6, 2006. She went on maternity leave on January 6, 2006. By the fall of 2006, she had decided not to return to work at the law firm due to her family responsibilities and the long commute to work. She says that she was asked to work from time to time on an ad hoc basis after her maternity leave finished in January 2007. She now works on average two days per week. She was not working for the law firm when she retained them to pursue this action.

[76] The defendants argue that the close connection between the plaintiff and class counsel gives the appearance of impropriety and renders the plaintiff unsuitable as a representative of the class. The defendants rely on *Kerr v. Danier Leather Inc.,* [2001] 19 B.L.R. (3d) 254 (Ont. S.C.J.) at 272 where Mr. Justice Cumming said:

> As a general principle, it is best that there is no appearance of impropriety. In this situation, there is the perception of a potential for abuse by class counsel through acting in their own self-interest rather than the interests of the class.... In my view, the better practice is that class counsel be unrelated to a representative plaintiff so that there is not even the possible appearance of impropriety.

[77] They say secondly that the plaintiff, as a retail consumer, is in a conflict with the diamond reseller class members.

[78] Finally, they say that the plaintiff has not produced a workable litigation plan.

[79] The plaintiff says that plaintiffs with close ties to class counsel have been accepted by Canadian courts, citing *Cassano v. Toronto-Dominion Bank,* [2009] 98 O.R. (3d) 543 (S.C.). The plaintiff also refers me to the words of Mr. Justice Donald (dissenting on a different issue) in *Sun-Rype Products Ltd. v. Archer Daniels Midland*, 2011BCCA 187, rev'd on other grounds, 2013 SCC 58 ("*Sun-Rype*"):

> [69] Dealing first with fair and adequate representation, while neither plaintiff had a grievance against the defendants prior to counsel bringing them into the action, it seems almost fanciful to challenge their representation on that ground in this kind of case. The individual losses are likely to be so small that separate proceedings are really out of the question. The only realistic approach is a class action. The focus shifts to the adequacy of counsel to pursue the matter and that has not been brought into question. I share the view taken by Mr. Justice Haines in *Segnitz v. Royal & SunAlliance Insurance Company of Canada* (2003), 40 C.P.C. (5th) 391 (Ont. S.C.J.):
>
>> [14] I am also satisfied that each of these plaintiffs has a demonstrated interest that is consistent with the balance of the proposed class and, as such, is an adequate representative plaintiff. It should perhaps be remembered in cases such as these that no representative plaintiff will have much of a stake in the ultimate outcome since the potential recoveries are so modest. Therefore reality dictates that the test for adequacy of the representative plaintiff is in large part a test of the capacity of class counsel to properly pursue the action in the best interests of the members of the class. I am satisfied that that requirement is fulfilled in these actions.

[80] The plaintiff says that a similar argument to the one that is alleged against her – that she has a conflict with other class members – was considered and rejected in *Sun-Rype* and *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59 ("*Option*"). In *Option*, the Court said:

> [148] Second, the appellants argue that there is an inherent conflict of interests between Ms. Cloutier, as an indirect purchaser, and the direct purchasers. More specifically, the appellants assert that the direct and indirect purchasers have opposing interests in that each of these subgroups will argue that its members absorbed the full amount of the overcharge resulting from the price-fixing conspiracy. This argument has no valid basis.
>
> ...

> [151] It would accordingly be contrary to the spirit of art. 1003(*d*) of the *C.C.P* [*Code of Civil Procedure*, C.Q.L.R. c. C-25]. to deny authorization for the proposed group of purchasers of DRAM on the basis of a potential conflict of interests between members of the group. The record does not suggest that Option consommateurs and Ms. Cloutier are undertaking and conducting the proceedings dishonestly or that they have failed to disclose material facts that would reveal a conflict with other members. Further, the class members clearly share a common interest in establishing the aggregate loss and in maximizing the amount of this loss. As the British Columbia Supreme Court astutely pointed out in its decision at trial in *Sun-Rype*, "[t]he only parties at this time that have an interest in having the direct and indirect purchasers in a conflict of interest are the defendants" (2010 BCSC 922 (CanLII), at para. 194).
>
> ...
>
> [154] In summary, we see no conflict between the direct and indirect purchasers at this stage of the proceedings that would bar either Ms. Cloutier or Option consommateurs from representing the interests of the class. It would be more appropriate to deal with any actual conflict between the direct and indirect purchasers at subsequent stages of the proceedings, once any aggregate loss has been established.

[81] With respect to the adequacy of the litigation plan, the plaintiff says that her plan is similar to others in like cases and is adequate to its purpose. She relies on *Watson:*

> [351] As previously noted, the purpose of a litigation plan was set out in *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717 (at para. 77):
>
>> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members…
>
> [352] The detail of a plan should correspond to the complexity of the action. Further, less detail is required concerning individual issues that will need to be decided after the common issues trial, as discovery has not taken place (*White v. Canada (Attorney General)*, 2004 BCSC 99 at paras. 151-153).
>
> [353] Regarding the specificity of the litigation plan, it is not materially less specific than the one in *Steele* (at paras. 83-85 and Appendix A). The litigation plan in *Steele* left the planning of the trial until after document discovery. As that plan was accepted by the Court of Appeal I would reject

> the specificity argument form the defendants in this case. Further, I have concluded that Dr. Brander's methodologies have a reasonable prospect of success, and thus there may be no need for individual determinations of liability.

[82] While this decision was under reserve, the plaintiff applied to add or substitute Marc Kazimirski as plaintiff. Mr. Kazimirski is a lawyer practicing in Vancouver who is prepared to act as representative plaintiff.

[83] The defendants oppose adding or substituting Mr. Kazimirski as a representative plaintiff. They argue that (i) Ms. Fairhurst is not an appropriate representative plaintiff because of her relationship to proposed class counsel, and (ii) her suggestions that she will continue as representative plaintiff, that Mr. Kazimirski will join her as a representative plaintiff, or will replace her as representative plaintiff are all unacceptable. They say it is far too late to address the conflict, that this should have been addressed at the outset. They say that certification must be denied.

[84] I am not persuaded that certification should be denied because of the relationship between Ms. Fairhurst and class counsel. The evidence does not persuade me that Ms. Fairhurst is a token plaintiff.

[85] It is to be remembered that this is a certification hearing, not a trial of the action. Certification is a procedural step. Where the certification requirements are met, the court is to certify the action.

[86] Section 5(6) of the *CPA* permits the court to adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence. I would not refuse certification simply because the proposed representative plaintiff may have a conflict, real or perceived, due to her relationship with class counsel. In such circumstances, I would adjourn the certification hearing to permit the class the opportunity to find a more appropriate representative plaintiff, as other courts have done: see *Graham v. Impark*, 2010 ONSC 4982 at paras. 196-202; *6323588 Canada Ltd. v. 709528 Ontario Ltd. (c.o.b. Panzerotto Pizza and Wing Machine)*, 2012 ONSC 2985 at paras. 97-101; *Ottawa Police Association v. Ottawa*

Police Services Board, 2014 ONSC 1584 at paras. 38-44; *Haddad v. Kaitlin Group Ltd.,* [2008] O.J. No. 5127; 2008 CanLII 66627(S.C.) at paras. 75-79; *Bence v. Okanagan-Similkameen (Regional District)*, 2002 BCSC 478.

[87] Here, before I adjourned the certification hearing, the plaintiff applied to add or substitute Mr. Kazimirski.

[88] In the BC *Supreme Court Civil Rules,* Rule 6-2(7) provides:

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[89] If I were to determine that Ms. Fairhurst is not a proper representative plaintiff because of her relationship with class counsel, then it would be necessary that another person be added as plaintiff, under either subrule (b) or (c). In my view, it is most appropriate to proceed under subrule (c), as this Court did in *Birrell v. Providence Health Care Society*, 2007 BCSC 668 (under the old Rule 15(5)(a)(iii)), varied 2009 BCCA 109 ("*Birrell*") and *Iverson v. Canada (Minister of Fisheries and Oceans)*, 2011 BCSC 1619. As Mr. Kazimirski has deposed, he has a question or issue relating to the relief claimed and subject matter of this proceeding.

[90] The question remains of whether it is just and convenient that Mr. Kazimirski be substituted. In reaching a determination, the court should consider:

1. The length of and reason for the delay;

2. The expiry of a limitation period;

3. The presence or absence of prejudice to either party;

4. The extent of the connection between the existing claims and those of the proposed plaintiff;

(*Birrell* at para. 82)

5. whether the litigation was commenced for an improper purpose; and

6. whether there is a viable alternative plaintiff.

(*Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 at para. 7, 36 C.P.C. (5th) 176 (S.C.), aff'd [2004] 71 O.R. (3d) 451 (C.A.)).

1. The Length and Reasons for Delay

[91] This action was started in 2007. In 2011, the defendants applied for an order dismissing the action on the basis that the court did not have jurisdiction over them. I do not know why that application was not brought earlier. It was denied by this Court in 2011. The appeal of that decision was dismissed in 2012. The Supreme Court of Canada refused leave in 2013.

[92] There was then some delay waiting for critical decisions from the Supreme Court of Canada relating to class actions of this type. The plaintiff set the certification hearing for April 2014. At that hearing, the defendants took the position that the plaintiff is not an appropriate representative.

[93] The plaintiff says that she has pursued this matter diligently, that the issue of her suitability was raised only recently, and that she has acted quickly to address the issue.

[94] The defendants say that Ms. Fairhurst has known for seven and one half years of her relationship with class counsel that may conflict with her duties to the

class and that she is aware the defendants are actively challenging her cause of action based on allegations that she is not a member of the class. In oral submissions, the defendants said that Ms. Fairhurst's situation is distinct in that her diamond was a Canadian diamond and the defendants argue that they were not manufacturing or producing diamonds in Canada at the time. I note that s. 2(4) of the *CPA* provides that the court has the discretion to certify a non-class member as the representative plaintiff for the class proceeding but only where it is necessary to do so in order to avoid a substantial injustice to the class.

[95] In any event, the defendants say that there is no explanation for Ms. Fairhurst's delay in applying for a substitute plaintiff.

2. Expiry of a Limitation Period

[96] Sections 38.1 and 39 of the *CPA* provide:

> **Limitation period for a cause of action not included in a class proceeding**
>
> **38.1** (1) If a person has a cause of action, a limitation period applicable to that cause of action is suspended for the period referred to in subsection (2) in the event that
>
> (a) an application is made for an order certifying a proceeding as a class proceeding,
>
> (b) when the proceeding referred to in paragraph (a) is commenced, it is reasonable to assume that, if the proceeding were to be certified,
>
> (i) the cause of action would be asserted in the proceeding, and
>
> (ii) the person would be included as a member of the class on whose behalf the cause of action would be asserted, and
>
> (c) the court makes an order that
>
> (i) the application referred to in subsection (1) (a) be dismissed,
>
> (ii) the cause of action must not be asserted in the proceeding, or
>
> (iii) the person is not a member of the class for which the proceeding may be certified.
>
> (2) In the circumstances set out in subsection (1), the limitation period applicable to a cause of action referred to in that subsection is suspended for the period beginning on the commencement of the proceeding and ending on the date on which

> (a) the time for appeal of an order referred to in subsection (1) (c) expires without an appeal being commenced, or
>
> (b) any appeal of an order referred to in subsection (1) (c) is finally disposed of.
>
> **Limitation periods**
>
> **39** (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a proceeding that is certified as a class proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when any of the following occurs:
>
> (a) the member opts out of the class proceeding;
>
> (b) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding;
>
> (c) a decertification order is made under section 10;
>
> (d) the class proceeding is dismissed without an adjudication on the merits;
>
> (e) the class proceeding is discontinued or abandoned with the approval of the court;
>
> (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
>
> (2) If there is a right of appeal in respect of an event described in subsection (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

[97] These sections suspend the running of the limitation period while the certification issue is determined. The plaintiff says that the limitation period has not expired. The defendants do not argue that it has; rather, they argue that they are prejudiced by the late application and that the court should not countenance such conduct. I will address these arguments when considering prejudice below.

3. Prejudice

[98] The plaintiff says that if the court has concerns with respect to her suitability, Mr. Kazimirski should be substituted as representative plaintiff. She says that the defendants will not suffer prejudice because:

1. the application is purely procedural, there will be no change to the class definition or common issues and the defendants will lose no substantive defences; and

2. if certified, the claim already encompasses the claims of the proposed class. There is no surprise to the defendants in the nature, scope of claims, or the potential number of claimants.

[99] The defendants argue that they will suffer prejudice and refer me to *Dodd v. Stork Craft Manufacturing Inc.,* 2011 BCSC 1914, where this Court refused to permit substitution. They say that they prepared for certification relying on the affidavit of Ms. Fairhurst, which revealed that she did not have a claim against them. They say that this case raises the spectre of the token plaintiff, which many courts have criticized. At paragraphs 30-31, Mr. Justice Gaul in *Dodd* found the following defendants' submissions persuasive:

> Allowing the plaintiff to substitute new proposed representative plaintiffs at will effectively allows counsel to commence an action in the name of a nominee plaintiff in order to toll the limitation period pending the location and appointment of a representative plaintiff with a valid cause of action. To allow the proposed representative plaintiff to be changed without inquiring into the appropriateness and /or eligibility of Dodd as plaintiff would expose the defendants to potentially invalid claims through tolling of the limitation periods. While it is no[t] alleged that there has been impropriety in this proceeding, the Defendants should not be required to remain exposed to claims which would otherwise be statute barred for the period of time necessary for class counsel to locate an appropriate representative plaintiff.
>
> Additionally, prejudice will be [caused] by allowing the Plaintiff to substitute McFadzean and Dixon for Dodd less than one month before the deadline for the Defendants' materials for the certification hearing to be filed. The Defendants have not yet had the opportunity to inspect and examine the [c]ribs of Dodd or McFadzean, and Dixon swears that she discarded her crib.

4. Connection of Claims

[100] Mr. Kazimirski proposes to advance the same claims as does Ms. Fairhurst. The claims are identical, although the defendants argue that Ms. Fairhurst does not have a claim based on her circumstances. The claims of the class are not changed if Mr. Kazimirski is added or substituted.

5. Improper Purpose

[101] The plaintiff says that there is no evidence of an improper purpose in commencing the action, i.e., no evidence that Ms. Fairhurst is a token plaintiff, simply tolling the limitation period while counsel looked for another representative

plaintiff. Ms. Fairhurst says that she has a legitimate claim and wishes to pursue it and the interests of the class. She applies only in response to the defendants' suggestion that she may not be an appropriate representative plaintiff.

[102] The defendants say that they have not had an opportunity to consider whether Mr. Kazimirski would be an appropriate representative plaintiff or to learn more about him, beyond the limited information that he provides in his affidavit. They say that his suitability as representative plaintiff should be determined on a separate application. They argue that Ms. Fairhurst's application is a concession that she is not an appropriate representative plaintiff; that she has served as a mere nominee plaintiff.

6. Viable Alternative Plaintiff

[103] The plaintiff says that Mr. Kazimirski is available as a viable alternative. The defendants say that he is not, and that he, too, is in a conflict with the interests of the diamond reseller class members, and he has not advanced a workable method of advancing the proceeding.

[104] Finally, the defendants argue that they should have the opportunity to cross-examine the deponents, whether or not the substitution is granted.

[105] In my view, it is preferable that the representative plaintiff is not as closely associated with plaintiff's counsel as is Ms. Fairhurst. I do not say that she is in a conflict or that she would not be able to act as representative plaintiff. The perceived conflict, that she may advertently or inadvertently prefer the interests of her employer to those of the class, is mitigated by the court approval of any settlement and of counsel fees. However, as Mr. Kazimirski is prepared to act as representative plaintiff, he is a preferable choice as he removes any potential taint of preference for class counsel.

[106] Nor do I see any prejudice to the defendants in substituting Mr. Kazimirski as representative plaintiff. I am not persuaded that Ms. Fairhurst was acting as a token plaintiff. Although, at the hearing dealing with the proposed change of parties, the

defendants said that their argument at certification was built around Ms. Fairhurst's status – that she had no claim against them as she purchased a Canadian diamond – this was not pressed at certification. In my opinion, the defendants have had sufficient time to consider whether Mr. Kazimirski would be an appropriate representative plaintiff. They were given notice in June 2014 of the proposed application, which was heard in October. Three months should have been adequate time for them to investigate Mr. Kazimirski.

[107] There is no basis in the affidavit material for cross-examination of Mr. Kazimirski or Ms. Fairhurst.

[108] I am satisfied that the litigation plan is adequate at this time. It may be amended as the litigation proceeds. I adopt the words of our Court of Appeal in *Infineon* at para. 79*:*

> It is also my view that the appellant's litigation plan is sufficient at this stage. The chambers judge's opinion that there were unad[d]ressed "critical" issues was informed by his conclusion that individual loss would have to be established to prove liability and damages. As I have explained, I do not agree. The plan may have to be amended as the action proceeds but that can be done under the supervision of the case management judge. As it stands, it does not disclose any weakness in the appellant's case that would suggest a class proceeding is not the preferable procedure: see *Cloud* at para. 95.

[109] Nor does the potential conflict between class members cause a problem at this stage of the action. See *Infineon* at para. 78:

> The chambers judge concluded the appellant is not a suitable representative because of its conflict with other class members in its particular marketing chain on the issue of pass-through of the overcharge. I see that as a minor issue that may never be reached. The appellant shares a common interest with all class members in establishing the respondents' wrongful conduct and the aggregate amount of its unlawful gain. In my view, it is, at least at this stage, a suitable representative plaintiff.

CONCLUSION

[110] The action is certified as a class action for all common issues, except issue 14. Mr. Kazimirski is substituted as representative plaintiff. The pleadings should also be amended to properly reflect the current claims.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown