IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Godfrey v. Sony Corporation,*
2016 BCSC 844

Date: 20160513
Docket: S106462
Registry: Vancouver

Between:

Neil Godfrey

Plaintiff

And

Sony Corporation, Sony Optiarc, Inc., Sony Optiarc America Inc., Sony of Canada Ltd., Sony Electronics, Inc., NEC Corporation, NEC Canada Inc., Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd., Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., Samsung Electronics America, Inc., Hitachi-LG Data Storage, Inc., Hitachi-LG Data Storage Korea, Inc., Hitachi Ltd., LG Electronics, Inc., LG Electronics Canada, LG Electronics USA, Inc., TEAC Corporation, TEAC America, Inc., TEAC Canada, Ltd., Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., Philips Electronics Ltd., Quanta Storage, Inc., Quanta Storage America, Inc., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., BenQ Corporation, BenQ America Corporation and BenQ Canada Corp.

Defendants

- and -

Docket: S136205
Registry: Vancouver

Between:

Neil Godfrey

Plaintiff

And

Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc.

Defendants

Before: The Honourable Mr. Justice D. M. Masuhara

Reasons for Judgment

Counsel for Plaintiff:	R. Mogerman D.G.A. Jones M.L. Segal
Counsel for Defendants Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., and Samsung Electronics America, Inc.	R. Kwinter J. Lysyk E. Kriaris
Counsel for Defendants Panasonic Corporation, Panasonic Corporation of North America, and Panasonic Canada Inc.	J. Rook E. Davis C. Jordaan
Counsel for Defendants Sony Corporation, Sony Optiarc, Inc., Sony Optiarc America Inc., Sony of Canada Ltd., and Sony Electronics, Inc.	E.M. MacKinnon D.M. Peebles M. Lam
Counsel for Defendants Hitachi-LG Data Storage, Inc. and Hitachi-LG Data Storage Korea, Inc.	J. Smithen S. Bhattacharjee
Counsel for Defendants Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd., Toshiba America Information Systems, Inc.	L. Cooper V. Toppings Z. Maladwala S. Hsia
Counsel for Defendant Hitachi Ltd.	K. Wright R. Von Ruti
Counsel for Defendants BenQ Corporation, BenQ America Corporation, and BenQ Canada Corp.	S. Fitterman
Counsel for Defendants NEC Corporation and NEC Canada Inc.	M. Jamal R. Eghan
Counsel for Defendants LG Electronics, Inc., LG Electronics Canada, and LG Electronics USA, Inc.	S. Forbes S. Franklin
Counsel for Defendants TEAC Corporation, TEAC America, Inc., and TEAC Canada, Ltd.	A. Cocks
Counsel for Defendants Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., and Philips Electronics Ltd.	J. Young N. Campbell

No one appearing for Defendants Quanta Storage, Inc. and Quanta Storage America, Inc.	
Counsel for Defendants Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd., and Pioneer Electronics of Canada Inc.	M. Osborne M. Booth
Place and Date Hearing:	Vancouver, B.C. January 19-23, 2015 January 13, 2016
Place and Date of Judgment:	Vancouver, B.C. May 13, 2016

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I. INTRODUCTION

[1] These reasons deal with an application that this action be certified as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*") and consequential orders. The plaintiff also seeks consolidation of Action No. S136205 (the "Pioneer Action") with Action No. S106462 (the "Main Action") pursuant to Rule 22-5(8).

[2] At the heart of these actions is the assertion that the defendants are participants in a global, criminal price-fixing cartel that increased or maintained the price that British Columbians paid for optical disc drives ("ODDs") and products containing ODDs. The impacts are asserted to have extended downstream of direct purchasers of the products to each level distribution and ultimately to the final consumer. The plaintiff is claiming damages from the defendants for unlawfully conspiring to fix, maintain, or increase the price of ODDs.

[3] An ODD is a memory storage device that uses laser light or electromagnetic waves near the light spectrum to read and/or record data on optical discs. Some ODDs can only read from discs, but many newer drives can both read and record. ODDs that record are commonly referred to as "burners" or "writers". Compact discs, DVDs and Blu-ray discs are common types of optical media which can be read and recorded by ODDs. ODDs are commonly found in computers and videogame consoles.

[4] The plaintiff's notice of application states the proposed class as:

> All persons resident in British Columbia who purchased optical disc drives ("ODD") or products that contained ODD in the period from January 1, 2004 through January 1, 2010 ("the Class" or "the Class Members").

Later in his application, the plaintiff says that "[t]he products containing ODD which are subject of this action include computers, videogame consoles, and external ODDs designed to be attached externally to devices such as computers".

[5] This is a “hybrid” class, consisting of both direct and indirect purchasers of ODDs and ODD products. It also includes purchasers of ODDs and products containing ODDs that were not manufactured or supplied by the defendants; I will call these “umbrella purchasers”, following the nomenclature used in *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148.

[6] The plaintiff is a businessman resident in Whistler, B.C., and deposes that he purchased a laptop computer and an Xbox 360 during the proposed Class Period.

[7] The 42 defendants are manufacturers, marketers, distributors and/or sellers of ODDs and products containing ODDs to customers in Canada, either directly or indirectly through predecessors, affiliates, subsidiaries, or independent distributors and retailers.

II. BACKGROUND

[8] The plaintiff commenced the Main Action on September 27, 2010 and the Pioneer Action on August 16, 2013. The Pioneer Action was brought on behalf of the plaintiff and other persons resident in British Columbia who purchased ODDs or products that contained ODDs from January 1, 2004 through January 1, 2010.

[9] The plaintiff cites Statistics Canada data that during 2004 to 2009 approximately 70 percent of Canadian households reported having a home computer. The plaintiff’s expert economist estimates that the value of ODD shipments into Canada was approximately $1.088 billion between 2005 and 2009.

A. United States Department of Justice Investigations

[10] In 2009, the U.S. Department of Justice acknowledged that it was investigating possible antitrust violations in the ODD industry. On November 8, 2011, Hitachi-LG Data Storage Inc. (“HLDS”) pleaded guilty and paid a $21,100,000 fine for participating in conspiracies to rig bids and fix prices for the sale of ODDs to Dell, Hewlett Packard, and Microsoft between 2004 and 2009. Three HLDS executives

also pleaded guilty to participating in the conspiracies, and each agreed to a $25,000 fine and to serve seven or eight months in prison.

B. European Commission Investigation

[11] In 2012, the European Commission ("EC") sent a Statement of Objections to 13 ODD suppliers, indicating that it had the preliminary view that the companies may have violated EU antitrust law by participating in a global cartel. In 2015, the EC fined eight ODD suppliers (Philips, Lite-On, Philips & Light-On Original Solutions, HLDS, Toshiba Samsung Storage Technology, Sony, Sony Optiarc, and Quanta Storage) a total of €116,000,000 for colluding in procurement tenders for ODDs for computers sold by Dell and Hewlett Packard.

C. The U.S. Class Actions

[12] In the U.S., direct and indirect purchasers of ODDs initiated separate proposed class actions in the Northern District of California. On October 3, 2014, the District Court denied certification in both actions based on a lack of a viable methodology for establishing class-wide antitrust injury and damages: *In re Optical Disk Drive Antitrust Litigation*, No. 3:10-md-02143 RS (N.D. Cal., 3 October 2014). Leave to appeal that decision was denied, and the direct purchasers settled their remaining claims. However, after amending and expanding their proposed methodology for proving damages, the indirect purchasers' renewed motion for certification was granted on February 8, 2016. I am advised by counsel that the defendants in that action filed an appeal on February 22, 2016.

III. CONSOLIDATION OF ACTIONS

[13] The plaintiff seeks an order that the Main Action and the Pioneer Action be consolidated. The plaintiff submits consolidation is warranted because the issues to be litigated and the class definitions in the two actions are the same and because it would be efficient to do so as it would avoid multiplicity of proceedings and the potential for inconsistent results.

[14] Pioneer does not oppose consolidation and the other defendants did not express a position.

[15] I agree with the plaintiff's submission that consolidation would be appropriate. Accordingly, the order is granted.

IV. CERTIFICATION

[16] The goals of the *CPA* are access to justice, behaviour modification and judicial economy. These goals are to be kept in mind in the certification process. The requirements for obtaining certification are set out in s. 4(1) of the *CPA*:

> 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.

[17] 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 (s. 4(2)):

> (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.

[18] The onus is on the party seeking certification to meet the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the certification hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24–25; *Dow Chemical Company v. Ring, Sr.*, 2010 NLCA 20 at para. 14, leave to appeal to S.C.C. refused 2010 CanLII 61130. The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. The authorities on this point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Microsoft*].

[19] In this respect, I note the observation of Rothstein J., for the Court, in *Microsoft* at para. 105:

> 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)).

[20] Expert evidence should not be subjected to the exacting scrutiny required at trial: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 66, leave to appeal to S.C.C. refused 2010 CanLII 32435, reconsideration of leave to appeal to S.C.C. refused 2012 CanLII 26716 [*Infineon*]. In *Infineon*, K. Smith J.A., for the Court, adopted the following passage from *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158, [2009] O.J. No. 418 at para. 76 (Sup. Ct.), motion for reconsideration dismissed 76 C.P.C. (6th) 173, [2009] O.J. No. 1592, leave to appeal to Div. Ct. refused [2009] O.J. No. 3438, aff'd 2010 ONCA 29, leave to appeal to S.C.C. refused 2010 CanLII 27725:

> [76] The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.).

[21] While not deciding the merits of the action, the court must equally avoid only symbolic scrutiny of the adequacy of the evidence. The court acting as a gatekeeper is to use the certification process as a meaningful screening device: *Microsoft* at para. 103.

A. Do the pleadings disclose a cause of action?

[22] The plaintiff sets out the following causes of action in his proposed consolidated notice of civil claim:

(a) breach of s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34;

(b) the tort of civil conspiracy;

(c) the unlawful means tort;

(d) unjust enrichment; and

(e) waiver of tort.

[23] The proposed notice of civil claim also alleges breach of s. 46(1) of the *Competition Act* by the Canadian subsidiaries of the foreign defendants. However, the plaintiff did not address this claim in his submissions and has not proposed any common issues relating to s. 46. I take it that the plaintiff is not pursuing this claim and I will not address it further.

[24] The plaintiff relies on the same allegations for each cause of action. These are detailed in paragraphs 78 to 82 of his proposed consolidated notice of civil claim:

> **THE CONSPIRACY**
>
> 78. During the Class Period, senior executives and employees of the defendants and co-conspirators, acting in their capacities as agents for the defendants and co-conspirators, engaged in communications, conversations and attended meetings with each other at times and places, some of which are unknown to the Plaintiff, and as a result of the communications and meetings the defendants and co-conspirators unlawfully conspired or agreed to:
>
> (a) enhance unreasonably the prices of ODDs and products containing ODDs globally including Canada;
>
> (b) exchange information in order to monitor and enforce adherence to the agreed upon prices for ODDs and products containing ODDs;
>
> (c) allocate the market share, customers, or to set specific sales volumes of ODDs and products containing ODDs that each defendant and unnamed co-conspirator would supply in Canada; and
>
> (d) to lessen unduly competition in the production, manufacture, sale or supply of ODDs and products containing ODDs globally including Canada.
>
> 79. In furtherance of the conspiracy, during the Class Period, the following acts were done by the Defendants, their co-conspirators and their servants and agents:
>
> (a) they increased or maintained the prices of ODDs and products containing ODDs globally including Canada;
>
> (b) they allocated the volumes of sales of, and customers and markets for ODDs and products containing ODDs among themselves;

(c) they reduced the supply of ODDs and products containing ODDs;

(d) they communicated secretly, in person and by telephone, to discuss and fix prices and volumes of sales of ODDs and products containing ODDs;

(e) they exchanged information regarding the prices and volumes of sales of ODDs and products containing ODDs for the purposes of monitoring and enforcing adherence to the agreed upon prices, volumes of sales and markets;

(f) they refrained from submitting truly competitive bids for ODDs and products containing ODDs in Canada and elsewhere;

(g) they submitted collusive, non-competitive and rigged bids for ODDs and products containing ODDs in Canada and elsewhere;

(h) they took active steps to, and did, conceal the unlawful conspiracy from their customers;

(i) they disciplined any corporation which failed to comply with the conspiracy;

(j) they encouraged and/or assisted in the initial formation of the conspiratorial agreement, and/or encouraged or assisted new members to join the conspiratorial agreement;

(k) they deliberately counselled, procured, solicited and/or incited persons and/or firms to join the conspiracy, with the intention that a conspiratorial agreement would be successfully reached, and/or awareness of the unjustified risk that a conspiratorial agreement would be successfully reached as a result of their encouragement; and

(l) they intended to agree to form a conspiracy to fix prices, completed such agreement to form a conspiracy to fix prices and had a common design to form a conspiracy to fix prices.

80. The defendants and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were:

(a) to harm the plaintiff and other Class Members by requiring them to pay artificially high prices for ODDs and products containing ODDs; and

(b) to illegally increase their profits on the sale of ODDs and products containing ODDs.

81. The Canadian subsidiaries of the foreign defendants and their co-conspirators participated in and furthered the objectives of the conspiracy by knowingly modifying their competitive behaviour in accordance with instructions received from their respective parent companies and thereby acted as agents in carrying out the conspiracy and are liable for such acts.

> 82. The acts alleged in this claim to have been done by each corporate defendant were authorized, ordered and done by each corporate defendant's officers, directors, agents, employees or representatives while engaged in the management, direction, control or transaction of its business affairs.
>
> [Formatting indicating additions and deletions omitted.]

[25] Regarding compensatory damages, the plaintiff pleads:

> 91. The plaintiff and the other Class Members suffered the following damages:
>
> (a) the price of ODDs and products containing ODDs has been enhanced unreasonably at artificially high and non-competitive levels; and
>
> (b) competition in the sale of ODDs and products containing ODDs has been unduly restrained.
>
> 92 During the period covered by this claim, the plaintiff and the other Class Members purchased ODDs and products containing ODDs. By reason of the alleged violations of the Competition Act and the common law, the plaintiff and the other Class Members paid more for ODDs and products containing ODDs than they would have paid in the absence of the illegal conspiracy and, as a result, they have been injured in their business and property and have suffered damages in an amount presently undetermined.
>
> [Formatting indicating additions and deletions omitted.]

1. Breach of s. 45 of the *Competition Act*

[26] The plaintiff says that the defendants breached s. 45(1) of the *Competition Act*, rendering them liable for damages and costs of investigation under s. 36.

[27] Section 36 of the *Competition Act* 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.

> …
>
> (4) No action may be brought under subsection (1),
>
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (i) a day on which the conduct was engaged in, or
>
> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later; and
>
> …

[28] Thus, to have a claim under s. 36, the plaintiff must plead that the defendants breached a provision of Part VI ("Offences in Relation to Competition") and that the plaintiff suffered loss or damage as a result of that breach.

[29] The plaintiff alleges that the defendants breached s. 45. During the class period, s. 45(1) provided:

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

[30] The defendants concede that the pleadings disclose a cause of action under s. 36 based on an alleged breach of s. 45 for some class members and some defendants. However, the defendants say that the claim against the Pioneer defendants is statute-barred because it was commenced after the expiry of the two

year limitation period in s. 36(4) of the *Competition Act*. They also say that the umbrella purchasers have no cause of action against any of the defendants because they did not purchase an ODD or a product containing an ODD manufactured or supplied by the defendants.

[31] I will first consider whether the pleadings disclose a cause of action in general and then address the defendants' arguments. Finally, I will consider whether a breach of the *Competition Act* can provide a basis for the plaintiff's other claims.

(a) Do the pleadings disclose a cause of action under s. 36 of the *Competition Act* based on breach of s. 45?

[32] Section 45 is a criminal conspiracy provision and the plaintiff must plead the *actus reus* and *mens rea* of the offence. The plaintiffs rely on the former ss. 45(1)(b), (c), and (d). The *actus reus* for these provisions was stated in *Watson v. Bank of America Corporation*, 2015 BCCA 362 [*Watson BCCA*] at para. 73:

> (a) the defendant conspired, combined, agreed, or arranged with another person; and
>
> (b) the agreement was to enhance unreasonably the price of a product, to lessen unduly the supply of a product, or to otherwise restrain or injure competition unduly.

[33] The *mens rea* of the former s. 45(1)(c) was stated in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 659–660 as follows:

> (a) the defendant had a subjective intention to agree and was aware of the agreement's terms; and
>
> (b) the defendant had the required objective intention, that is, a reasonable business person would or should be aware that the likely effect of the agreement would be to lessen competition unduly.

[34] Sections 45(1)(b) and (d) have the same *mens rea* requirement: see e.g. *Watson BCCA* at para. 74.

[35] Paragraph 78 of the proposed consolidated notice of civil claim pleads the fact of an agreement and that it contained the elements required by s. 45(1)(b), (c), and (d). The plaintiff does not expressly plead the *mens rea*, but, as in *Watson BCCA*, the *mens rea* is encompassed within s. 45 and the pleadings identify s. 45 as one foundation for the action. Further, as noted in *Watson BCCA* at para. 101, "the mental element need not always be pleaded; depending on the cause of action and the facts already pleaded, proof of an element may be by inference."

[36] As a result, I am satisfied that the plaintiff has pleaded the elements of a breach of s. 45(1)(b), (c), and (d).

[37] The plaintiff has also pleaded the necessary elements entitling him to relief under s. 36. He pleads the actions that the defendants took in furtherance of the conspiracy (para. 79) and the damages he and the class plaintiffs suffered as a result (paras. 91–92).

(b) Is the Pioneer Action bound to fail because it is statute-barred by s. 36(4) of the *Competition Act*?

[38] The defendants argue that the Pioneer Action is bound to fail because it is barred by the two year limitation period in s. 36(4) of the *Competition Act*. As the plaintiff's allegations are limited to the proposed class period, which ended on January 1, 2010, the limitation period expired (at the latest) on January 1, 2012. The defendants say that the discoverability rule does not apply to the limitation period in s. 36(4) because the period runs from a fixed event (the last day on which the conduct was engaged in) and is not tied to the injured party's knowledge.

[39] The plaintiffs respond that: (i) the limitation issue does not arise until pleaded in defence, not at the certification stage; (ii) the limitation defence is so bound up in the facts that it would be premature to address it now; (iii) it is not plain and obvious

that the discoverability rule does not apply to s. 36(4); and (iv) the doctrine of fraudulent concealment may apply to extend the limitation period.

i. Can a limitation period be considered under s. 4(1)(a) of the *CPA*?

[40] There are numerous cases holding that an application to strike pleadings under Rule 9-5 is not the place to decide a limitation issue: see *Jensen v. Ross*, 2014 BCCA 173 at paras. 42–44 and cases cited at para. 42, including *Fuoco Estate v. Kamloops (City)*, 2001 BCCA 325. In *Jensen* the Court said at para. 44 that "[t]he notice of civil claim, in and of itself, does not raise a limitation issue. The limitation issue only arises if it is pleaded in defence. Even then, the issue cannot be resolved in an evidentiary vacuum." As the test is the same under Rule 9-5 and s. 4(1)(a) of the *CPA*, it stands to reason that limitation issues should not be considered under s. 4(1)(a).

[41] There is also case law to the effect that limitation defences should not be considered in a class action certification application: *MacQueen v. Sydney Steel Corp.*, 2011 NSSC 484 at para. 73, rev'd on other grounds 2013 NSCA 143, leave to appeal to S.C.C. refused [2015] 1 S.C.R. ix; *Safioles v. Saskatchewan*, 2014 SKQB 260 at para. 52. In *Crosslink v. BASF Canada*, 2014 ONSC 1682 at para. 86, leave to appeal to Div. Ct. refused 2014 ONSC 4529, the Court questioned "whether it is even appropriate to deal with a limitation argument at certification, particularly in the absence of a cross motion" by the defendant. Justice B.J. Brown of this Court agreed with this statement in *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 at para. 45.

[42] On the other hand, in *Watson v. Bank of America Corporation*, 2014 BCSC 532 [*Watson BCSC*], rev'd in part *Watson BCCA*, Bauman C.J.S.C. (as he then was) struck a claim under Rule 9-5 in a proposed class action based on the two year limitation period in s. 36(4) of the *Competition Act*. The s. 36 claim was based on breach of ss. 45 and 61 of the Act. Section 61 had been repealed more than two years before the notice of civil claim had been filed. The defendants' application to

strike the notice of civil claim was heard at the same time as the certification application. In striking the claim based on breach of s. 61, Chief Justice Bauman wrote:

> [126] If, as *Fuoco Estate* indicates, it is not impossible to rely on a limitation period to strike pleadings, I think it is appropriate in response to a pleading that is based entirely on a repealed statutory cause of action where the limitation period has clearly expired before the claim is filed. It is plain and obvious that such a claim would fail, and little would be gained from requiring a statement of defence or a trial, as no evidentiary findings would be necessary. This is in contrast with the usual issues surrounding limitation periods discussed above.
>
> [127] … Accordingly, the plaintiff's s. 61 claim, while properly pled, must be struck.

[43] Chief Justice Bauman did not strike the claim that relied on breach of s. 45, reasoning that it was not plain and obvious that that claim was statute-barred (at paras. 119–124).

[44] The Court of Appeal in *Watson BCCA* did not expressly consider whether limitation periods can be considered under Rule 9-5 or under s. 4(1)(a) of the *CPA*. The s. 61 limitation issue was not addressed on appeal and Bauman C.J.S.C.'s decision on the s. 45 limitation issue was affirmed on the following basis:

> [122] It seems to me it is open to consider these pleadings as a plea of on-going arranging of the prohibited kind. On that view, it is not plain and obvious that the limitation provision bars the claim. Nor is it plain and obvious that new members of the class, who could have had no complaint until they became a merchant agreeing to accept Visa or MasterCard credit cards in payment, would be foreclosed from a claim because any "agreement" between the defendants was made more than two years before they became such merchants.

[45] Other courts have decided limitation issues prior to, or together with, certification hearings, including on motions for summary judgment: see e.g. *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at paras. 635–650, aff'd 2012 ONCA 867, leave to appeal to S.C.C. refused [2013] 2 S.C.R. viii; *Coulson v. Citigroup Global Markets Inc.*, 2010 ONSC 1596, aff'd 2012 ONCA 108.

[46] However, I am of the view that limitation periods cannot be considered under s. 4(1)(a). It is well-established that limitation defences are affirmative defences that do not arise until pleaded: *Jensen*. I note that in *Watson BCSC* the defendants had applied to strike the notice of civil claim under Rule 9-5; no such application has been made here.

[47] As a result, I conclude that the pleadings disclose a cause of action against the Pioneer defendants under the *Competition Act*.

[48] If I am wrong, and limitation periods can be considered under s. 4(1)(a), I will go on to consider the plaintiff's other arguments. As will be seen, I again conclude that it is not plain and obvious that the Pioneer Action *Competition Act* claim is limitation barred.

ii. Is it premature to consider the limitation defence as it is bound up in the facts?

[49] If limitation defences can be considered under s. 4(1)(a) of the *CPA*, they can only bar claims where it is plain and obvious, based on the pleadings, that the limitation period has expired. This is because no evidence can be considered under s. 4(1)(a): *Hollick* at para. 25.

[50] In this case, it is clear that if discoverability and fraudulent concealment do not apply, the limitation period expired in January 2012 at the latest. Section 36(4)(i) of the *Competition Act* states that the limitation period expires two years from the day the prohibited conduct was engaged in, and the conduct prohibited by the former s. 45 is the making of the agreement: *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825 at paras. 479–482, aff'd 2009 FCA 222, leave to appeal to S.C.C. refused 2010 CanLII 14709; *Fairview Donut Inc.* at para. 643. Thus, if it is plain and obvious that both discoverability and fraudulent concealment do not apply, I would conclude that the plaintiff's *Competition Act* claim against the Pioneer defendants is bound to fail.

iii. Discoverability

[51] The defendants say that, as a matter of law, the discoverability principle can never apply to s. 36(4).

[52] The discoverability rule provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224. The rule is "an interpretive tool for constructing limitation statutes": *Ryan v. Moore*, 2005 SCC 38 at para. 23. In *Ryan* at para. 23, the Court approved the following statement from *Fehr v. Jacob*, [1993] 5 W.W.R. 1, 85 Man. R. (2d) 63 (C.A.):

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

[53] The Court in *Ryan* went on to say at para. 24 that "[t]he law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action".

[54] The text of s. 36(4) suggests that it fits within the second category in *Fehr*: time runs from the occurrence of the prohibited conduct (the agreement) without regard to the injured party's knowledge. This conclusion was reached in *Laboratoires Servier* at para. 488 and in *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996 at paras. 31–33, aff'd 2012 FCA 48. But, in affirming the Federal Court decision in *Garford*, the Federal Court of Appeal said that discoverability did not arise on the facts of the case (para. 10). Other cases have not decided the issue, but suggested that discoverability does not apply to s. 36(4): *Fairview Donut Inc.* at para. 646, citing *Garford*.

[55] However, the text of s. 36(4) is not necessarily determinative; after all, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. I do not think that the Court in *Ryan* intended to depart from this well-established approach to statutory interpretation.

[56] And, in *Fanshawe College v. AU Optronics*, 2015 ONSC 2046, leave to appeal to Div. Ct. granted 2016 ONSC 17, appeal transferred to C.A. 2016 ONCA 131, Grace J. concluded at paras. 114–120 that the discoverability principle applied to s. 36(4). In granting leave to appeal to the Divisional Court, Rady J. noted that the question of whether s. 36(4) is subject to discoverability is “of considerable importance” and “the law is unsettled on the point”. That appeal was consolidated with another and will be heard by the Ontario Court of Appeal.

[57] In other cases, courts have held that it is not plain and obvious that discoverability does not apply to the s. 36(4) limitation period. In *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202, [1998] O.J. No. 6419 at para. 10 (Ct. J. (Gen. Div.)), the Court declined to strike a s. 36 claim, writing that it was arguable, but not beyond doubt, that the discoverability rule did not apply to s. 36(4), and that it was premature to decide the issue based on the statement of claim. In *Sandhu v. HSBC Finance Mortgages Inc.*, 2014 BCSC 2041, the Court certified a *Competition Act* claim and held that the plaintiffs may be able to argue that the limitation period was extended based on discoverability (at para. 58). In *Crosslink*, the Court certified a s. 36 claim despite the fact that the alleged conspiratorial agreement occurred more than two years prior to the issuance of the claim; the Court said that “[t]here may also well be an issue respecting discoverability that makes a determination of the limitation at this stage premature” (at para. 85).

[58] In light of this conflicting case law, I am not satisfied that it is plain and obvious that the discoverability principle can never apply to the limitation period in s. 36(4). While this is a matter of law alone that can be evaluated without factual

inquiry, at the certification stage “it is not necessary for a chambers judge to resolve complex questions involving the interpretation of legislation”: *Jer v. Royal Bank of Canada*, 2014 BCCA 116 at para. 67.

[59] As it is not plain and obvious that discoverability can never apply to the limitation period in s. 36(4), it follows that it is not plain and obvious that discoverability does not apply to extend the limitation period in this case. The plaintiff has pleaded that the defendants communicated secretly and took steps to conceal the conspiracy from their customers. Assuming these facts are true, it is not plain and obvious that the limitation period was not extended as it relates to the Pioneer defendants.

iv. Fraudulent concealment

[60] The Ontario Court of Appeal described the doctrine of fraudulent concealment in *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341, 249 D.L.R. (4th) 662) as follows:

> [28] Unlike the discoverability rule, with which Abella J.A. was concerned, the common law doctrine of fraudulent concealment is not a rule of construction. It is an equitable principle aimed at preventing a limitation period from operating "as an instrument of injustice" (see *M. (K.)* [*v. M. (H.)*, [1992] 3 S.C.R. 6], supra, at para. 66). When applicable, it will "take a case out of the effect of statute of limitation" and suspend the running of the limitation clock until such time as the injured party can reasonably discover the cause of action … (see *M. (K.)*, supra, at paras. 65 and 66). Its underlying rationale is grounded in the well-established principle, reiterated in *Goldin (Trustee of) v. Bennett and Co.* (2003), 65 O.R. (3d) 691, [2003] O.J. No. 2778 (C.A.), at para. 35, that equity will not permit a statute to be used as an instrument of fraud.
>
> [29] In other words, unlike the discoverability rule, the doctrine of fraudulent concealment is not dependent upon the particular wording of the limitation provision. When applied, there is no risk that the limitation provision will be construed in a manner not intended by the legislature. Fraudulent concealment is concerned with the operation of the provision, not its interpretation. Stated succinctly, it is aimed at preventing unscrupulous defendants who stand in a special relationship with the injured party from using a limitation provision as an instrument of fraud.

[61] In this context, fraud is given a broad meaning, and is not confined to the traditional parameters of the common law action. Fraud can result from active concealment of the right of action after it has arisen or from the manner in which the act giving rise to the right of action is performed: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 57. However, the mere fact that the injured party is ignorant of his or her right of action is insufficient; there must be "some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts": *M. (K.)* at 57.

[62] As noted, the plaintiff has pleaded that the defendants took active steps to conceal their alleged conspiracy. While the plaintiff does not plead the existence of a special relationship, that may not be fatal. A purely commercial relationship may be sufficient for equitable fraud: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278 at para. 99, leave to appeal to S.C.C. refused 2009 CanLII 4263. As a result, it is not plain and obvious that fraudulent concealment will not toll the limitation period in this case.

v. Conclusion on the limitation period in s. 36(4)

[63] It is not plain and obvious that the Pioneer Action *Competition Act* claim is statute-barred. In my opinion, limitation defences cannot be considered under s. 4(1)(a) of the *CPA*. Even if they can be considered under s. 4(1)(a), it is not plain and obvious that both discoverability and fraudulent concealment do not apply to extend the limitation period in this case.

(c) Do the umbrella purchasers have a cause of action under the *Competition Act*?

[64] The parties only made brief submissions on this issue. The defendants say that (a) the plaintiff has not pleaded any causal connection between the defendants' alleged misconduct and any injury the umbrella purchasers suffered; (b) any injury to the umbrella purchasers was not caused by the defendants; and (c) any such injury is too remote to support a claim against the defendants. The plaintiff replies that the cause of action under s. 36 for breach of s. 45 can extend to umbrella purchasers

and that his allegation is that the price-fixing defendants moved the entire ODD market.

[65] There are two questions here: (1) do umbrella purchasers—that is, direct or indirect purchasers from non-cartel members—have a right of action against cartel members based on ss. 36 and 45 of the *Competition Act*?; and (2) if the answer is "yes", has the plaintiff properly pleaded the cause of action in this case?

i. Do umbrella purchasers have a cause of action against cartel members based on ss. 36 and 45 of the *Competition Act*?

[66] The impact of a price-fixing cartel may extend beyond the cartel members' products. The theory of umbrella liability is that cartels create an "umbrella" of supra-competitive prices that enable non-cartel members to set their prices higher than they otherwise would have: *Shah v. LG Chem* at para. 159. As explained in a recent article:

> Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a substitution away from the cartels' products toward substitute products produced by cartel outsiders. … [T]he increased demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market—for example, in cases where a cartel covers less than 100 percent of the firms in that market—or in neighboring markets.
>
> Roman Inderst, Frank P. Maier-Rigaud & Ulrich Schwalbe, "Umbrella Effects" (2014) 10:3 J. Competition L. & Econ. 739 at 740 [citations omitted].

[67] Umbrella claims have been certified in actions that also include non-umbrella claims (i.e. direct or indirect purchases from alleged cartel members): see e.g. *Fairhurst v. Anglo American PLC* at para. 41; *Infineon* at para. 17; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 at para. 100 (Sup. Ct.), leave to appeal to Div. Ct. refused 2010 ONSC 2705; *Crosslink* at paras. 92, 98. In *Crosslink*, Rady J. rejected the defendants' argument that the class was overbroad because it may have included those who purchased from non-defendants (at paras. 98–99).

[68] However, to date, the only explicit consideration of whether umbrella purchasers have a cause of action under the *Competition Act* is Justice Perell's analysis in *Shah v. LG Chem*. In that case, the plaintiff alleged that the defendants' price fixing of lithium ion batteries led to increased prices across the market. Justice Perell held that it was plain and obvious that umbrella purchasers do not have a cause of action under the *Competition Act*:

> [164] The Defendants offer five reasons why the claim of the Umbrella Purchasers does not disclose a cause of action. First, the Defendants submit that s. 36, upon which the Plaintiffs rely, is not a substantive law provision, and, therefore, s. 36 cannot introduce a cause of action. Second, the Defendants submit assuming s. 36 can introduce a substantive cause of action, then as a matter of interpreting the scope of that cause of action, allowing a claim by Umbrella Purchasers would be inconsistent with restitutionary law. Third, the Defendants submit that assuming s. 36 can introduce a substantive cause of action, then as a matter of interpreting the scope of that cause of action, the Defendants' liability would be indeterminate and uncircumscribed and this is contrary to legal policy about economic loss torts. Fourth, the Defendants submit that the proposed new cause of action is unjust because the Defendants would be liable for the independent pricing decisions of non-Defendants, which they submit are intervening acts that break any purported causative link between Umbrella Purchasers and the Defendants. Fifth, the Defendants submit that to the extent that tort law has a role to play in behaviour modification and deterrence of wrongdoing, there is no need to extend liability to include compensation for Umbrella Purchasers.
>
> [165] I do not agree with the Defendants' first reason for concluding that there is no cause of action by Umbrella Purchasers but, generally speaking, I do agree with their other four reasons for concluding that it is plain and obvious that the Umbrella Purchasers do not have a cause of action against the Defendants.

[69] I note that there is mixed case law in the United States on whether umbrella damages are recoverable under the *Sherman Act*, 15 U.S.C. §1-7. Examples where umbrella damages were held recoverable include *In re Beef Industry Antitrust Litigation*, 600 F. (2d) 1148 at 1166, note 24 (5th Cir. 1979) certiorari denied 449 U.S. 905; and *In re Arizona Dairy Products Litigation*, 627 F. Supp. 233 (D. Ariz. 1985). Decisions holding the opposite include *Mid-West Paper Products Co. v. Continental Group Inc.*, 596 F. (2d) 573 at 587 (3rd Cir. 1979); and *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F. (2d) 1335 at 1340-1341 (9th Cir. 1982).

[70] In the European Union, umbrella damages are available under article 101 of the *Treaty on the Functioning of the European Union*: *Kone AG and Others v. ÖBB-Infrastruktur AG*, C-557/12 (5 June 2014), ECLI:EU:C:2014:1317.

[71] In my opinion, it is not plain and obvious that umbrella purchasers do not have a cause of action under the *Competition Act*. Section 36 affords a cause of action to "[a]ny person who has suffered loss or damage" due to conduct contrary to Part VI. The ordinary meaning of this section seems capable of extending to umbrella purchasers.

[72] As to the reasons given in *Shah v. LG Chem*, with respect, I cannot agree.

[73] First, while I acknowledge that allowing umbrella claims is inconsistent with restitutionary law, I do not think that restitutionary law determines the scope of *Competition Act* claims. Section 36 by its terms is inconsistent with restitutionary law because it allows any person "who has suffered loss or damage" as a result of prohibited conduct to sue and recover an amount equal to his or her loss or damage. In other words, s. 36's focus is on compensating for losses, not restoring wrongful gains.

[74] The Court in *Microsoft* did note that affording indirect purchasers a cause of action was consistent with restitutionary law. However, that was in response to the defendants' argument that the rejection of passing on as a defence necessarily meant it could not be used as a "sword" by indirect purchasers. One reason that the Court rejected this argument is that, unlike the defensive use of passing on, the offensive use of passing on is consistent with restitutionary law. But I do not read *Microsoft* as saying that s. 36 of the *Competition Act* must be interpreted to be consistent with restitutionary principles.

[75] Second, I do not think that the possibility of indeterminate liability militates against affording umbrella purchasers a cause of action. Section 45 prohibits intentional conspiracies; to succeed, the plaintiff must establish both the subjective and objective elements of the *mens rea*. The policy rationales for limiting a duty of

care in negligence, discussed in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 97–101, and cited in *Shah v. LG Chem* at para. 174, are not compelling here.

[76] In most price-fixing cases the defendants hold a substantial share of the relevant market. And, for umbrella purchasers to be successful, they will generally need to show that the defendants had such market power that their pricing decisions moved the market. Thus, I think it reasonable to assume that in most cases the number of purchases from non-cartel members will not exceed the number of purchases from cartel members. This would expose cartel members to double the liability they would face if umbrella purchasers were excluded; while this is certainly significant, I do not think that it is impermissibly indeterminate.

[77] Third, it is true that allowing umbrella claims could make defendants liable for the pricing decisions of non-defendants. But, at least under the umbrella theory, these pricing decisions are not truly "independent". As stated by the European Court of Justice in *Kone* at para. 29:

> 29 In that regard, it should be noted that market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer its goods or services. Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or to the size of the market covered by that cartel, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is, in the absence of that cartel. <u>In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules.</u>
>
> [Emphasis added.]

[78] Fourth, in my view allowing umbrella purchasers to bring a claim furthers the goals of the *Competition Act*, including compensation, deterrence, and behaviour modification.

[79] Accordingly, I conclude that umbrella purchasers have a cause of action under the *Competition Act*.

ii. Has the plaintiff properly pleaded the cause of action for the umbrella purchasers?

[80] As above, the plaintiff pleads the fact of an agreement and that it contained the elements required by s. 45(1)(b), (c), and (d) (para. 78). The plaintiff also pleads the actions that the defendants took in furtherance of the conspiracy (para. 79) and that the class members suffered damage because the price of ODDs and ODD products was enhanced unreasonably at artificially high and non-competitive levels (paras. 91–92).

[81] The plaintiff does not specifically link the conspiracy to the pricing decisions of non-defendants. However, I do not think that is fatal. It is clear that the plaintiff is alleging that non-conspiring ODD manufacturers and suppliers raised their prices as a result of the defendants' alleged conspiracy.

[82] I conclude that the umbrella purchasers' *Competition Act* claim is adequately pleaded.

(d) Can breach s. 45 of the *Competition Act* supply the "unlawful" element of the plaintiff's claims in unlawful means conspiracy, the unlawful means tort, and unjust enrichment and waiver of tort?

[83] The defendants say that the *Competition Act* is a complete code and the right of action under s. 36 is the sole route to remedies for breaches of Part VI of the Act. Thus, a breach of that Act cannot found civil causes of action, for example by supplying the element of a "wrong" or "unlawful means" in an unlawful means conspiracy claim. As a result, the defendants say that the plaintiff's claims in unlawful means conspiracy, the unlawful means tort, and unjust enrichment and waiver of tort are bound to fail.

[84] At the initial certification hearing, the defendants relied on *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36, leave to appeal to S.C.C. refused [2014] 2 S.C.R. x, and *Watson BCSC*. In *Wakelam*, Newbury J.A., for the Court, wrote:

> [90] Section 36 clearly limits recovery for pecuniary loss to "the loss or damage proved to have been suffered" by the plaintiff, together with possible investigatory costs incurred by the plaintiff. 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; and that accordingly, paras. 34-38 of Ms. Wakelam's statement of claim do not disclose a cause of action.

[85] In *Watson BCSC*, the Court applied *Wakelam* and held that the plaintiff's claims under the *Competition Act* could not constitute the foundation for other causes of action. As a result, the plaintiff's claims in unlawful means conspiracy and the unlawful means tort were bound to fail and were struck: paras. 189–190 (the unlawful means tort claim was also struck because the plaintiff did not identify any third party that the defendants allegedly committed an unlawful act against: para. 156).

[86] However, the Court of Appeal allowed the plaintiff's appeal, writing:

> [58] In my view, it cannot be said that the scheme for civil redress in s. 36 of the *Act* is a replacement for an action in common law for unlawful means conspiracy. … I consider a claim for unlawful means conspiracy relying upon breach of the *Competition Act*, is a viable pleading. My conclusion extends to a claim in restitution and waiver of tort to the extent those claims derive from the tort of unlawful means conspiracy.
>
> [59] I turn now to the secondary issue on this appeal, the claim for restitution for simple breach of the *Competition Act*. This is, indeed, the claim that was before the court in *Wakelam*. In my view *Wakelam* is dispositive of the issue. To the extent the claim derives from non-observance of the *Act* and nothing else, for the reasons given by Madam Justice Newbury, the remedy provided by the *Act* in s. 36 is the sole route to recovery.

[87] The defendants now say that *Watson BCCA* incorrectly interpreted *Wakelam*; they say that *Wakelam* dealt with the same issue and that *Watson BCCA* applied the wrong principle of statutory interpretation.

[88] I cannot entertain this argument. I am bound to follow *Watson BCCA*. To the extent (if any) that there is conflict between *Wakelam* and *Watson BCCA*, this Court will give effect to the latest views expressed by the Court of Appeal: *Fisken and Gordon v. Meehan* (1877), 40 U.C.Q.B. 146 at 159 (C.A.); *R. v. Lindsay*, 2003 BCSC 1203 at para. 24, leave to appeal denied 2005 BCCA 376, denial of leave to appeal aff'd 2008 BCCA 30, leave to appeal to S.C.C. refused 2008 CanLII 46982.

[89] To conclude, breach of s. 45 of the *Competition Act* can be the foundation for the plaintiff's other causes of action.

2. Tort of Civil Conspiracy

[90] The tort of civil conspiracy arises when two or more parties agree "to do an unlawful act, or to do a lawful act by unlawful means": *Microsoft* at para. 72, quoting *Mulcahy v. The Queen* (1868), L.R. 3 H.L. 306 at 317. There are two types of actionable conspiracy in tort law: predominant purpose conspiracy (also known as conspiracy to injure, or unlawful object conspiracy) and unlawful means conspiracy.

(a) Predominant purpose conspiracy

[91] The elements of predominant purpose conspiracy were stated in *Watson BCCA* at para. 125 as follows:

> (a) an agreement or concerted action between two or more persons;
>
> (b) with the predominant purpose of causing injury to the plaintiff; and
>
> (c) overt acts committed that cause damage to the plaintiff.

[92] The defendants say that the plaintiff has not pleaded material facts to support the claim in predominant purpose conspiracy. They also say that "a predominant

purpose of promoting one's own self-interest or profit does not meet the unlawful object requirement of a conspiracy to injure".

[93] Pleadings alleging conspiracy must be as specific as possible: *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 at para. 9 (C.A.), leave to appeal to S.C.C. refused [1993] 3 S.C.R. viii. In *Can-Dive*, Chief Justice McEachern quoted with approval the following excerpt from J.I.H. Jacob & Iain S. Goldrein, eds., *Bullen & Leake & Jacob's Precedents of Pleadings*, 13th ed. (London, U.K.: Sweet & Maxwell, 1990) at 221–222:

> The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure … It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff …

[94] In my view, the plaintiff's pleadings are sufficient. The notice of civil claim identifies the relationships between the defendants; the structure of the ODD industry; the communications, meetings, and agreements between the defendants and their agents; the acts taken in furtherance of the conspiracy; the harm to the plaintiff and the proposed class plaintiffs; and the start and end time in respect to which the claim is brought. In this respect the pleadings are similar to those found sufficient in *Watson BCCA* (at para. 135).

[95] The one potential deficiency is that the pleadings do not identify all the parties to the conspiracy, referring at times to "defendants and co-conspirators". However, in the circumstances I do not think this is fatal to the claim. Reading the pleadings as a whole, I think it is clear that "co-conspirators" refers to similarly situated ODD manufacturers or suppliers. In any event, I do not think the reference to "co-conspirators" prevents the defendants from being able to respond specifically to the plaintiff's claims. As such, this claim is adequately pleaded.

[96] I also do not think pleading two predominant purposes is fatal to the plaintiff's claim. In *Microsoft*, the plaintiff pleaded that the defendants' predominant purposes were (1) to harm the plaintiffs by requiring them to purchase Microsoft's products; (2) to harm the plaintiffs by requiring them to pay artificially high prices; and (3) to unlawfully increase their profits (para. 76). The Court acknowledged that "the pleadings could have been drafted with a more precise focus", but could not "rule out [the plaintiff]'s explanation that [the defendant]'s primary intent was to injure the plaintiffs and that unlawfully increasing its profits was a result of that intention" (para. 78).

[97] Further, in paragraph 83 of the pleadings the plaintiff refers to only one predominant purpose:

> 83. … Further, or alternatively, the predominant purpose of the acts particularized in paragraphs 78-82 was to injure the plaintiff and the other Class Members and the defendants are liable for the tort of civil conspiracy.

[98] The same situation arose in *Watson BCCA*: paragraph 53 of the pleadings listed two predominant purposes (causing harm to the plaintiff and illegally increasing profits), but paragraph 55 pleaded that the defendants' predominant purpose was to cause injury to the plaintiff. The Court of Appeal wrote that paragraph 55 saved the pleading "by clearly averring to the predominant purpose of harm to [the plaintiff and proposed class plaintiffs]" (at para. 139).

[99] The defendants rightly point out that the mere fact that the pleadings in this case are similar to pleadings in other cases where claims have been certified does not mean that the pleadings are necessarily proper. But the circumstances here are so similar to those in *Microsoft* and *Watson BCCA* I am satisfied that the reasoning in those cases applies here.

[100] Accordingly, I conclude that the pleadings disclose a cause of action in predominant purpose conspiracy.

(b) Unlawful means conspiracy

[101] Like predominant purpose conspiracy, unlawful means conspiracy requires an agreement or concerted action between two or more persons. The additional elements of unlawful means conspiracy are:

(a) the conduct of the defendants is unlawful;

(b) the conduct is directed towards the plaintiff (alone or with others);

(c) the defendants should know that injury to the plaintiff is likely to result; and

(d) injury to the plaintiff does occur.

Watson BCCA at para. 56, citing *Microsoft* and *Cement LaFarge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452.

[102] The plaintiff has pleaded each element of the tort. The only ground on which the defendants disputed the unlawful means conspiracy pleadings was based on their contention that breach of the *Competition Act* could not supply the unlawful element of this tort. But *Watson BCCA* makes clear that this is not the case. Accordingly, the pleadings disclose a cause of action in unlawful means conspiracy.

[103] The plaintiff also says that the defendants' conduct breached ss. 21, 22, and 465(1)(c) of the *Criminal Code*, and he seeks to amend his pleadings accordingly. This appears to be a response to the interpretation of *Wakelam* in *Watson BCSC*. In light of the conclusion in *Watson BCCA* that s. 45 of the *Competition Act* can provide the unlawful means element of an unlawful means conspiracy claim, I do not find it necessary to address this argument.

3. Unlawful means tort

[104] The unlawful means tort was described in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 as follows:

> [23] The unlawful means tort creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party). There is no dispute here that this is an intentional tort; the focus of the dispute in this case is on the unlawful means element.
>
> [Citations omitted.]

[105] Conduct is "unlawful" for the purposes of the tort if it gives rise to civil liability to the third party (or would do so if the third party had suffered loss): *Bram* at para. 74. The tort "extend[s] civil liability without creating new actionable wrongs. It thereby closes a perceived liability gap where the wrongdoer's acts in relation to a third party, which are in breach of established legal obligations to that third party, intentionally target the injured plaintiff": *Bram* at para. 43.

[106] The targeting of the plaintiff must be intentional; "[i]t is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result": *Bram* at para. 95.

[107] In this respect the plaintiff pleads in his proposed consolidated notice of civil claim:

> 85. Further, or alternatively, the acts particularized in paragraphs 78-82 were unlawful acts undertaken by the defendants with the intent to injure the plaintiff and the other Class Members as an end in itself or as a necessary means of enriching the defendants, and the defendants are liable for the tort of unlawful interference with economic interests
>
> 85A The acts particularized in paragraphs 78-82 were unlawful under the laws of the jurisdictions where these acts took place and are actionable by third parties, including direct purchasers located outside of British Columbia who directly purchased ODD and/or products that contain ODD, or would be actionable by those third parties if those third parties had suffered a loss. As such, the defendants are jointly and severally liable for the unlawful means tort.
>
> 86. The plaintiff and the other Class Members suffered damages as a result of the defendants' unlawful interference with their economic interests.

[108] In my opinion, the pleadings do not disclose a cause of action in this tort. The plaintiff does not identify the third parties beyond saying that they include "direct purchasers located outside British Columbia". Nor does the plaintiff identify the jurisdictions in which the unlawful acts occurred nor the causes of action that the third parties have or would have. He only pleads that the acts were "unlawful under the laws of the jurisdictions where these acts took place" and are actionable or would be actionable if the third parties had suffered a loss. This makes it impossible for the defendants to properly evaluate and respond to this claim.

[109] I conclude that the unlawful means tort claim is not properly pleaded. Thus, it is not certified. However, the plaintiff is free to apply to further amend his pleadings and to have this claim certified. At a minimum, the amended pleadings should specify the jurisdictions in which the unlawful acts occurred and the causes of action the third parties have (or would have) against the defendants. I note that in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1280 at paras. 77–78, the Court held that it is not plain and obvious that acts directed at foreign third parties in breach of foreign antitrust statutes cannot supply the "unlawful means" element of this tort.

[110] To be clear, I am not saying that this claim will be certified, nor am I expressing an opinion on whether the claim will ultimately succeed. Rather, the plaintiff's ability to apply to further amend his pleadings and to certify this claim reflects the fact that certification "is a fluid, flexible procedural process": *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 23, quoting *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 747, 106 D.L.R. (4th) 339 (Gen. Div.), leave to appeal to Div. Ct. refused [1993] O.J. No. 4210. As noted in *Halvorson* at para. 23, "[t]o hold plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the [*Class Proceedings*] *Act*".

4. Unjust Enrichment

[111] The elements required to establish unjust enrichment are: (1) an enrichment to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

[112] The plaintiff pleads that the defendants were enriched, and the plaintiffs deprived, in the form of the overcharge that was passed through the chain of commerce. The plaintiff says that any contracts that the defendants seek to rely on to justify the overcharge are void because they are prohibited by statute, are in contravention of common law principles, and are in contravention of public policy, including because they constitute a restraint of trade.

[113] The defendants' primary submission on this issue was based on *Wakelam*. In light of *Watson BCCA*, it is clear that the *Competition Act* only bars restitution in lieu of a s. 36 remedy.

[114] The defendants also say that the plaintiff fails to identify the contracts which he says are void, and on what grounds. The latter objection has been rectified in the proposed consolidated notice of civil claim. As to the former objection, reading the pleadings as a whole it is clear that the plaintiff could only be referring to the contracts between the defendants and the direct purchasers and the contracts between the direct purchasers and the indirect purchasers.

[115] Accordingly, as in *Microsoft*, it is not plain and obvious that the plaintiff's unjust enrichment claim—with the exception of the umbrella purchasers' claim—will fail.

(a) Umbrella purchasers do not have an unjust enrichment claim

[116] The umbrella purchasers do not have a restitutionary claim against the defendants because any deprivation they suffered resulted in an enrichment of non-

defendants. Thus, the umbrella purchasers' claim in unjust enrichment is bound to fail.

5. Waiver of Tort

[117] In *Watson BCSC*, the Court certified the claim in waiver of tort and said the following:

> [158] Waiver of tort is a doctrine that allows a plaintiff to disgorge a defendant's gains from tortious conduct rather than recover his or her own loss. It is a benefit-based claim as opposed to a loss-based claim. The doctrine is the subject of substantial judicial and academic debate (*Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 579 [*St. Jude*]):
>
> > [579] …the primary debate about waiver of tort has been whether the doctrine exists as an independent cause of action in restitution (the independence theory) or is parasitic of an underlying tort (the parasitic theory). Under the parasitic theory, waiver of tort may only be invoked where all of the elements of the underlying tort have been proven, including damage to the plaintiff if that is an element of the tort. If, however, waiver of tort exists as an independent cause of action, by invoking the doctrine, a plaintiff can claim the benefits that accrued to the defendant as a result of the defendant's wrongful conduct, even if the plaintiff suffered no harm. It is also noteworthy that the independence theory of waiver of tort is not the same as an action for unjust enrichment, as the plaintiff does not have to demonstrate a deprivation that corresponds to the defendant's enrichment.
>
> As a result, it may not be necessary for a plaintiff to establish every element of the underlying tort, including proof of loss.
>
> [159] Given this controversy, courts have generally refused to strike the claim at the pleadings stage; usually in favor of deferring the decision to a trial judge with the benefit of a full factual record (*Koubi* at paras. 15-40; *St. Jude* at paras. 578-582). However, it is doubtful that a full factual record is necessary, or even helpful, when considering the debate (*St. Jude* at paras. 584-587). The Court in *Koubi* did impose a minimal constraint on the doctrine at the certification stage (at paras. 79-80). Nevertheless, the Court in *Microsoft*, despite being presented with an opportunity, held that the appeal was not the proper place to resolve the debate and instead merely found that it was not plain and obvious that the claim would fail (at paras. 93-97).
>
> [160] I echo the comments in *Koubi* and *St. Jude* that the debate needs to be resolved, but if *Microsoft* was not a proper venue for resolution then neither is this certification motion where the debate has received little attention from the parties. The plaintiff has pled and argued for a very

> standard waiver of tort claim based on the alleged overcharges; the kind that has been certified in many other class actions. …
>
> [161] Accordingly, the plaintiff has properly pled a claim in waiver of tort.

[118] These comments remain apt.

[119] As in *Watson BCSC*, the plaintiff here has pleaded and argued for a "very standard waiver of tort claim based on the alleged overcharges; the kind that has been certified in many other class actions". It is not bound to fail, and thus meets the s. 4(1)(a) criterion.

(a) Umbrella purchasers do not have a waiver of tort claim

[120] Again, the defendants did not receive any monetary benefit attributable to the umbrella purchasers. Accordingly, the umbrella purchasers do not have a waiver of tort claim.

B. Is there an identifiable class?

[121] Section 4(1)(b) of the *CPA* requires an identifiable class of two or more persons to certify a class proceeding. Defining the scope of the class is crucial: it identifies individuals who have a possible claim against the defendant, it identifies those individuals entitled to notice of the certification and, if relief is rewarded, it identifies those who are bound by the judgment: *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 at para. 38.

[122] A class should be defined so that it is not overly broad; all attempts to narrow the class, without doing so arbitrarily, should be made: *Hollick* at para. 21. Where the scope of the class is not obvious, it is the putative representative of the class who bears the burden of ensuring the scope is appropriately narrowed. The Court in *Hollick* also noted that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues: para. 20.

[123] The class definition must state objective criteria from which class members could be identified: *Western Canadian Shopping Centres* at para. 38.

[124] The plaintiff seeks to certify the action on behalf of a class defined as:

> All persons resident in British Columbia who purchased optical disc drives ("ODD") or products that contained ODD in the period from January 1, 2004 through January 1, 2010 ("the Class" or "the Class Members").

[125] Later in his application, the plaintiff says that "[t]he products containing ODD which are subject of this action include computers, videogame consoles, and external ODDs designed to be attached externally to devices such as computers". Apparently, the plaintiff intends to exclude from the class purchasers of ODD-containing products other than computers, videogame consoles, and ODDs designed to be attached externally to devices such as computers.

[126] The defendants do not challenge the plaintiff's assertion that the proposed class includes many thousands of class members. However, the defendants submit that the proposed class does not meet the requirements for certification because:

(a) It is vague as to which products are the subject of the proposed action. It also includes any device that is able to read or record data on optical discs, but some products that perform these functions are not ODDs.

(b) The plaintiff's expert did not separately consider the situation with respect to ODD-containing products.

(c) The class is overbroad, in that it includes purchasers of ODDs or ODD-containing products that were not made or supplied by the defendants.

[127] I will analyze these arguments in turn.

1. Is the class definition impermissibly vague?

[128] I agree with the defendants that the class definition is vague as to which products are included. Paragraph 4 of Part 1 of the notice of application requests an order defining the class as:

> All persons resident in British Columbia who purchased optical disc drives ("ODD") or products that contained ODD in the period from January 1, 2004 through January 1, 2010 ("the Class" or "the Class Members").

[129] This definition is broad, but broad definitions are not *per se* objectionable. However, later in the notice of application the plaintiff says:

> 12. ODD is a memory storage device that uses laser light or electromagnetic waves near the light spectrum to read and/or record data on optical discs. Some ODD can only read from discs, but many newer drives can both read and record. ODDs that record are commonly referred to as "burners" or "writers". Compact discs, DVDs and Blu-ray discs are common types of optical media which can be read and recorded by ODD. The ODDs that are the subject of this action include CD-ROMS, CD-recordable/rewritable, Blu-Ray, Blu-Ray-recordable/rewritable and HD-DVD.
>
> …
>
> 13. The products containing ODD which are subject of this action include computers, videogame consoles, and external ODDs designed to be attached externally to devices such as computers.
>
> [Emphasis added.]

[130] Similar statements are found in the proposed consolidated notice of civil claim at paras. 3–4.

[131] In isolation, these paragraphs may be taken as mere examples of ODDs and ODD-containing products included in this action. However, from the plaintiff's other materials it is clear that he intends to limit the class by reference to these or similar criteria. For example, the plaintiff's written submissions of November 28, 2014 state that "[t]he class is further defined by reference to ODDs used in computers, computer peripherals and video game consoles and those same ODD products". Dr. Reutter's analysis assumes that ODDs include CD-ROM, CD-R/RW, DVD-ROM, DVD-R/RW, Blu-Ray, Blu-Ray R/RW and HD DVD, and that ODD-containing

products includes “computers, videogame consoles and Optical Disc Drives that are designed to be attached externally to devices such as computers”.

[132] As can be seen, the criteria in the pleadings, the plaintiff’s submissions, and Dr. Reutter’s report are similar, but not identical.

[133] As a result, it is not clear what class the plaintiff is proposing. Obviously, if it is not clear what the class is, the members of the class cannot be objectively identified.

[134] While this Court may modify the class definition, it will not “perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept”: *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 at para. 41 (Ont. Sup. Ct.). In the circumstances, I will not attempt to craft an appropriate definition.

[135] However, I will not deny certification. Instead, I will allow certification on condition that the class definition is suitably amended: see *Hollick* at para. 21.

2. Dr. Reutter did not separately consider the situation with respect to ODD products

[136] The plaintiff says there is no need to consider whether there was another price-fixing cartel for ODD products because the plaintiff’s allegation is that the ODD overcharge worked its way through well-understood supply chains into ODD products. I agree. In this respect the plaintiff’s allegations are similar to other cases involving price fixing of inputs into computers: see e.g. *Fanshawe* (LCD monitors); *Infineon* (DRAM).

[137] Dr. Reutter’s reports address the impact of increased ODD prices on the price of ODD products. In my view, that is sufficient at this stage.

3. The class is overbroad because it includes umbrella purchasers

[138] As discussed above, the plaintiff’s theory is that the defendants’ conspiracy created a pricing umbrella which shifted the prices of ODDs across the market. The

plaintiff has deliberately included umbrella purchasers in the class, and therefore the class is not overbroad.

[139] However, I have concluded that unlike the non-umbrella purchasers, the umbrella purchasers do not have a cause of action in unjust enrichment or in waiver of tort. And, as will be seen, the issue of aggregate damages is not suitable for certification with respect to the umbrella purchasers' claims. In other words, the non-umbrella purchasers' claims raise common issues not shared by all the class members. In the circumstances, I am satisfied that there will need to be a non-umbrella purchaser subclass.

C. Do the claims raise common issues and do they predominate over individual issues?

[140] At the heart of any class proceeding is the resolution of common issues: *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at para. 35. The critical factors and considerations in determining whether an issue is common to the proposed class members are:

(a) whether resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres* at para. 39;

(b) the common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each member's claim: *Western Canadian Shopping Centres* at para. 39; *Hollick* at para. 18; and

(c) success for one class member on a common issue need not mean success for all, but success for one member must not mean failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45; *Watson BCCA* at para. 151.

[141] In general, the threshold to meet the commonality requirement is low; there must be a rational connection between the class and the proposed common issues and each common issue must be a triable legal or factual issue, the determination of which will move the litigation forward: *Thorburn* at para. 38. Commonality may be satisfied "whether or not common issues predominate over issues affecting only individual members": s. 4(1)(c). While the plaintiff must show "some basis in fact" to satisfy the commonality requirement, this only requires evidence establishing that these questions are common to the class: *Microsoft* at para. 110.

[142] With respect to class-wide loss, Rothstein J. said the following in *Microsoft*:

> [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.

[143] The common issues proposed by the plaintiff are:

> ***Breach of the Competition Act***
>
> (a) Did the defendants, or any of them, engage in conduct which is contrary to s. 45 of the *Competition Act*?
>
> (b) What damages, if any, are payable by the defendants to the Class Members pursuant to s. 36 of the *Competition Act?*
>
> (c) Should the defendants, or any of them, pay the full costs, or any, of the investigation into this matter and of proceedings pursuant to s. 36 of the *Competition Act?*
>
> ***Conspiracy***
>
> (d) Did the defendants, or any of them, conspire to harm the Class Members?
>
> (e) Did the defendants, or any of them, act in furtherance of the conspiracy?
>
> (f) Was the predominant purpose of the conspiracy to harm the Class Members?
>
> (g) Did the conspiracy involve unlawful acts?

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

(i) Did the Class Members suffer economic loss?

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

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

Tortious Interference with Economic Interests

(l) Did the defendants, or any of them, intend to injure the Class Members?

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

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

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

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

Unjust Enrichment and Waiver of Tort

(q) Have the defendants, or any of them, been unjustly enriched by the receipt of overcharges on the sale of ODD?

(r) Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of ODD?

(s) Is there a juridical reason why the defendants, or any of them, should be entitled to retain the overcharges on the sale of ODD?

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

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

(v) What restitution, if any, is payable by the defendants to the Class Members because of their unlawful conduct?

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

Punitive Damages

(x) Are the defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, what amount and to whom?

Interest

(y) What is the liability, if any, of the defendants, or any of them, for court order interest?

[144] I note that in the plaintiff's notice of application, proposed issues (x) and (y) are mislabelled (z) and (aa), respectively.

[145] As the pleadings do not disclose a cause of action in the unlawful means tort, issues (l)–(p) are not certified. However, if the plaintiff properly amends his pleadings and is successful in the certification of this claim, it is my tentative view that, for the reasons given below, these issues are suitable for certification. Like the other aggregate damages issues, proposed issue (p) would be suitable for the non-umbrella purchasers only.

[146] The umbrella purchasers do not have a restitutionary cause of action and therefore issues (q)–(w) are not suitable for certification with respect to those purchasers.

[147] I will discuss the remaining common issues under four headings:

(a) Cause of action issues: proposed issues (a), (d)–(h), and (s);

(b) Loss and gain issues: proposed issues (b)–(c), (i)–(j), (q)–(r), and (t)–(v);

(c) Aggregate damage issues: proposed issues (k) and (w); and

(d) Punitive damages and court order interest: proposed issues (x)–(y).

1. Cause of action issues: (a), (d)–(h), and (s)

[148] These issues focus on the defendants' conduct . They mainly relate to the existence and scope of the alleged conspiracy. They are common to the class.

[149] I agree with the plaintiff that any variations in the nature of the conspiracy do not undercut the core commonality of the issues. Variations may simply require the court "to provide a nuanced answer to the common question": *Rumley v. British Columbia*, 2001 SCC 69 at para. 32.

[150] These issues are suitable for certification.

2. Loss and gain-related issues: (b)–(c), (i)–(j), (q)–(r), and (t)–(v)

(a) Expert evidence

[151] As is generally the case in price-fixing class actions, the plaintiff retained an expert economist, Dr. Keith Reutter, to produce a report on whether the loss, gain, and aggregate damage issues are capable of resolution on a common basis. Specifically, Dr. Reutter was asked to give his opinion on:

(a) whether all the proposed class members would have been impacted by the defendants' alleged conspiracy, and

(b) whether there are methods available to estimate any overcharge that resulted from the alleged conspiracy, as well as aggregate damages.

[152] He answered the questions in the affirmative. Dr. Reutter assumed that the allegations in the notice of civil claim were true but did not assume impact on the class members. Rather, he investigated the issues and came to these affirmative opinions based on the application of economic analysis to publicly available information. He continued to hold those opinions after considering the criticisms of the defendants' economic expert.

[153] The defendants (except the Quanta defendants) retained Dr. James Levinsohn. He was requested to evaluate whether Dr. Reutter "has put forth a credible methodology grounded in the facts of the case that offers a realistic prospect of determining fact of injury for proposed class members (loss on a class-wide basis)". Dr. Levinsohn opined that it would not be possible to determine the fact of injury for proposed class members using common evidence and analysis.

i. Dr. Reutter's analysis

(1) The ODD market

[154] Dr. Reutter analyzed the ODD market and noted that it exhibited four key characteristics that lend themselves to, but do not prove, collusive behaviour:

(a) ODDs are "commodity-like"; that is, they are homogeneous goods that lack unique features and therefore are substitutable across producers. He bases this conclusion largely on the fact that ODDs are manufactured to conform to industry standards. This is unsurprising as consumers insist, for example, that every DVD unit be capable of reading the same DVDs as DVD units of the same generation made by other manufacturers.

(b) The defendants had market power in the ODD market based on their large market shares. By the middle of the class period in 2007-2008, six defendant companies accounted for over 90% of ODD shipments.

(c) There were no economic substitutes for ODDs as a mass storage device, meaning class members had no choice but to purchase price-fixed ODDs.

(d) There are substantial barriers to entry into the ODD market, preventing new firms entering the market and competing with the defendants. ODD production requires specialized knowledge and equipment, exhibits economies of scale, and requires licensing agreements and patent rights to the necessary technology.

[155] Dr. Reutter concluded that price fixing of ODDs by the defendants would have caused the price of ODDs sold to direct purchasers to increase across the ODD market. These price increases would have been passed-through to all indirect purchasers of ODD products given the competitive nature of the computer market.

(2) Economic methodology

[156] In order to estimate the overcharge on the sale of ODDs, Dr. Reutter proposes to construct a model to estimate the “but-for" price of ODDs absent the alleged anticompetitive conduct.

[157] Dr. Reutter says that pass-through of overcharge on ODDs to indirect purchasers can also be assessed using economic methods and data available from the defendants.

[158] Dr. Reutter proposes to use mainstream and accepted class-wide economic methodologies to answer the questions put to him in this case. In particular, he proposes to use econometric methods based on multiple regression to determine the overcharge and pass-through rates. He says his regression methods are adaptable to the realities of the ODD market and are not simply theoretical.

[159] The quantification of aggregate damages suffered by the proposed class requires adding up the damages suffered by direct and indirect purchasers in the proposed class. Dr. Reutter’s opinion is that this can be done on a class-wide basis, using accepted economic and statistical methods.

[160] Dr. Reutter’s methods can also be used to quantify the economic gains to the defendants from their alleged collusive conduct.

[161] Dr. Reutter has identified sources of data appropriate for the implementation of his proposed methods. Specifically, he proposes to use cost and input data as well as sales transaction data from the defendants, supplemented by publicly available information and data from third party vendors. Dr. Reutter has reviewed public (though redacted) filings in the U.S. ODD litigation and concluded that the relevant categories of data were produced by the defendants in that case and some third parties.

ii. Dr. Levinsohn's analysis

[162] The defendants rely on the affidavit of Dr. Levinsohn in opposing certification of this action. Dr. Levinsohn's summarizes his opinion at paragraphs 18–23 of his report:

> 18. My principal opinion is that it would not be possible to determine fact of injury for proposed class members using common evidence and analysis.
>
> 19. The plaintiff alleges a conspiracy and proposes a class that cover thousands of highly differentiated ODDs and ODD products, sold through multiple pricing mechanisms, including customer-specific negotiations, at multiple levels of supply chains, into multiple markets characterized by different competitive dynamics, and that reached members of the proposed class through multinational, multilevel supply chains. A consequence of the breadth of the plaintiffs claim and proposed class is that the alleged conspiracy would not have injured all (or nearly all) proposed class members.
>
> 20. That the alleged conspiracy would not have injured all (or nearly all) proposed class members is directly relevant to the analyses that would be required to determine fact of injury for proposed class members. Analyses flexible enough to identify proposed class members who would have been injured separately from proposed class members who would not have been injured would be required. Such flexibility would preclude analyses based on estimates of average overcharges and average pass-through rates, and instead would require multiple different highly fact intensive disaggregated analyses that could in no way be characterized as common.
>
> 21. The plaintiffs expert Dr. Reutter has reached two erroneous conclusions. One, all members of the proposed class were "impacted"—a term that I interpret to mean "injured." Two, there are accepted methods available to estimate "any overcharge and aggregate damages" that resulted from the alleged misconduct using evidence common to the proposed class.
>
> 22. Dr. Reutter's conclusions are based on oversimplifications of the relevant industries, markets, and products. Rather than recognizing and addressing that the plaintiff alleges a conspiracy and proposes a class that cover thousands of highly differentiated ODDs and ODD products, sold through multiple pricing mechanisms, at multiple levels of supply chains, into multiple markets characterized by different competitive dynamics, and that reached members of the proposed class through multinational, multilevel supply chains, Dr. Reutter takes an approach that ignores the facts of the case and the realities of the relevant industries, markets, and products.
>
> 23. Ignoring the facts of the case and the realities of the relevant industries, markets, and products is consequential. It leads Dr. Reutter to conclude erroneously that the alleged conspiracy would have injured all proposed class members. And because Dr. Reutter concludes erroneously that the alleged conspiracy would have injured all proposed class members, he does not propose a method that could identify the proposed class

> members who would have been injured separately from the proposed class members who would not have been injured. The only method that he proposes is a method to estimate aggregate damages that is based on comparisons of averages. But a method based on comparisons of averages is—by construction—not up to the task of identifying the proposed class members who would have been injured separately from the proposed class members who would not have been injured. Consequently, in my opinion, Dr. Reutter has not proposed a credible method for determining fact of injury for proposed class members.
>
> [Citations omitted.]

[163] The bulk of Dr. Levinsohn's report addresses the commonality of harm and whether the fact of injury to all or nearly all class members can be proven on common evidence.

[164] Dr. Levinsohn critiques Dr. Reutter's methodology in paragraphs 88–130 of his report. Again, he focuses on whether Dr. Reutter has put forward a credible method for determining the fact of injury for proposed class members. He says that Dr. Reutter's proposed regression analysis at best "estimates an average overcharge and does not speak to the commonality of overcharges across direct sales" (para. 107) and therefore "does not and cannot estimate whether there was an overcharge on any individual direct purchase" (para. 103).

[165] While he admits that "regression analysis, done properly and at the appropriate level of disaggregation, is a useful way of estimating an average overcharge(s)" (para. 114), Dr. Levinsohn says that Dr. Reutter's methodology is overly simplistic and not credible for the purpose of estimating an average overcharge given the complexities of the ODD market (paras. 107–114).

(b) Analysis

[166] The defendants' main argument with respect to these issues is that the plaintiff's proposed methodology does not address the commonality of harm. According to the defendants, the key question is whether the plaintiff's methodology has a realistic prospect of establishing that every member of the class suffered financial harm. They say, and Dr. Reutter admitted, that his proposed methodology

yields average overcharge and average pass-through. As a result, according to the defendants, the plaintiff's proposed methodology does not do what is required to satisfy the commonality requirement in *Microsoft*: demonstrate some basis in fact that every member of the class was harmed.

[167] In my view, the defendants have misread *Microsoft*. All that *Microsoft* requires is that "the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain": *Microsoft* at para. 115 (emphasis added). On this issue I adopt the reasoning and conclusions of Perell J. in *Shah v. LG Chem* at paras. 58–70, and in particular paras. 69–70:

> [69] Thus, for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing. If the plaintiff's expert's methodology failed in proof at trial, then the class members' claim would fail across the indirect class members' class because each and every one of them would have failed to prove a constituent element of their cause of action; i.e., that the price-fixing penetrated their place or "level" of the distribution channel, and the Defendants would secure a discharge of liability against all the class members. Conversely, if the methodology proved sound to show that overcharges reached the indirect purchaser place in the distribution channel, then there might have to be individual issues trials to determine each class member's entitlement.
>
> [70] Or, if at trial the methodology to prove loss to the group was sound and a methodology for an aggregate assessment was also established, then the distribution mechanisms of the *Class Proceedings Act, 1992* could be used to determine what is a fair and reasonable distribution and it would not be necessary to have any individual issues trials.

[168] The plaintiff must show that the defendants took part in a conspiracy, that they sometimes or always overcharged direct purchasers, and that at least some direct purchasers passed on these overcharges. That is sufficient to establish the fact of the defendants' liability. The methodology need not go further and show that every single member of the class suffered a financial loss.

[169] This interpretation of *Microsoft* is supported by the aggregate damage provisions in Division 2 of the *CPA*, which allow for an aggregate award even where some class members have suffered no financial loss: *Fulawka v. Bank of Nova*

Scotia, 2012 ONCA 443 at para. 133, leave to appeal to S.C.C. refused 2013 CanLII 14307. Section 31 allows the court to order that an aggregate award be distributed on an average or proportional basis if it would be impractical or inefficient to identify which class members are entitled to share in the award (s. 31(1)(a)(i)). These sections clearly contemplate that the defendants' liability may be established even where some of the class members have suffered no financial harm.

[170] The defendants' other objections to Dr. Reutter's proposed methodology include:

(a) Dr. Reutter incorrectly concludes that ODDs are commodity-like products.

(b) The methodology fails to take into account the numerous factors that impacted the defendants' pricing decisions.

(c) The methodology is "not grounded in the facts of the industry" and fails to take account the importance of things like retail price points.

(d) Dr. Reutter fails to separately analyze the markets for ODD products.

(e) The plaintiff has not shown some basis in fact that the data required for the analysis is available.

(f) Dr. Reutter does not propose a methodology of proving harm to the umbrella purchasers.

[171] As to (a), an important foundation of Dr. Reutter's analysis is that ODDs are commodity-like; that is, they are homogeneous goods that lack unique features and therefore are substitutable across producers. Dr. Reutter says that "but for collusive behavior, the price of commodity-like goods will tend to be competitive", because price becomes the predominant consideration among consumers.

[172] In support of his conclusion that ODDs are commodity-like, Dr. Reutter points to the fact that ODDs are manufactured to conform to industry standards to ensure interoperability and interchangeability and are produced in a limited number of standard sizes.

[173] The defendants dispute this characterization, pointing to the variability among ODDs as to functionality, reading and writing speeds, form factor size, loading mechanism, method of connection to a computer, and other characteristics.

[174] Despite these differences, Dr. Reutter's analysis has satisfied me that there is a large degree of homogeneity in the ODD market. I base this conclusion largely on the high degree of standardization, interchangeability, and interoperability of ODDs. Further, Dr. Reutter's proposed methodology is flexible enough to be applied to subgroups of ODDs if required.

[175] As to (b) and (c), Dr. Reutter proposes to compare the price of ODDs "but for" a conspiracy with the actual price of ODDs. The methodology is specifically designed to isolate the effect of the conspiracy. Thus, the other factors that impact pricing are accounted for in his model.

[176] I have addressed (d) when discussing the identifiable class criterion. To reiterate, the plaintiff need not address whether there was a separate price-fixing conspiracy for ODD products.

[177] With respect to (e), Dr. Reutter has identified the necessary data inputs and possible data sources. His opinion that the defendants have the necessary data is supported by his review of the filings in the U.S. ODD action. At this early stage, it is difficult to imagine what more could be required of him. I am satisfied that the plaintiff has shown some basis in fact that the required data is available.

[178] Finally, with respect to the umbrella purchasers, the plaintiff says that Dr. Reutter's methodology will show that collusion among the defendants led to market-wide price increases for ODDs because the defendants' market power allows

them to shift the industry supply curve upward. I am not convinced this methodology will succeed, but the plaintiff has established that it is at least plausible.

(c) Conclusion

[179] On the whole, Dr. Reutter's opinion that his proposed methods are able to establish loss on a class-wide basis is supported by his detailed analysis of the ODD market. His methods appear to be plausible and his approach to class-wide impact, overcharge and pass-through meets the standard set out by the Supreme Court of Canada in *Microsoft.*

[180] I conclude that the plaintiff has shown some basis in fact that the loss- and gain-related issues are common. They are certified.

3. Aggregate damage issues: proposed issues (k) and (w)

[181] The availability of an aggregate damage award is governed by s. 29 of the *CPA*:

> 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.

[182] An aggregate monetary award can only be made after liability has been established: *Microsoft* at paras. 131–134. Aggregate assessment may be certified as

a common issue only if resolving the other certifiable common issues could be determinative of monetary liability: *Fulawka* at para. 139.

[183] An aggregate damage award is appropriate where the defendant's liability can be reasonably determined without proof by individual class members; s. 29 does not require that the defendant's liability be assessed with the same degree of accuracy as in an individual action.

[184] Here, monetary relief is claimed and the common issues will be dispositive of the defendants' liability. Thus, the criteria in s. 29(1)(a) and (b) are satisfied.

[185] As to s. 29(1)(c), Dr. Reutter proposes to calculate the defendants' aggregate liability by summing the aggregate liability to direct ODD purchasers (a class member who buys an ODD directly from a defendant), direct ODD product purchasers (a class member who buys an ODD product directly from a defendant), indirect ODD first purchasers (the first class member to buy a defendant's ODD from a non-defendant) and indirect ODD product first purchasers (the first class member to buy an ODD product from a non-defendant). To avoid double counting, purchases of ODD and ODD products attributed to direct purchasers are not included in the estimation of indirect first purchaser damages.

[186] This is a plausible method for determining aggregate damages when combined with the rest of Dr. Reutter's methodology.

[187] I conclude that the aggregate damage issues are suitable for certification for the non-umbrella purchasers.

(a) Umbrella purchasers

[188] Dr. Reutter has not proposed a methodology for determining the aggregate damages of the umbrella purchasers. I am unable to infer that the methodology would be the same as the methodology for the non-umbrella purchasers. As such, the aggregate damage common issues are not certified for the umbrella purchasers.

4. Punitive damages and court order interest: issues (x) and (y)

[189] Punitive damages are awarded where the defendant's conduct "has been egregious, deliberate and intentional and so extreme in nature as to be deserving of condemnation and punishment and where compensatory damages alone would be inadequate to punish the defendant for this conduct": *Andersen v. St. Jude Medical, Inc.*, 2010 ONSC 77 at para. 31. Punitive damages must be considered in light of the other punishments faced by the defendant, because punitive damages should only be awarded if all other penalties are "found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 123.

[190] Punitive damages may be certified as a common issue where the assessment of the defendant's conduct is focused on systemic wrongdoing against the class, rather than wrongdoing towards individual members: *Rumley v. British Columbia*, 2001 SCC 69 at para. 34. The question at the common issues stage is whether certification of punitive damage issues will avoid duplication of fact-finding or legal analysis: *Sherry v. CIBC Mortgage Inc.*, 2015 BCSC 490 at para. 20.

[191] In this case, I am satisfied that the issue of whether the defendants' conduct warrants an award of punitive damages can be assessed on a class-wide basis without considering the circumstances of individual class members because the defendants' alleged wrongful conduct was systemic in nature.

[192] However, the quantum of punitive damages cannot be assessed until compensatory damages are assessed. This is because punitive damages are only available if all other penalties are inadequate to accomplish the objectives of retribution, deterrence and denunciation: *Whiten* at para. 123.

[193] Entitlement to aggregate damages is not certified as a common issue with respect to the umbrella purchasers. Thus, the class' total compensatory damages will only be known following individual issues trials unless the judge at the common

issues trial decides that an aggregate damage award is appropriate for the umbrella purchasers.

[194] As such, I would adopt the bifurcated approach to punitive damages outlined in *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 31:

> 31. Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be on the defendants' conduct, and there is nothing in this case that will require consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.

[195] Accordingly, the following issue will be determined at the common issues trial:

> Was the conduct of any or all of the defendants sufficiently reprehensible or high-handed to warrant punishment?

[196] The class's entitlement to punitive damages, and the quantum of any award, will be determined on a class-wide basis once the amount of compensatory damages is determined for both the umbrella and the non-umbrella purchasers (either at the common issues trial or following individual trials). The question at this stage will be:

> If the conduct of any or all of the defendants warrants punishment, should an award of punitive damages be made against any or all of those defendants and, if so, in what amount?

[197] For the same reasons as for punitive damages, the issue of pre-judgment interest requires assessment of the class's entitlement to damages. Accordingly, this issue can only be determined following the common and individual issues trials: see *Pollack v. Advanced Metal Optics Inc.*, 2011 ONSC 1966 at para. 66. Issue (y) is

certified but will be determined once the issue of compensatory damages is determined for both the umbrella and the non-umbrella purchasers.

5. Conclusion on common issues

[198] The punitive damage and court order interest issues will be determined as outlined above.

[199] For the non-umbrella purchasers, the remaining issues other than the unlawful means tort issues ((l)–(p)) are certified.

[200] For the umbrella purchasers, the following issues are not certified: the unlawful means tort issues ((l)–(p)); the restitutionary issues ((q)–(w)); and the aggregate damages issue (k). The remaining issues are certified.

D. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

[201] Section 4(1)(d) of the *CPA* states that the court must determine whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

[202] Section 4(2) of the *CPA* identifies specific criteria that must be considered in assessing preferability:

> (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.

[203] The preferability analysis should be conducted through the lens of the three principal aims of class actions: judicial economy, access to justice, and behaviour modification: *Hollick* at para. 27.

[204] The test for preferability is twofold: first, a court must assess whether the class action would be a fair, efficient and manageable method of advancing the claim; second, the court must determine whether the class action would be preferable to other reasonably available means of resolving the claims of class members: *Hollick* at paras. 27–28; *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235 at para. 24.

[205] In *AIC Limited v. Fisher*, 2013 SCC 69, Cromwell J., for the Court, wrote:

> [21] In order to determine whether a class proceeding would be the preferable procedure for the "resolution of the common issues", those common issues must be considered in the context of the action as a whole and "must take into account the importance of the common issues in relation to the claims as a whole": *Hollick*, at para. 30. McLachlin C.J. in *Hollick* accepted the words of a commentator to the effect that in comparing possible alternatives with the proposed class proceeding, "it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court": para. 29, citing W. K. Branch, *Class Actions in Canada* (loose-leaf 1998, release 4), at para. 4.690.

[206] The defendants' main argument as to preferability relates to s. 4(2)(a): they say that the individual issues overwhelm the common issues. However, this is based on their contention that Dr. Reutter's proposed methodology does not have a realistic prospect of establishing class-wide harm as discussed in *Microsoft*. For the reasons given above, I disagree. As such, the certified common issues relate to the existence of causes of action, to the loss of the class members, and, for the non-umbrella purchasers, to the defendants' gain. It is clear that the common issues predominate over any individual issues.

[207] As to s. 4(2)(b), there is no evidence that any class members have an interest in controlling separate actions.

[208] As to s. 4(2)(c), neither party has directed my attention to any proceedings related to ODDs except for class actions in other provinces.

[209] As to s. 4(2)(d), I do not think that there are any other practical means of resolving most of the class plaintiffs' claims. The respondents have not proposed any. Most of the individual recoveries will be small, much lower than the cost of pursuing an individual action. The Court of Appeal's reasoning in *Infineon* is apt:

> [75] The chambers judge did not consider whether there were any other more practical or efficient means of resolving the appellant's claims and the respondents did not propose any. Thus, the only apparent alternative to a class action is no action at all. Therefore, if this action does not proceed as a class action there is the potential for an unconscionable result – that the respondents will be allowed to retain their unlawful gains. This potential unconscionability also weighs in favour of certifying this action as a class proceeding.
>
> [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.

[210] Finally, the administration of the class proceeding would not create greater difficulties than would be experienced if relief were sought by other means. At the least, all the same issues and difficulties would be experienced in individual actions, and the procedural tools in the *CPA* would be unavailable.

[211] I acknowledge that the inclusion of umbrella purchasers may lead to added challenges. However, I do not think these challenges will be so great that the proceeding will be unfair, inefficient, or unmanageable. Many of the issues are common to all class members. The issues focusing on the defendants' conduct are the same. The loss-based issues differ somewhat, but, as Dr. Reutter's reports suggest, many of the issues between the two subclasses overlap somewhat. As such, including the umbrella purchasers will avoid duplication of fact-finding or legal analysis.

[212] If the inclusion of the umbrella purchasers makes the action unmanageable, the case management judge can amend the certification order, decertify the proceeding, or make any other order that is appropriate: *CPA s.* 10(1).

[213] To conclude, I am satisfied that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

E. Is there an appropriate representative plaintiff?

[214] Section 4(1)(e) of the *CPA* mandates that the representative plaintiff must be able to fairly and adequately represent the class, must have developed a plan for proceeding, and must not have a conflict with the class on the common issues. The representative plaintiff must be prepared and able to vigorously represent the interests of the class.

[215] Mr. Godfrey deposed that he purchased an Xbox 360 and a laptop computer in the class period. However, the invoice for his computer purchase (Exhibit C to his affidavit) shows it was purchased on August 7, 2010, outside the class period. He did not attach an invoice for his Xbox 360 purchase. I will proceed on the assumption that he purchased his Xbox 360 within the class period.

[216] The defendants acknowledge that Mr. Godfrey meets the requirements, and I am satisfied that the evidence supports the appointment of Mr. Godfrey as the representative plaintiff. Mr. Godfrey's interests do not conflict with the interests of the other class members on the common issues and he has demonstrated a knowledge of and interest in the action and his role as representative plaintiff.

[217] I am also of the view that Mr. Godfrey can adequately represent the umbrella purchasers' interests. There are no conflicts between Mr. Godfrey and the umbrella purchasers and most of the issues are common to all. If problems arise after certification, separate representation can easily be established: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at 684 (C.A.), leave to appeal to S.C.C. refused (2000), 185 D.L.R. (4th) vii.

[218] The proposed litigation plan is also adequate.

[219] I conclude that the requirements of s. 4(1)(e) are satisfied.

V. CONCLUSION

[220] The Main Action and the Pioneer Action are to be consolidated.

[221] This action is certified as a class proceeding on condition that the class definition is suitably amended. This issue is referred to counsel to make further submissions on an amended class definition to be proposed by plaintiff's counsel.

[222] There will be a sub-class for the non-umbrella purchasers.

[223] Mr. Godfrey is appointed the representative plaintiff.

The Honourable Mr. Justice Masuhara