COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.,* 2021 BCCA 85

Date: 20210226
Docket: CA46584

Between:

676083 B.C. Ltd.

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Revolution Resource Recovery Inc.

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Mr. Justice Butler
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated November 22, 2019 (*676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2019 BCSC 2007, Vancouver Docket S172912).

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Written Submissions Received:	January 25, 28, February 2, 2021
Place and Date of Hearing:	Vancouver, British Columbia October 21, 2020
Place and Date of Judgment:	Vancouver, British Columbia February 26, 2021

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:

The Honourable Mr. Justice Butler
The Honourable Mr. Justice Grauer

Summary:

The appellant applied to certify its action as a class proceeding under the Class Proceedings Act. It raised claims in breach of contract, unjust enrichment, and restraint of trade, among others. The judge refused to certify the action, but granted the appellant leave to re-apply to certify the claim in restraint of trade. The appellant appeals aspects of the judge's conclusions on breach of contract and unjust enrichment. The respondent cross appeals aspects of the conclusions on restraint of trade.

Held: Appeal allowed in part; cross appeal dismissed. It is plain and obvious that the appellant's claim in unjust enrichment, as pleaded, does not disclose a cause of action, and the appellant should not be permitted to further amend its pleadings in unjust enrichment or to re-apply for certification of that claim. The appellant should be permitted to re-apply for certification of the breach of contract claim, subject to certain amendments and conditions; the appellant's proposed class definition is appropriate, subject to minor modification, and the proposed common issues, in light of the modified class definition, are appropriate for class-wide adjudication. In relation to the restraint of trade claim and associated issues, the judge did not err in finding that the pleadings disclosed a cause of action, that the proposed class definition was acceptable, and that certain proposed common issues were appropriate for class-wide adjudication. The judge also did not err in granting the appellant, or a replacement representative plaintiff, leave to re-apply to certify the restraint of trade claim, subject to certain conditions.

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Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] This appeal arises out of an application by the plaintiff 676083 B.C. Ltd. (“676”) to certify its action as a class proceeding under s. 2(2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (“*CPA*”). That action advances multiple causes of action and seeks various remedies. In his reasons for judgment, indexed at 2019 BCSC 2007, the chambers judge addressed each of the essential elements under s. 4(1) of the *CPA* and the 21 proposed common issues that were presented to him. 676 and the respondent, Revolution Resource Recovery Inc. (“Revolution”), through its cross appeal, have appealed most, but not all, of the determinations that were made by the chambers judge.

I. BACKGROUND

A. Overview of 676’s Claims

[2] This action was commenced on March 29, 2017, as a proposed class action against Revolution. The chambers judge was also the case management judge for the action.

[3] The chambers judge succinctly outlined the claims being advanced by 676 and Revolution's response:

> [2] The defendant, Revolution Resource Recovery Inc. ("Revolution"), provides waste disposal and recycling services to commercial customers in the Lower Mainland area of British Columbia. 676 is one of Revolution's former customers. In this action, 676 advances two discreet claims against Revolution.
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> [3] First, 676 alleges that, since April 2015, Revolution has been routinely overcharging its customers by billing them for certain municipal fines, levies and surcharges that it never actually incurred, without authority under the standard form of agreement that it uses. 676 seeks, in that regard, damages for breach of contract and unjust enrichment.
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> [4] Second, 676 alleges that Revolution routinely relies on certain clauses in its standard form of agreement in order to make it difficult for its customers to avoid an automatic renewal of the term or otherwise to terminate their agreements and change service-providers. 676 seeks to have those clauses declared void and unenforceable as unconscionable and in restraint of trade.

[4] The first of these two broad categories of claims, that Revolution imposed surcharges on its clients that it did not actually incur, has its genesis in various municipal programs and bylaws.

[5] The Greater Vancouver Sewerage and Drainage District (the "GVSDD") is a corporate entity that is, among other things, responsible for the management of municipal solid waste and recyclable material in much of the area administered by the Metro Vancouver Regional District (the "MVRD"), previously known as the Greater Vancouver Regional District (the "GVRD").

[6] As part of its management of municipal solid waste and recyclable material, the GVSDD imposes fines on disposal companies, such as Revolution, pursuant to its material ban disposal program. During the relevant period, the program was established under the *Greater Vancouver Sewerage and Drainage District Tipping Fee and Solid Waste Disposal Regulation Bylaw*, No. 287, 2014; No. 293, 2015; and No. 302, 2016 (collectively the "Tipping Fee Bylaws").

[7] The Tipping Fee Bylaws permit the GVSDD to impose surcharges on loads of waste that contain higher than permitted concentrations of different types of materials including, for example, contaminated recyclable paper, food waste, clean wood, source-separated organic waste, and other forms of waste.

[8] Revolution began to charge a “Government Surcharge/Material Ban” fee to its clients, or many of them, in April 2015. It says that it stopped imposing the Government Surcharge/Material Ban on new clients when it adopted a different pricing formula in January 2017, before 676 commenced its action. In the materials it filed for the certification hearing, Revolution estimated that as of March 2018, approximately 6742 of its customers were charged the Government Surcharge/Material Ban at some point, and that approximately 2629 were still being charged the Government Surcharge/Material Ban.

[9] In his reasons for judgment, the chambers judge, for ease of reference, defined this additional charge, which was identified as the “Government Surcharge/Material Ban” on the monthly invoices Revolution delivered to many of its clients, as the “Surcharge.” For the purposes of the appeal, the parties, in their respective factums, similarly use the term “Surcharge” in place of “Government Surcharge/Material Ban.” For reasons that I will develop, I have not done so. As a starting point, the term “Government Surcharge/Material Ban” is used in the parties’ pleadings and in their application materials. Furthermore, it is the Government Surcharge/Material Ban, and not other forms of surcharge, that is the foundation of 676’s breach of contract claim. Nevertheless, it is important to realize that the chambers judge’s references to the “Surcharge” are references to the Government Surcharge/Material Ban.

[10] The second broad category of claim advanced by 676 pertains to the apparent difficulty that some of Revolution’s customers have had in terminating their agreements with Revolution. 676 says, among other things, that a number of provisions in these agreements result in agreements that have an indefinite term. It is relevant that 676 terminated its contract with Revolution in February 2017.

B. The Nature of Revolution’s Contracts and Relationships with its Clients

[11] 676, in its fourth amended notice of civil claim (“4th ANOCC”), and in its submissions on appeal, asserts that the customer service agreements (the

“CSAs”) and, in particular, the “General Conditions” in those agreements, which were prepared by Revolution and presented to its clients, contained “standard terms” and were in “standard form.”

[12] The central pillar of the response that Revolution advances, both in relation to 676’s formal claim and its certification application, is the degree of variation and inconsistency that exists in the agreements and relationships that it has with its many clients. It is therefore important to understand the nature and breadth of this issue. The chambers judge explained:

> [6] Revolution opposes the application. It argues that 676’s claims are not amenable to adjudication on a class-wide basis for two main reasons. First, it says that the agreements in question are, contrary to 676’s assertion, not in a standard form but rather individually negotiated and therefore highly variegated. Second, it says that because the charges appearing on a customer’s monthly invoice depend on, among other things, the content of the waste that the customer actually generated during that month, determining whether a particular charge was justified or not, and the quantum of any damages that might be payable, requires an individualized inquiry.

[13] The variation takes multiple forms. First, Revolution has a diverse client base that operates in different areas. The chambers judge explained:

> [8] Revolution provides commercial waste and recycling disposal services throughout the Metro Vancouver Regional District (the “MVRD”) except the Sunshine Coast, and across Abbotsford and Chilliwack, which are part of the Fraser Valley Regional District (the “FVRD”). [Its] customers include small family businesses and large corporations, societies, partnerships, strata corporations, religious organizations, and sole proprietorships.

[14] Second, those clients have diverse needs. The chambers judge said Revolution “may be called upon to collect, transport, process and dispose of a variety of materials, including garbage, plastics, paper, cardboard, food scraps, yard trimmings, wood, construction and demolition materials, manure, sawdust, drywall, Styrofoam, aluminum or steel.”

[15] Third, the chambers judge explained that Revolution provides different types of services to its clients:

> [10] Revolution identifies three distinct categories of service that it provides to its customers, which it calls, respectively, “front-end service,” “roll-off service” and “tote service.”

> [11] Revolution provides “front-end service” where there is no space for a large roll-off bin. In those circumstances, Revolution supplies smaller waste disposal or recyclables containers to the customer. Revolution picks up the containers periodically and dumps their contents into a waste-haul truck, where they are mixed with solid waste or recyclables from other locations before being taken to an appropriate waste disposal or recycling facility. It is said to be the most common category of service provided for customers seeking to dispose of small to large volumes of waste or recyclables containing different materials.
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> [12] Revolution provides “roll-off services” to high-volume producers of specific materials, such as wood, organics, plastic or mixed waste. The service involves the provision of large disposal or recycling bins. These are transported directly from the customer’s business premises to an appropriate waste disposal or recycling facility without being mixed with materials disposed of by other customers.
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> [13] Revolution’s “tote service” is said to consist of supplying 32, 64 or 96 gallon plastic bins, which are considerably smaller than a front-end or roll-off container. These are used to separate recyclables only. Some of its customers use this service because they do not require garbage disposal service. More typically, customers will use this service if they generate a low volume of recyclables or if the space at their place of business is too small to accommodate larger containers.

[16] Fourth, Revolution’s clients dispose of their waste materials in either the MVRD or the Fraser Valley Regional District (the “FVRD”). The chambers judge explained:

> [15] Many of Revolution’s customers have their waste disposed of at one or more of the GVSDD Disposal Sites or the City Disposal Sites. Others do not. Abbotsford and Chilliwack, for example, operate outside of the GVSDD and within the FVRD. Customers in the FVRD have their waste and recycling taken to private facilities.
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> [16] Revolution says that, even within the MVRD, the waste and recycling it disposes of is not always deposited at a GVSDD Disposal Site or a City Disposal Site. Metro Vancouver recognizes 45 private solid waste and recycling facilities. Revolution says that it uses those to dispose of specific materials, such as recyclables, wood, construction materials, manure, sawdust, drywall, Styrofoam, and steel, that cannot be disposed of at the GVSDD Disposal Sites and City Disposal Sites. Revolution says that it incurs an array of different fines, surcharges, or levies to use such facilities.

[17] Fifth, Revolution operates under different forms of CSAs. 676 entered into a CSA with Revolution in November 2009. That original CSA was replaced by a new CSA on November 3, 2011. That second CSA remained in effect until February 2017, when it was terminated by the parties. At the certification application, Revolution adduced over 100 different CSAs that related to its relationships with

other clients. Those CSAs revealed that there were seven versions of its general template CSA in place during the proposed class period—that being from April 2015 to the present.

[18] Sixth, it appears that these template CSAs were frequently modified or supplemented. The chambers judge said:

> [22] Revolution describes its preprinted forms as a "template" which serves as the "starting point" for negotiations with its customers. Mr. McRae states that it is "quite common" for Revolution's sales representatives to modify the preprinted terms through negotiations with customers. With the introduction of version 5G, a space was added for "Special Instructions" that was used, according to Mr. McRae, "to add, delete, supplement or amend" the preprinted terms. Mr. McRae says that in his experience, "it would be rare for the 'Special Instructions' section not be used to make changes to any given [CSA]."
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> [23] That evidence is supported to some extent by the examples that have been adduced in evidence by 676 itself, which include not only its own most recent CSA but also those of two other customers. All of them include handwritten terms that amend the preprinted ones in various ways. It is also supported by many examples reproduced by Revolution.

[19] Revolution also adduced forms that accompanied some of the new CSAs, and recorded changes in service with existing customers, including the rate charged under the Government Surcharge/Material Ban. It also adduced records of oral conversations with clients who did not sign new CSAs, indicating a negotiated change in the rate for the Government Surcharge/Material Ban where a new CSA had not been signed.

[20] The point that the various CSAs were modified in relation to various issues, including rates, surcharges, and termination rights, was revisited and emphasized by the chambers judge throughout his reasons. For example, in relation to the Government Surcharge/Material Ban, the chambers judge said:

> [29] Revolution says that the amounts it has collected from its customers through the Surcharge were insufficient to cover the additional costs it has had to incur to address the consequences of the organics ban promulgated by the MVRD and the City of Vancouver. Mr. McRae explains that the amount of the Surcharge as invoiced may have varied, among Revolution's customers, from anywhere between 1% and 18% of the gross amount invoiced. He offers the following explanation for that range:
>
> > After the [Surcharge] was initially implemented, Revolution proceeded to negotiate this rate with a number of existing customers individually.
> >
> > In setting the effective rate for the [Surcharge] with existing customers, Revolution considered the specific risk of contamination

> of banned materials posed by a customer's particular waste handling practices. Revolution would expect customers with waste handling practices that posed a higher risk of contamination of banned materials to pay a higher rate for the [Surcharge] than customers deemed to have safer waste handling practices.
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> [30] Mr. McRae and other employees of Revolution describe the process they followed in negotiating the amount of the Surcharge with customers. By way of example, a number of email exchanges have been reproduced to show how Revolution negotiated a compromise rate of 8% or 10% with certain of its customers when their CSA's were renewed. Celine Sun, Revolution's Retention Manager, states that:
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> > Revolution's customers have used their agreement to pay a certain rate for the [Surcharge] to obtain concessions from Revolution on other terms contained in their customer service agreement, such as reduced [fuel surcharge] or [environmental regulation fee] charges, shorter service terms, reductions to bin removal, exchange and delivery fees, or other amendments that were of importance to a particular customer.
> >
> > [31] At times the negotiated amount was formalised by revising the CSA, at other times it was done by replacing it with a new CSA and at still other times it was done by placing a note in the customer's file. Some customers are said to have had the Surcharge reversed and credited back to their accounts.

[21] The differences in the relationships, including in relation to fees, levies or surcharges, that Revolution had or has with its clients was further developed in the application materials that were before the chambers judge and in Revolution's factum on appeal.

[22] Seventh, it is relevant that 676 argues that the ability of Revolution to impose the Government Surcharge/Material Ban is limited to a particular provision within the CSAs under the heading "Fines." Revolution, conversely, argues that the contractual authority to pass on a broad array of operational costs through the Government Surcharge/Material Ban is found not just in the Fines clause but also in other provisions of the CSAs such as the "Weights," "Rate Adjustments," and "Waste Material" clauses.

[23] The chambers judge included the text of these various provisions, as well as a number of other provisions dealing with the "Term," "Right to Re-Negotiate," and "Failure To Perform" (collectively the "Termination Clauses"), in his reasons. The Termination Clauses pertain to the restraint of trade claim that 676 advances.

The specific language of these various provisions is not, however, directly engaged on this appeal.

C. The Conclusions of the Chambers Judge and the Issues on Appeal

[24] The chambers judge began by identifying the essential requirements for certification that are set out in s. 4(1) of the *CPA*. He confirmed that 676 carries the burden to show "some basis in fact" supporting each element of the certification test other than the requirement under s. 4(1)(a) to show the plaintiff advances valid causes of action. He observed that the parties "join issue on each element of the certification test."

[25] I do not propose to address, at the outset, each of the chambers judge's conclusions in relation to each sub-issue under s. 4(1). Rather I have, at this point, simply distilled those conclusions and the positions of each of 676 and Revolution on appeal.

[26] The chambers judge declined to certify 676's breach of contract claim on the basis that that claim did not raise common issues. The chambers judge also declined to certify 676's unjust enrichment claim on the basis that the claim would need to be recast and that it did not raise common issues. 676 appeals both of these determinations.

[27] The chambers judge declined to certify an unconscionability claim brought by 676, on the basis that the claim did not raise a common issue. This conclusion is not appealed.

[28] The chambers judge found that the common issues in relation to contract enforceability and restraint of trade were, with one exception, suitable for certification. Aspects of these determinations are the subject of Revolution's cross appeal.

[29] The chambers judge ultimately declined to certify the proposed restraint of trade claim as a class proceeding because 676 had not shown that it was a suitable representative plaintiff for that class. However, he granted 676, or a replacement representative plaintiff, leave to re-apply to certify the restraint of trade claim and the associated common issues that he found suitable for the class.

This was subject to the condition that any such application be brought either by a different representative plaintiff who was a current customer of Revolution or by 676 if the application was supported by evidence showing that the appointment of 676 was necessary to avoid substantial injustice to the class. He also required a revised litigation plan that satisfied the requirements of s. 4(1)(e)(ii) of the *CPA*. 676 challenges aspects of these determinations.

II. STANDARD OF REVIEW

[30] A certification decision, including whether the statutory requirements of the *CPA* are met, is "entitled to substantial deference": *Wilson v. DePuy International Ltd.*, 2019 BCCA 440 at para. 37; see also *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 55–56. This Court will only interfere in issues of fact and questions of mixed fact and law if the chambers judge made a palpable and overriding error or was clearly wrong: *Service v. University of Victoria*, 2019 BCCA 474 at para. 50. Deference is also accorded to the chambers judge's assessment of the evidence. Accordingly, this Court will not interfere with that assessment by reweighing or substituting "its view of the weight of the evidence", absent "an error in principle or unless he was clearly wrong": *Jones v. Zimmer GMBH*, 2013 BCCA 21 at para. 51. Finally, extricable questions of law are reviewed on a standard of correctness: *Service* at para. 50; *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 56. The question of whether the pleadings of a plaintiff disclose a cause of action is generally a pure issue of law and does not attract appellate deference: *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 44; *Sherry* at para. 56.

III. DISCUSSION

A. Overview of s. 4(1) of the *CPA*

[31] Section 4(1) of the *CPA* establishes the statutory requirements for certification of a class action. When these requirements are met, the proceeding must be certified. The merits of a claim are not determined on a certification application and the threshold for certification is low. Nevertheless, certification serves as a "meaningful screening device", and the court performs "an important gatekeeping role by screening out those claims destined to founder at the merits stage of the proceeding": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 103−04 [*Pro-Sys Consultants*]; *Sherry* at para. 22. Thus,

the standard for assessing evidence at certification requires more than a "superficial level of analysis into the sufficiency of the evidence" and more than "symbolic scrutiny": *Pro-Sys Consultants* at para. 103.

B. Section 4(1)(a): Adequacy of the Pleadings

1. The Legal Framework

[32] In *Pro-Sys Consultants*, Rothstein J., writing for the Court, described the test to be applied in determining whether the pleadings disclose a cause of action for the purpose of s. 4(1)(a):

> [63] The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 ("*Alberta Elders*"), this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta Elders*, at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

[33] This framework was further developed in *Sherry*:

> [24] When deciding whether pleadings disclose a cause of action, the judge should read them generously, err on the side of permitting novel but arguable claims to proceed and accommodate inadequacies in form to the extent reasonable by allowing for proposed amendments to cure deficient drafting. Nevertheless, for a claim to be certified the prospect of success must be reasonable, not speculative, taking into account the salient law and the litigation context: *Imperial Tobacco* at paras. 21–25; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44–46. In addition, and importantly, the material facts upon which the claimant relies in making the claim must be clearly pleaded. As Chief Justice McLachlin explained in *Imperial Tobacco*, the pleaded facts form the basis upon which the prospect of success of the claim will be assessed: at para. 22.

[34] The evidence provided by the defendants is not to be taken into account in the court's evaluation of the pleadings: *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235 at para. 14.

2. The Unjust Enrichment Claim

[35] Paragraphs 23–25 of the 4th ANOCC, which advance an unjust enrichment claim, provide:

> 23. Further, or alternatively, the plaintiff pleads that it and other members of the Class are entitled to recover under restitutionary principles.

> 24. Revolution was unjustly enriched by the receipt of the Government Surcharge/Material Ban. The plaintiff and other members of the Class have suffered a corresponding deprivation in the amount of the Government Surcharge/Material Ban.
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> 25. There is no juristic reason for Revolution to retain any part of the Government Surcharge/Material Ban, and Revolution must disgorge and make restitution of the Government Surcharge/Material Ban to the Class.

[36] The chambers judge determined that "the CSA serves as a valid juristic reason for at least that part of the alleged enrichment that 676 acknowledges to have been permitted by the CSA", and that this claim was therefore "bound to fail insofar as it seeks disgorgement of all monies received by Revolution through the Surcharge" (emphasis in original). Later he said, "I have already found that the claim in unjust enrichment, as currently pleaded, does not disclose a viable cause of action inasmuch as it seeks to compel Revolution to disgorge all of the amounts that it received through the Surcharge, without regard to the amounts that it received but was admittedly entitled to charge."

[37] 676, on this appeal, argues that the chambers judge erred in engaging in a merits-based assessment, and says "nowhere does the plaintiff plead that Revolution incurred costs that they were entitled to pass onto their customers under the contract".

[38] I do not consider that either of these assertions is correct. At para. 11 of the 4th ANOCC, 676 avers: "The General Conditions include a term that Revolution may charge its customers surcharges, fines, or levies where those costs were incurred by Revolution." At para. 12 of the 4th ANOCC, 676 alleges that "Revolution charged the Class surcharges for fines … that exceed and/or bear no relation to the fines charged to Revolution by the GVRD". At para. 20 of the 4th ANOCC, 676 alleges that "Revolution breached the customer service agreements by charging the Government Surcharge/Material Ban without having incurred a corresponding fine or surcharge."

[39] Each of the words "exceed," "bear no relation," and "corresponding" contemplate that Revolution sought to collect more, by way of the Government Surcharge/Material Ban, than it was entitled to under the terms of the General Conditions in the CSAs. 676 has not, in its submissions, and more importantly in its pleading, advanced a legal theory under which Revolution was not permitted to pass on that portion of the Government Surcharge/Material Ban that it properly

incurred and paid to regional authorities. Its pleadings say the opposite. Accordingly, the chambers judge's conclusions were based on the language of the pleadings before him and were not the product of a merits-based inquiry.

[40] The chambers judge was prepared to allow 676 to rectify this first difficulty with the unjust enrichment claim that it advanced. His decision is consistent with the authorities I have referred to and I would not, in concept, revisit that determination.

[41] I say "in concept" because there is a more fundamental difficulty with the unjust enrichment claim that 676 seeks to advance. It is this difficulty that Revolution presses on appeal, where it argues that 676's remedy lies in contract, that it has no remedy in unjust enrichment available to it, and that the judge erred in concluding that 676 could properly amend its pleadings in unjust enrichment to coexist with its claim in breach of contract.

[42] This issue engages the principles that underlie the relationship between a claim in contract and a claim in unjust enrichment and that define when those two causes of action can properly coexist.

a) The Relevant Principles

[43] The existence of a contract is one of the established categories of juristic reason that will bar a claim in unjust enrichment, together with disposition of law, donative intent, and "other valid common law, equitable or statutory obligations": *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44; see also *Moore v. Sweet*, 2018 SCC 52 at para. 57; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 69–71.

[44] Professor Mitchell McInnes, in *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis Canada Inc., 2014) at 652, addresses the circumstances when a contract serves as a juristic reason for an enrichment:

> The general proposition often is stated broadly: restitution is not available if the parties' relationship is governed by contract. The actual rule is somewhat narrower. The mere existence of a contract obviously is no bar to restitution if it is entirely unrelated to the impugned transfer. The existence of an agreement for the sale of a car, for instance, is totally irrelevant if the vendor mistakenly sends to the purchaser a ring that was intended as a gift for a third party. The issues become more interesting, however, if the purported enrichment generally pertains to the same

> matters as the parties' contract. It then becomes necessary to determine whether the impugned benefit, having occurred within a contractual context, is governed by the contract.
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> [Emphasis added.]

[45] McInnes identifies the underlying rationale behind the general rule as "the need to protect the integrity of contractual allocations of benefits and burdens" (at 652). Contracts allow the parties to determine their own rights and liabilities, whereas unjust enrichment applies by operation of law. See also *Goff & Jones: The Law of Unjust Enrichment*, 8th ed (London: Sweet & Maxwell, 2011) at 47–48. Accordingly, McInnes defines the central question as "whether restitution effectively would rewrite the parties' bargain" (at 653), or "whether an enrichment pertains to an allocated risk" under a contract (at 655).

[46] This general rule and its rationale were expressed by this Court in *Kosaka v. Chan*, 2009 BCCA 467:

> [17] Counsel was not aware of any authority in which unjust enrichment had been found where a valid and enforceable contract provided the reason for the conferring of the benefit on the defendant and the deprivation of the plaintiff. If a court were to allow recovery in these circumstances, the negotiation of contracts between arm's-length parties would be an undertaking fraught with risk and the security of concluded agreements would be threatened. As Maddaugh and McCamus write in the *Law of Restitution*):
>
> > Where the enrichment results from the performance of a valid contractual obligation, the general policy favouring the security of transactions weighs against the intervention of restitutionary claims. Only if the transactions can be found to be unenforceable for a reason recognized either at law or in equity can the possibility of a restitutionary claim for the value of benefits conferred be entertained. [At 3-27.]
> >
> > [emphasis added.]

[47] There are several recent decisions in which courts have allowed unjust enrichment claims to be brought in the alternative to contract claims. For example, this Court distinguished *Kosaka* in *Noh v. Plaza 88 Developments Ltd.*, 2011 BCCA 461. In *Noh*, this Court upheld the trial judge's determination that a claim in contract had failed, but that a claim in unjust enrichment had succeeded. This Court noted that "the central question is whether the services that Mr. Noh undoubtedly provided fell outside the scope of the fee agreement": at para. 67. The Court concluded that they did, as the contract placed no obligation on the

plaintiff to perform the services that he rendered. *Noh* has been relied on for the proposition that a plaintiff may validly plead breach of contract and unjust enrichment in the alternative to one another, particularly where it is possible that a claim in contract could fail while a claim in unjust enrichment could succeed: *Bear Creek Contracting Ltd. v. Pretium Exploration Inc.*, 2020 BCSC 1523 at paras. 93–94; *Tyk v. Graham*, 2017 BCSC 920 at para. 101. See also *Murray Market Development Inc. v. Casa Cubana*, 2018 BCSC 568 at para. 13.

[48] Several further decisions, which arise in the class action context, are relevant. Both *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 (also known as *Chatfield v. Bell Mobility Inc.*) and *Ileman v. Rogers Communications Inc.*, 2015 BCCA 260 involved proposals to certify a class action by customers of cell phone services operated by the defendants. In both cases, the defendants billed the plaintiffs a monthly fee for services as well as a "system access fee" of $6.95. In *Chatfield*, the Saskatchewan Court of Appeal upheld the chambers judge's certification of a claim in unjust enrichment as a class proceeding, whereas in *Ileman*, this Court upheld the chambers judge's refusal to certify the class proceeding.

[49] These cases are distinguished solely on their underlying pleadings, within the limited context of the class certification proceedings in which they arose. In *Chatfield*, the plaintiff's factual allegations in the statement of claim supported a claim in both contract and unjust enrichment. In particular, the plaintiff's statement of claim pleaded that the entire "system access fee" was an "add on" or "extra" fee, on top of the charges that subscribers had agreed to (and therefore had allocated risk to). Accordingly, the unjust enrichment claim, as pleaded, could arguably fall outside of any provision in the contract. In *Ileman*, however, the plaintiff and the chambers judge accepted that the "system access fee" was expressly stipulated in the contract, and the plaintiff did not plead that the fee was imposed beyond what had been agreed to in the rate for services. Accordingly, the benefit was conferred pursuant to the contract, which was a juristic reason. See also *Simsek v. United Airlines, Inc.*, 2017 BCCA 316 at paras. 29–38.

[50] The common theme in cases where claims in unjust enrichment have been allowed to proceed in the presence of a contractual arrangement is that in each case, the purported benefit was found (or, at the certification stage, pleaded) to have been provided to the defendant extra-contractually, or beyond the scope of

the contract. This is consistent with the underlying principle of respecting the contractual allocations of benefits and burdens. Where a benefit is conferred beyond the scope of the negotiated terms of a contract, there is no concern that the contractual allocation of benefits and burdens will be disturbed.

[51] The second broad set of circumstances where claims in contract and unjust enrichment can be pleaded concurrently is where some issue in relation to the validity or enforceability of the contract in question is raised. This may arise, for example, when issues of illegality, capacity, or frustration are raised. See *Kosaka* at para. 17; *Ileman* at para. 66; McInnes at 901.

b) Application of these Principles

[52] Neither of the two broad categories of circumstances in which claims in contract and unjust enrichment can coexist are present in this case.

[53] First, 676 does not plead, and Revolution does not allege, that any part of the Government Surcharge/Material Ban arises from work done by Revolution for 676, or any other members of the proposed class, outside of the terms of the CSAs or the other forms of agreement that Revolution has with its clients. Both parties agree that the contracts between Revolution and its clients capture, in full, the amounts Revolution could properly charge by way of the Government Surcharge/Material Ban.

[54] Second, 676 does not allege in its pleadings that its contract with Revolution is ineffective or discharged on any ground such as frustration, illegality (with the exception of the alleged restraint of trade provisions in respect of which 676 seeks a declaration), mistake, lack of capacity, or any similar basis. Nor does Revolution raise any such issue. Instead, both 676 and Revolution accept that a contract existed between them and that the agreements between Revolution and other potential class members are valid.

[55] Third, there is no prospect in the circumstances of this case, as pleaded, that 676's claim in contract could fail while its claim in unjust enrichment could succeed.

[56] In its reply factum, 676 cites *Kim v. Choi*, 2019 BCSC 437 for the proposition that an "overcharge" can fall outside of the scope of a contract and

form the basis for an unjust enrichment claim. This, in fact, is not the proposition the case advances. In *Kim* the parties had devised a scheme to deceive immigration authorities and to allow the plaintiff to obtain permanent resident status in Canada. Under that scheme, the plaintiff agreed to purchase a restaurant from the defendant and to pay the operating expenses of the restaurant. The defendant misrepresented those operating expenses. The plaintiff advanced a claim in both contract and unjust enrichment. The trial judge noted that the defendant argued that the plaintiff was complicit in misleading immigration authorities and that therefore her claims were barred by the doctrine of *ex turpi causa*: at para. 6. Though the trial judge did not address the pleadings that had been filed by the parties, it seems clear that it was the alleged illegality of the underlying contract between the parties that caused the plaintiff and the court to focus on the unjust enrichment claim: see paras. 183–92, 225–34, 244–50. This Court dismissed an appeal from that decision in reasons indexed at 2020 BCCA 98, but the juristic reason issue was not appealed, and the question was whether the doctrine of illegality barred the plaintiff's recovery, on a restitutionary basis, of the overstated expenses that she had been charged.

[57] In its oral submissions, when pressed on this issue, counsel for 676 argued that claims in contract and unjust enrichment can coexist where, for example, there has been a mistake as to the terms of the contract. While this is true in concept, the reality is, again, that neither illegality nor mistake nor any similar doctrine is pleaded by 676.

[58] In *Basyal* at para. 43, the Court confirmed: "The case law is also clear that the requirement that the material facts be pleaded applies to class actions". The Court, at paras. 73–74, considered that the plaintiffs' unjust enrichment pleadings were inadequate, and it observed, at para. 72, that an aspect of the plaintiffs' claim pertained to "obviously contractual obligations that, if breached, would be compensable in the [contract] claim." In *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 103, 113, the Court similarly considered that the plaintiff's various restitutionary claims should not have been certified as pleaded. See also *Simsek* at para. 37.

[59] I consider it plain and obvious that 676's claim in unjust enrichment, as pleaded, does not advance a proper cause of action. Normally, absent some form of particular prejudice, this Court would consider whether it is in the interests of

justice to permit a plaintiff to make appropriate amendments to its pleadings, as opposed to striking out such pleadings on the basis that they are deficient. In *Sandhu*, however, the Court said that "in this mix [the court will consider] the length of time the plaintiff has had to 'get it right'": at para. 44. The Court adopted the following observation from *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36:

> [92] Since [the plaintiff] has failed to plead any material facts in support of the required causal connection, we may at this late stage infer that she is unable to do so.

[60] In this case, the action was commenced nearly four years ago, and the 4th ANOCC is 676's fifth pleading. The question of whether a claim in unjust enrichment can properly be grounded on those pleadings was squarely before the chambers judge, and it was squarely raised on appeal. 676 has had ample time to advance that claim properly. The nature of the deficiencies in its unjust enrichment claim are fundamental and not merely technical. Furthermore, the thesis of its claim, in relation to the Government Surcharge/Material Ban, is entirely contractual. Neither party made any meaningful submission, in writing or orally, that deviated from that focus. In such circumstances, I do not consider that 676 should be provided with a further opportunity to amend its unjust enrichment claim. It has had sufficient time to "get it right," and it can be inferred that it is unable to do so. This conclusion is also in keeping with the Court's gatekeeping role as described in *Pro-Sys Consultants* and *Sherry*.

[61] I would dismiss this aspect of 676's appeal. I note that the chambers judge's reasons appear to suggest that 676 may be able to properly recast its claim in unjust enrichment, but he made no order granting 676 leave to amend its pleadings or to re-apply to certify that claim. To be clear, I would not grant 676 leave to amend its pleadings in unjust enrichment or to re-apply for certification of that claim as a class proceeding.

3. The Contract Claim

[62] No issue is taken, under s. 4(1)(a), with respect to the breach of contract claim that 676 has advanced in the 4th ANOCC. Revolution does argue that 676's pleadings do not support the common issues that it seeks to raise in its breach of contract claim. I propose to return to that issue.

4. The Restraint of Trade Claim

[63] At the certification hearing, Revolution argued that 676, as a former customer, could not seek the declaratory relief set out in its prayer for relief and that therefore the associated claims did not disclose a valid cause of action. The chambers judge did not accept this submission on the basis that "at least some members of the proposed class, if not 676 itself, may properly pursue [that relief]."

[64] On appeal, Revolution has changed its focus. Revolution now argues that restraint of trade is "a shield, not a sword," and that it cannot form the basis for a cause of action. It relies on authorities such as *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1280 at paras. 79–80; *Brooks v. Canadian Pacific Railway Ltd.*, 2007 SKQB 247 at paras. 113–18; and *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*, 2020 ABQB 6 at paras. 247–53, 266–67, for this proposition. These decisions are not binding on this Court, they arose under markedly different circumstances, and they address different questions, such as the role of restraint of trade as the unlawful means for the tort of interference with economic interests or as part of an action for damages.

[65] More significantly, Revolution's argument that a restraint of trade cannot ground a cause of action is misconstrued because, in the present case, the proposed class members merely seek a declaration that the impugned clauses of their contracts are a restraint of trade and therefore void or unenforceable. The British Columbia Supreme Court has inherent jurisdiction to make declaratory orders: *Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176 at para. 45. In *Ewert v. Canada*, 2018 SCC 30, the Supreme Court of Canada noted:

> 81 A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available …. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought ….
>
> [Emphasis added, citations omitted.]

See also R. 20-4 of the *Supreme Court Civil Rules*; *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228 at para. 259; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 60; *West Moberly First*

Nations v. British Columbia, 2020 BCCA 138 at paras. 308–11; L. Sarna, *The Law of Declaratory Judgments*, 4th ed (Toronto: Thomson Reuters, 2016) at 88.

[66] I am mindful that some older authorities suggest that a plaintiff who does not have a cause of action may not be able to obtain a declaration in circumstances where what that plaintiff seeks to do, in practice, is to obtain the answer to an issue in an anticipated action where only the defendant might have a cause of action: see e.g., *Sara v. Sara* (1962), 36 D.L.R. (2d) 499 at 504 (B.C.C.A.); *Dyson v. Attorney General*, [1911] 1 K.B. 410 at 417 (C.A.); *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536 at 553–54 (C.A.); Sarna at 117. This proposition does not appear to have been followed in more recent cases, and the broad test for declaratory relief under *Ewert* suggests that such circumstances do not constitute a bar to declaratory relief. Instead they may simply be relevant to the judge's exercise of discretion.

[67] A full analysis of whether declaratory relief is available to the parties is not appropriate at the certification stage, and the decision whether to grant declaratory relief will lie with the trial judge. However, there is no suggestion that the Supreme Court lacks jurisdiction. The dispute over the enforceability of the impugned clauses is real and not theoretical—that is to say, this is not a question of a theoretical future action or a theoretical future contract, but a question of the parties' present rights under clauses of their contracts that may or may not be enforceable. The proposed class members appear to have a genuine interest in its resolution—this is not, for example, a case where individuals who are not parties to the contract seek its interpretation. Revolution has an interest in opposing the declaration sought. Applying these considerations, it would at least be open to a trial judge to find that a declaratory order is available and appropriate.

[68] Finally, courts are sometimes called upon to provide guidance and to interpret commercial agreements for the parties through declaratory orders. In *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 at 452 (H.L. (Eng.)), Lord Sumner said:

> For many years it has been accepted practice in cases in the Commercial List to hear and determine claims for a declaration of right, when a real and not a fictitious or academic question is involved and is in being between two parties, in order that they may know what business course to take without having to run the risk of acting and finding themselves liable in damages, when at last the matter is brought before the Court.

[69] Specifically, courts have considered applications for declarations that contractual clauses are invalid as a restraint of trade in cases such as: *Chen v. Kiss* (1995), No. 64 C.P.R. (3d) 175 (Ont. S.C.); *Stanford Holdings Ltd. v. Southcoast Printers (1989) Ltd.* (1990), 85 Nfld. & P.E.I.R. 243 (N.L.S.C.); *Maxwell v. Gibsons Drugs Ltd.* (1979), 16 B.C.L.R. 97 (S.C.).

[70] This Court recently entertained a plaintiff's action for a declaration that a contractual clause in her employment contract was in restraint of trade and therefore unenforceable in *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97. Although the majority of this Court found that the impugned clause was enforceable, the Court was unanimous that the clause was *prima facie* a restraint of trade, and there was no dispute at trial, or on appeal, that a declaration of unenforceability could be sought by the plaintiff from the courts.

[71] In light of the foregoing, I do not consider that it is plain and obvious that members of the intended class for the restraint of trade claim cannot pursue the declaration being sought in the 4th ANOCC, and I would dismiss this aspect of Revolution's cross appeal.

C. Section 4(1)(b): An Identifiable Class

1. The Legal Framework and Proposed Class Definitions

[72] In *Jiang v. Peoples Trust Company*, 2017 BCCA 119, a decision referred to by the chambers judge, the Court summarized the general principles to be applied in determining whether there is an identifiable class as required by s. 4(1)(b):

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[Emphasis in original.]

[73] At the certification application, 676 initially sought to provide a class definition that mirrored para. 5 of the 4th ANOCC: “all persons resident in British Columbia who had contracts with Revolution for the provision of waste and recycling disposal services from April 1, 2015 to the present (the ‘Class Period’).”

[74] Revolution argued that this class definition was overly broad in that, for example, with respect to 676’s contract claim, it would include customers who signed a CSA after Revolution changed its pricing scheme in 2017, or existing customers who had negotiated out of the Government Surcharge/Material Ban. It similarly argued with respect to the claim in restraint of trade that the class definition would include former customers, including 676, who have no interest in obtaining a declaration that clauses in their agreements are unenforceable and should therefore not be included.

[75] The chambers judge accepted that this initial class definition was unnecessarily broad, and that it included “identifiable groups of people who manifestly have no claim.”

[76] 676 advanced an alternative proposal and sought to certify two separate classes:

> … all persons resident in British Columbia who had contracts with Revolution for the provision of waste and recycling disposal services from April 1, 2015 to the present (the “Class Period”), and:
>
> (a) paid the [Surcharge] to Revolution (the “Surcharge Class”); and/or
>
> (b) continue to have a contract with Revolution (the “Restraint of Trade Class”).

[77] At the certification hearing, Revolution again argued that these alternative definitions were overly broad because, for example, it included customers who consented to the impugned clauses, others who agreed to modify the clauses, and others who arranged for the clauses to be removed from their agreements. It argued that many of the members of the proposed Surcharge Class had CSAs that raised individual issues. It raised still other concerns in relation to the proposed Restraint of Trade Class.

[78] The chambers judge was not persuaded that 676's alternative definitions could be further narrowed without prejudging the merits or otherwise arbitrarily excluding class members with potential claims.

2. The Surcharge Class

[79] On appeal, Revolution again argues that the proposed class "includes individuals who paid a specific surcharge rate, capped surcharge rate, or who negotiated minimum or maximum rate increases. It includes individuals who were refunded the Surcharge, whose materials were commingled with other customers, whose materials were sent to non-GVSDD operated waste disposal sites, and individuals whose Surcharge amount was equal to or less than the fines Revolution incurred."

[80] At bottom, Revolution argues that the definition for the Surcharge Class is overly broad and it asserts, as a proposition, that a "class definition containing individuals who have no claim is overbroad and will not be certified."

[81] This Court has recently addressed the issue of "overbreadth", in relation to s. 4(1)(b), several times. In *Douez v. Facebook, Inc.*, 2018 BCCA 186, the Court said:

> [68] In order to fulfill its purpose, a class definition should be as narrow as practical, without excluding persons who have a valid claim. The problem of overbreadth was discussed by the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68:
>
> > [20] The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. …
> >
> > [21] The requirement is not an onerous one. The representative need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, *Class Actions in Canada* (1996), at para. 4.205; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to

> have been terminated for just cause); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).
>
> [Emphasis in original.]
>
> [69] A proper class definition will not include, within its ambit, large, identifiable groups of people who manifestly have no claim: see, for example, the recent decision of this Court in *Harrison* at paras. 43–44.

[82] In *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165, the Court, at para. 24, relied on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38, a part of which states: “It is not necessary that every class member be named or known. It is necessary, however, that any particular person’s claim to membership in the class be determinable by stated, objective criteria”. This mirrors one of the conditions identified in *Jiang* at para. 82.

[83] Ultimately, these various authorities recognize that defining an identifiable class is not an exercise of mathematical precision and that it requires a balance. A class definition that includes “large, identifiable groups of people who manifestly have no claim” is too broad. Conversely, it may not be possible to further narrow a class without inadvertently excluding persons who have a valid claim.

[84] I consider that there are potential difficulties with aspects of the definition for the proposed Surcharge Class. Without wishing to be pedantic, that definition should not rely on the word “Surcharge” alone. I have said that the parties’ formal application materials and their pleadings rely on the words “Government Surcharge/Material Ban.” Furthermore, it is these words that are found on the invoices that Revolution delivered to many or most of its clients, and it is these words that capture the particular surcharge that 676’s contract claim is based on.

[85] The chambers judge’s defined expression “Surcharge,” though convenient, has the prospect of being confusing. A class definition of “all persons … who had contracts with Revolution … from April 1, 2015 to the present … and paid the Surcharge” would not allow members of the class to self-identify. Conversely, a class definition that uses the words “Government Surcharge/Material Ban” does exactly that. Class members are able to look at the invoices they received during

the Class Period to see if they were charged the Government Surcharge/Material Ban. This aspect of the definition deals with the specific type of surcharge in issue.

[86] Furthermore, and I will develop this more fully, the Government Surcharge/Material Ban was apparently based, at least initially, on a standard or fixed 18% of the gross invoice amount charged to customers. Thus, inherent in 676's use of the words "Government Surcharge/Material Ban" is a surcharge that is based on a fixed percentage amount. I would make this inherent qualification express so that the defined Surcharge Class is "all persons … who had contracts with Revolution … from April 1, 2015 to the present … and who were charged a Government Surcharge/Material Ban of 18%." This aspect of the definition deals with the amount or rate of the surcharge in issue.

[87] A court is entitled to modify a proposed class definition in some ways, including on appeal, but there are limits to the role that a judge should play in re-formulating the class definition, and the court must be satisfied that the modifications do not result in prejudice to the responding party: see *Douez* at para. 44; *Harrison* at para. 47.

[88] On account of these concerns, and because the parties did not address this proposed definition for the Surcharge Class during the hearing of the appeal, the Court contacted the parties and asked for their further submissions in relation to the proposed definition for the Surcharge Class that I have described.

[89] In its further submissions, 676 expresses no real objection to the proposed definition, though it argues that these changes are not necessary. For the reasons that follow, I do not agree with this.

[90] Revolution, on the other hand, raises multiple concerns. It had earlier raised some of these concerns in relation to other specific issues on this appeal, and I more fully respond to those concerns elsewhere in these reasons. It also repeats some of the submissions it had made earlier in opposing the proposed Surcharge Class definition that the chambers judge had accepted. Accordingly, what follows addresses both sets of submissions or issues that Revolution raised.

[91] First, Revolution argues that the Court should not "enter the ring" and make "wholesale changes to arrive at a definition that the court itself would accept." In support of this proposition, it relies on both *Douez* and *Harrison*.

[92] I do not consider that this raises a serious issue. The new proposed Surcharge Class definition makes two changes to the definition the chambers judge considered appropriate. The first such change simply arises by way of clarification. The “Surcharge” and the “Government Surcharge/Material Ban” were intended to be synonymous. The change I have proposed is intended to ensure the proper levy or surcharge is identified for class members.

[93] The second change is also in the nature of a clarification, and it is intended to address some of the concerns that Revolution raises on appeal. Specifically, and I will develop this further in connection with the common issues for the contract claim, the surcharge that Revolution imposed on many of its customers beginning in April 2015 was in the amount of 18% of a customer’s monthly service charge. This conclusion is consistent with the statement of the chambers judge that “[t]he sample invoices that 676 has reproduced include a Surcharge that varied between $77.74 and $89.97 per month – reflecting in each case 18% on the gross invoice amount.” This assertion is also derived directly from the affidavit of Mr. McRae, the president of Revolution, dated March 22, 2018, where he stated:

> 40. In response to paragraph 14 of Part 2 of 676083’s Notice of Application, I disagree that the Government Surcharge/Material Ban was applied at a standard rate of 18% for all Revolution’s customers since April 30, 2015.
>
> 41. The Government Surcharge/Material Ban was only initially applied to many of Revolution’s existing customer base as at April 30, 2015 at a rate of 18% of the customer’s monthly service charge. There were exceptions, as some customers already had negotiated terms in their customer service agreements restricting the application of surcharges and were never charged the Government Surcharge/Material Ban as a result. For the reasons discussed below, the rate Revolution actually charged for the Government Surcharge/Material Ban varied considerably amongst different customers.
>
> 42. After the Government Surcharge/Material Ban was initially implemented, Revolution proceeded to renegotiate this rate with a number of existing customers individually.
>
> 43. In setting the effective rate for the Government Surcharge/Material Ban with existing customers, Revolution considered the specific risk of contamination of banned materials posed by a customer’s particular waste handling practices. Revolution would expect customers with waste handling practices that posed a higher risk of contamination of banned materials to pay a higher rate for the Government Surcharge/Material Ban than customers deemed to have safer waste handling practices.

[94] Finally, I consider it relevant that the fact the Government Surcharge/Material Ban was initially imposed on many customers' invoices at a rate of 18% was fully argued by the parties on appeal in connection with the common issues raised by 676 in its contract claim. It is well understood that there should be a rational relationship between the definition for a class and the common issues being proposed in connection with that class.

[95] Accordingly, I do not consider that my proposed revision of the class definition constitutes "entering the ring" or making "wholesale changes" to the definition of the Surcharge Class that was established by the chambers judge. I am also satisfied that no prejudice would result from these modifications, as they are consistent with 676's submissions on appeal.

[96] Second, and in a similar vein, Revolution argues that the proposed definition for the Surcharge Class is inconsistent with the pleadings that 676 has filed. Revolution made this same point, in connection with the common issues in 676's contract claim, in its factum and at the hearing of the appeal. I address this issue more fully in the context where it was first developed by the parties (at paras. 147–49 of these reasons). Though there is an aspect of this issue that I agree with, I do not consider that it is a basis on which to object to the definition of the Surcharge Class that I have proposed.

[97] Third, in yet a further iteration of the foregoing issues, Revolution argues that 676 has shifted the focus of its claim from individuals or entities who were "overcharged" to a claim that is based on the arbitrary nature or "method" by which the 18% assessment was imposed. Once again, this issue was fully developed in the factums and oral submissions of the parties in connection with the proposed common issues for 676's contract claim. I address this particular submission at paras. 135–45 of these reasons.

[98] Fourth, Revolution argues the proposed definition for the Surcharge Class is vague and will not allow class members to self-identify due to the necessarily individualized calculation of their invoices. The starting points for this issue are the findings of the chambers judge and the comments of Mr. McRae as they pertain to the imposition of an 18% Government Surcharge/Material Ban. Neither the chambers judge nor Mr. McRae had any difficulty in confirming that Revolution had

imposed an 18% surcharge on the invoices that were delivered to many customers.

[99] Furthermore, a review of the invoices in the record establishes that Revolution overstates the complexities faced by customers in ascertaining whether they were charged an 18% Government Surcharge/Material Ban. The 18% rate is apparent from at least two invoices billed by Revolution to 676 in April and May 2015, which were appended to one of the affidavits filed by 676 for the certification application. The invoices demonstrate that 676 was charged a Government Surcharge/Material Ban that amounts to 18% of the subtotal of the service-related charges on the invoices, excluding other surcharges, taxes, and a $10 processing fee.

[100] For example, the ensuing calculation is apparent from the following replication of 676's invoice from May 2015:

DESCRIPTION	REFERENCE	RATE	QTY.	AMOUNT
[0001] **CHIMNEY HILL PLAZA …**				
Serv #002 FL OCC 1 - 3.00YD				
31 - May Monthly Service Charge (Jun 01/15 - Jun 30/15)		$55.26	1.00	$55.26
May 2015 Commodity Adjustment		$10.44	4.00	$41.76
Serv #003 FL Waste 1 - 4.00YD				
31 - May Monthly Service Charge (Jun 01/15 - June 30/15)		$334.89	1.00	$334.89
31 - May Processing Fee				$10.00
31 - May Government Surcharge/Material Ban	SC554071			$77.74
31 - May Fuel & Environmental	SC554070			$60.47
GST at 5.000%				$29.01
Increased Government fines from highly contaminated loads have been reflected in your bill.		**INVOICE TOTAL**		$609.13

[101] The $77.74 Government Surcharge/Material Ban reflected in that invoice amounts to 18% (rounded to the nearest cent) of the subtotal of the amounts in the right-hand column, excluding the $10 processing fee, the $60.47 “Fuel & Environmental” charge, and the 5% GST:

$55.26
+ $41.76
+ $334.89
$431.91
x 18%
$77.7438

[102] Revolution notes that the specific line items that may be included or excluded from the subtotal, for the purposes of calculating the 18%, varies from invoice to invoice and customer to customer. It argues that this lack of precision prevents potential class members from being able to self-identify. It is true that none of the various descriptions that have been used in the proceeding thus far—the “gross invoice amount” by the chambers judge, the “monthly service charge” by Mr. McRae, and the “total monthly invoice, excluding [the $10 processing fee]” by 676 in its further submissions—fully describe what is included or excluded from the subtotal. However, I do not consider that this concern renders the proposed definition unworkable. The calculation of the 18% on Revolution’s invoices is sufficiently straightforward that I am satisfied potential class members will be able to make the necessary calculations and self-identify. It will also be open to the parties and the chambers judge to refine the language of the calculation in, for example, the notices that are sent to potential class members.

[103] No other customers’ invoices demonstrating this calculation appear to have been filed in the record before this Court. I have, however, already referred to the affidavit of Mr. McRae, which confirms that the Government Surcharge/Material Ban was “initially applied to many of Revolution’s existing customer base as at April 30, 2015 at a rate of 18% of the customer’s monthly service charge.”

[104] Furthermore, it is generally not necessary for a representative plaintiff to specifically demonstrate, through affidavit evidence, that a second person has a claim, as the existence of multiple claims may be apparent from the nature of the claim being advanced: *Douez* at para. 53. I consider that 676’s invoices and the

admissions of Mr. McRae are sufficient, at this stage of the proceeding, to demonstrate the existence of an objective means for potential class members to self-identify.

[105] Fifth, Revolution revisits the most consistent element of its submissions. It argues that the proposed definition for the Surcharge Class still requires an individualized assessment of whether Revolution breached its contracts with proposed class members. Revolution argues that the common issues "as currently proposed will not resolve that question, even with the Proposed Class Definition." It will become apparent, however, that I have made a modest revision to one of those common issues based on the submissions made on appeal. I consider that the revised common issue has the prospect of addressing certain liability issues, including potentially whether Revolution breached its contract with its customers: at paras. 141–45 of these reasons. That is a different question, however, from ascertaining what each customer's losses would be.

[106] With the two changes to the proposed definition for the Surcharge Class in hand, most of the concerns that are raised by Revolution fall away. Clients who were charged a surcharge other than the Government Surcharge/Material Ban would not be members of the proposed Surcharge Class. Clients who negotiated separate rates with Revolution or who were charged a surcharge of any amount other than 18% would not be members of the Surcharge Class or would not be members of the class for any period after which they had renegotiated their contracts. These qualifications are objective, they exclude groups of individuals or entities who are manifestly not members of the Surcharge Class, and they allow class members to self-identify: *Jiang* at para. 82; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57.

[107] A review of the various agreements and other documents that are footnoted in Revolution's factum, and that Revolution relies on in aid of its concern that its relationships with its clients are too varied or diverse to be amenable to creating a defined Surcharge Class, demonstrates that its concerns, or at least most of them, no longer appear to be valid. These various agreements and documents sometimes do not identify a specific surcharge being charged to the client as the Government Surcharge/Material Ban. Furthermore, they often expressly include a percentage other than 18% that Revolution can levy on the particular client. Such

customers likely would not, at least during the times when those agreements were in place, be members of the Surcharge Class.

[108] Further, Revolution, in arguing that the proposed revised definition is overbroad, relies on the same authorities that it did at the hearing of the appeal. Some of these authorities have been overtaken by more recent and more authoritative case law: see paras. 150–51 of these reasons.

[109] Still further, and I will return to this, the new proposed definition of the Surcharge Class, with the express inclusion of the words “Government Surcharge/Material Ban of 18%,” creates a rational relationship with the common issues being proposed by 676 for the contract claim of the Surcharge Class.

[110] Finally, as the chambers judge observed, this aspect of Revolution’s submission conflates the requirement under s. 4(1)(b) of the *CPA*, to identify a class of two or more persons, “with real or imagined difficulties in determining if any particular individual [or entity] can as a matter of fact bring themselves within the class definition in the administrative phase of the proceeding”: *Jiang* at para. 105. The possibility of the need for individualized inquiries is a proper consideration under the preferable procedure criteria under s. 4(1)(d) of the *CPA*: *Jiang* at para. 120. *Jiang* confirms that the fact “individual inquiry will be required does not take away from the fact that a plaintiff may have properly defined a class under s. 4(1)(b)”: at para. 106.

[111] Subject to the changes in the language of the definition of the Surcharge Class that I have identified, I would agree with the chambers judge’s conclusion that the definition of the Surcharge Class is appropriate.

3. The Restraint of Trade Class

[112] Revolution advances three reasons why the proposed Restraint of Trade Class is inappropriate. It argues that the appellant has not identified a single member of the class in the evidence that was before the court, that there is no evidence that any of Revolution’s current customers have terms identical to those excerpted in the appellant’s certification application, and that the class is overbroad.

[113] Revolution appears to have raised the same three issues before the chambers judge. The chambers judge was mindful of the variations in the agreements that Revolution has with its clients insofar as they pertain to the proposed Restraint of Trade Class, and said:

> [95] Some CSA's contain handwritten terms that shorten the duration of the term from sixty months to one or three years, for example. Some stipulate that the initial term will not be renewed. Others contain "Special Instructions" that appear to override one or more aspects of those clauses in favour of the customer in other ways. One CSA stipulates that the customer may terminate the CSA on 30 days' notice if its building is sold or if service issues with Revolution are not resolved. Another stipulates that the initial term is to be for one year only, following which the CSA is to be terminable on one month's notice. Another contains a handwritten term requiring Revolution to provide 120 days written notice of the renewal date by registered mail. There are still other variations in evidence.

[114] Nevertheless, the chambers judge said that he was "not persuaded that 676's alternative definition can be further narrowed without prejudging the merits or otherwise arbitrarily excluding class members with potential claims. Revolution's submission to the contrary conflates the requirement under s. 4(1)(b) to show an identifiable class with the other requirements in ss. 4(1)(c) and (d) pertaining to the proposed common issues and the degree to which they may or may not lend themselves to class-wide adjudication."

[115] He further said:

> I am also not persuaded that 676 has failed to adduce a sufficient basis in fact to justify certifying the proposed Restraint of Trade Class. On the contrary, it would appear that many current customers continue to use older versions of the CSA's, as evidenced by the fact that, as of March 2018, 2,629 customers were still paying the Surcharge pursuant to one of those older versions. In the absence of evidence to the contrary, I am prepared to infer that Revolution has continued to use preprinted terms similar to those found in the older versions of the CSA that are in evidence, such that all current customers are properly included in the proposed "Restraint of Trade Class."

[116] Finally the chambers judge said:

> I find, in summary, that 676's alternative class definition satisfies the requirements of [s.] 4(1)(b). The evidence establishes to the requisite standard that there are at least two customers … who continue to have a CSA with Revolution. It will be a simple matter for the proposed class members to self-identify applying objective criteria. … Current customers will know if they are in the proposed "Restraint of Trade Class" if they have

> a contract with Revolution that remains in effect as of the effective date specified in the certification order.

[117] Further aspects of the chambers judge's reasons address Revolution's principal submission that the variability of the CSAs and in the Termination Clauses are inconsistent with the creation of a Restraint of Trade Class. When addressing the issue of punitive damages, the chambers judge said:

> [145] With respect to the restraint of trade claim itself, however, the situation is different. I have found that there are suitable common issues that could, if 676 is successful, lead to the declaratory relief it seeks. If that relief is granted at the common issues trial, it will resolve the claims of those class members whose CSA's contain the impugned clauses in an unamended form. For those class members whose CSA's contain handwritten or oral terms that delete or amend one or more of those clauses, the declaration sought, if it is made, can serve only as the starting point of the analysis.

[118] When addressing the "preferable procedure" issues that arise under s. 4(1)(d) of the *CPA*, the chambers judge said:

> [153] What will be left to be resolved following the conclusion of the common issues trial for the proposed Restraint of Trade Class, if 676 is successful, are any individual issues that may arise from the various handwritten and oral terms that delete or materially modify one or more of the impugned clauses. Many of those variations appear to fall into their own smaller categories, such as those that delete one or more of the impugned clauses, those that set shorter terms, those that allow for early termination by the customer, or those that stipulate that there is to be no automatic renewal. Some of those categories may be capable of being considered as subclasses within the rubric of the common issues trial itself. On the other hand, there may be many CSA's that will still require individual attention, depending on the outcome of the common issues trial. The complications that can be foreseen in that regard do not appear to be insurmountable, however. It does not appear that the individual issues would overwhelm the litigation, even at that stage.

[119] These two passages are important because they demonstrate that the chambers judge was acutely alive to the variability in the CSAs and, in some cases, in the language of the Termination Clauses. The passages are also important because they further reveal that the chambers judge appreciated that the common issues trial may only resolve the claims of class members whose CSAs "contain the impugned clauses in an unamended form."

[120] I would note that it is unclear from 676's pleadings whether it alleges that the three Termination Clauses operate to create a restraint of trade individually, or

in combination. Depending on the answer, it may become apparent that clients who do not have some or all of the three Termination Clauses in their CSAs in an unamended form are not appropriate members of the class.

[121] I consider that the conclusions of the chambers judge properly applied the relevant legal framework and properly addressed the various concerns raised by Revolution in relation to the definition of the Restraint of Trade Class. It may be that the class definition will need to be further refined in the future, but the chambers judge reasonably concluded that the definition could not properly be narrowed any further at this stage of the proceedings. Accordingly, I would dismiss this aspect of Revolution's cross appeal.

D. Section 4(1)(c): The Proposed Common Issues

1. The Legal Framework

[122] The phrase "common issues" is defined in s. 1 of the *CPA*:

> "common issues" means
>
> > (a) common but not necessarily identical issues of fact, or
> >
> > (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts …

[123] The chambers judge relied on *Watson v. Bank of America Corporation*, 2014 BCSC 532, where Bauman C.J., as he then was, summarized the factors to be considered in determining whether the claims of class members raise common issues:

> [65] Subsection (c) requires the plaintiff to provide some basis in fact that at least some of the issues raised by the claims are common issues, whether or not they predominate over individual issues. …
>
> [66] In *Dutton*, the Court held that the underlying question when analyzing commonality is "whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis" (at para. 39). In *Microsoft*, the Court summarized the other holdings of *Dutton* regarding commonality (*Microsoft* at para. 108, citing *Dutton* at paras. 39-40):
>
> > (1) The commonality question should be approached purposively.
> >
> > (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
> >
> > (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

> (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.
>
> [67] The Court recently clarified the final point and held that "success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another" (*Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45). Further, questions may be common even if the answers to those questions vary from class member to class member (*Vivendi* at paras. 45−46). In any event, concerns about unproven material differences are not determinative at certification. If they actually emerge during the proceeding, Courts can deal with them when the time comes, through decertification if necessary: *Microsoft* at para. 112; *Dutton* at para. 54.

[124] In the appeal from *Watson*, indexed at 2015 BCCA 362, which was allowed in part on other grounds, the Court summarized a number of authorities that explain the commonality requirement in s. 4(1)(c) and said:

> [152] From these various cases reframing the term "common issue" I take it that a common issue need not be one that determines liability, but must be one encompassed by the litigation, and for which its answer will advance the ultimate determination of outcome. Moreover, commonality requires that the members of the class all have the same qualitative stake in the answer to the question, although the degree of importance to each member need not be the same. In other words, they cannot pull in opposite directions on the issue.

[125] Other principles are relevant. In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45–47, the Court confirmed that the "common success" requirement should be applied flexibly. In *Service* at para. 59, this Court confirmed that "[t]he threshold for this requirement is low. The plaintiff need only show that there is a triable factual or legal issue that, once determined, will advance the litigation".

[126] The question of whether a common issue would "advance the litigation" should be examined (or considered) from the perspective of the litigation, not the plaintiff. In *Pioneer Corp. v. Godfrey*, 2019 SCC 42, Brown J., writing for the majority, explained this and said:

> [109] When thinking about whether a proposed common question would "advance *the litigation*", it is the perspective of *the litigation*, not the plaintiff, that matters. A common issues trial has the potential to *either* determine liability *or* terminate the litigation (W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 108). Either scenario "advances" *the litigation* toward resolution. Here, if it cannot be shown that loss was suffered by *any* purchasers at the indirect purchaser level, then *none* of the indirect purchasers have a cause of action and the action with respect to *all* the indirect purchasers would fail. I endorse, in this regard, this statement of the Ontario Superior Court in *Shah (Ont. S.C.J.)* (at para. 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.

2. The Contract Claim: Common Issues (a)–(c), (r)

a) The Findings of the Chambers Judge in Relation to Common Issues (a)–(c)

[127] The chambers judge determined that none of the common issues 676 proposed in relation to its contract claim were suitable common issues. This conclusion gives rise to the central issue on this appeal because, as I have explained, that contract claim is the foundation of 676's claim and of the class action.

[128] In relation to the first of the three common issues that were proposed, the chambers judge said:

> [80] The first of these, (a), asks whether the CSA's are "contracts between Revolution and the Class Members." I agree with Revolution that this is not a proper common issue because it is not really an issue that is in dispute on the pleadings. The parties agree that the CSA's are, by definition, agreements between Revolution and its customers. Answering that question will not meaningfully advance the litigation.

[129] No issue is taken with this conclusion on appeal.

[130] In relation to the second proposed common issue, the chambers judge said:

> [81] The second proposed common issue, (b), asks whether Revolution breached the terms of the CSA's by charging the Surcharge.
>
> …
>
> [83] 676's theory is that the only possible term in the CSA's justifying the Surcharge is the Fines clause, and it allows Revolution to pass on only fines, surcharges and levies that it actually incurred for that customer. Revolution's theory is that other preprinted terms, such as the Weights, Waste Material and Rate Adjustments clauses, as well as, in some cases, handwritten terms or oral agreements, may also have served as authority for Revolution to recuperate the broader array of costs described by Mr. McRae as having gone into the quantification of the Surcharge.
>
> [84] Even on 676's theory, the CSA's can only have been breached if the customer was charged more for the Surcharge than the fines, surcharges and levies that Revolution actually incurred in disposing of that customer's waste and recycling. In order to decide if that occurred, the Court will need to know what fines, surcharges and levies were actually incurred for that customer. That inquiry will of necessity be specific to each customer. 676 cannot prove a class-wide breach of the CSA's by relying on aggregated data as it proposes: *Microsoft* at paras. 128-134; *Pioneer Corp. v. Godfrey*, 2[0]19 SCC 42, at paras. 116-117 [*Godfrey*].
>
> [85] The problem is exacerbated by the need to rule out, before a breach can properly be found, the applicability of the other terms in the CSA's that Revolution relies upon to justify the Surcharge. That means the Court must first find that no combination of the Fines, Weights, Waste Material or Rate Adjustments clauses can justify the Surcharge. Each of those clauses contain different potential justifications for a surcharge that may or may not apply in any given case, depending on the particular customer's individual circumstances. It appears that Revolution provides different categories of services to its customers. The contents of their waste and recycling will be unique. That waste and recycling will have been taken to different facilities attracting, in each case, different rules and associated costs, including differing fines, surcharges and levies. The appropriate inquiry would necessarily require a case-by-case analysis that is ill suited to class-wide adjudication.
>
> [86] It is against the backdrop of these problems that the variations in the CSA's themselves must also be considered.
>
> [87] For most customers, it appears that the language of the contract could be analysed by reference to the preprinted terms exclusively. Although there are different iterations of the preprinted terms in evidence and some of the differences among them may be material, those differences do not necessarily pose an insurmountable barrier to certification. On the other hand, many of the CSA's in evidence bear handwritten additions that modify one or more of the preprinted terms in a manner that may bear directly on the scope of Revolution's authority to pass on its operational costs as it did through the Surcharge. For example, some customers have negotiated a specific rate for the Surcharge that is

> lower than 18%. Some CSA's have material terms crossed out. Others set various kinds of limits on the rates that Revolution may charge. One CSA has the following handwritten term added at the end of Rate Adjustments clause: "All rate adj. increases subject to 50 day notification and acceptance." Another requires Revolution to send a notice by registered letter 30 days prior to any increase before a proposed rate adjustment can validly go into effect. Revolution says that there will be oral agreements to consider as well.
>
> …
>
> [89] The problem here is more serious than that, however. At the common issues trial, the Court could only answer the specific question posed (that is, whether the Surcharge was imposed in breach of the CSA's) by making assumptions about what the outcome of several individual inquiries would be. Such an answer would really be no answer at all. It would not advance the litigation in any meaningful way. I am therefore unable to find question (b) to be a suitable common issue.

[131] The third proposed common issue, (c), asks whether, if there was a breach of contract, "Revolution is liable to the Class Members for breach of contract and, if so, in what amount". The chambers judge concluded that this question depended on 676 having obtained a positive answer to question (b) and said, "Given that there can be no class-wide finding of a breach of contract, there can be no class-wide finding of liability, let alone a class-wide award of damages."

b) Proposed Common Issue (b): 676 Recasts its Position

[132] On appeal, as before the chambers judge, 676 relies on a number of authorities that establish that claims involving "standard form" contracts are ideally suited to be tried as class actions. Revolution, in turn, as it did before the chambers judge, argues that such cases are distinguishable and that the CSAs are not really in the nature of a "standard form" document as that concept is understood in the jurisprudence. In aid of this submission, Revolution relies on the "representative sample" of 100 or so contracts and CSAs that it introduced at the application and that, it argues, establish considerable variability in the nature of the contractual relationships it has with its various clients. 676, in response, says that Revolution has selected and tendered into evidence barely 100 CSAs out of approximately 6742 members of the proposed Surcharge Class, and that the modifications contained in these various agreements are "minor" in nature.

[133] I do not, in the main, consider that these various positions materially advance the issue before the Court. This is so for three reasons. First, the

chambers judge accepted that "[f]or most customers, it appears that the language of the contract could be analysed by reference to the preprinted terms exclusively. Although there are different iterations of the preprinted terms in evidence and some of the differences among them may be material, those differences do not necessarily pose an insurmountable barrier to certification."

[134] Second, the chambers judge appreciated both that there was significant consistency in a number of the relevant clauses in the CSAs and, at the same time, there was also some variability in those clauses.

[135] Third, and importantly, 676 on appeal has changed the focus of its submissions without actually changing the language of the proposed common issues it advanced at the certification hearing. Thus, for example, 676 now argues in its factum:

> However, the common issue ought to have been considered in light of the evidence that the surcharge was implemented on a common basis against the putative class members. Given this, the first step in answering the common issue would be for the court to decide whether the common imposition of the Surcharge was permissible under the standard form general conditions in the CSAs. In other words, do the CSAs give Revolution the authority to arbitrarily impose an 18% surcharge on its customers, without any analysis as to what fines, levies or surcharges were actually incurred for any individual customer?

and:

> In the appellant's submission, a review of the clauses that Revolution points to could not possibly be interpreted to authorize Revolution to impose the Surcharge *in the manner it did*, namely, as an arbitrary 18% charge on each customer's invoice starting in April 2015.
>
> [Emphasis in original.]

and:

> The important point is that for those customers who had CSAs with Revolution as of April 2015, and had the Surcharge commonly imposed on them as an 18% fine called a Government Surcharge/Material Ban, the breach of contract claim gives rise to common issues that will advance the litigation.

[136] It will be apparent from these various submissions that the focus 676 now brings to bear is on the "arbitrary" nature of a surcharge that uniformly applied an 18% figure to the invoices of customers. Indeed, the heading 676 has used in this part of its factum asserts "A Common Surcharge Gives Rise to a Common

Question". Imposing such a uniform figure and surcharge also appears to be at odds, it is argued, with the core position of Revolution—that being that no common issue can properly cover the myriad variations in the services, materials, dump sites, CSAs, and other agreements that it has with its clients. Still further, 676 observes that Mr. McRae's affidavit accepts that the Government Surcharge/Material Ban was initially applied, as of April 30, 2015, on a common basis to many of Revolution's existing customers at a rate of 18% of the customer's monthly service charge. In that affidavit, he goes on to assert that Revolution has since renegotiated that rate with some of its customers on an individual basis.

[137] This focus is not readily apparent in the 4th ANOCC, in 676's second amended notice of application for certification, or in its proposed common issue (b), and it was alluded to only in passing in the oral submissions that were made before the chambers judge. In those oral submissions, 676 appeared to argue that it was defining its proposed class and common issues in relation to anyone who was charged a "Government Surcharge/Material Ban," regardless of the rate at which it was charged. This is also consistent with the way the class action was described in both the short notice and the long notice that were attached to the second amended notice of application for certification filed by 676.

[138] The reason this change in emphasis matters is because proposed common issue (b) as it was described by the chambers judge—"whether Revolution breached the terms of the CSA's by charging the Surcharge"—is, on its face, problematic. These problems mirror the concerns I expressed earlier in relation to the proposed Surcharge Class. First, the word "Surcharge" has to be clearly limited to mean the Government Surcharge/Material Ban and not other forms of surcharge that Revolution may have passed on to its clients.

[139] Second, without knowing that that surcharge is a uniform and fixed percentage, the answer to common issue (b) depends on two variables. The first is the fine or charge that Revolution would actually incur, from the GVSDD or others, on behalf of each of its various clients. The second is the amount that Revolution would then impose or pass on to its clients. Such a scenario merges, as is sometimes the case in a breach of contract case, questions of liability and damages. That is, the question of whether there has been a breach turns on the result of the calculation or assessment of loss that is undertaken. This is the

concern that was identified by the chambers judge at para. 84 of his reasons for judgment. Importantly for present purposes, it would also, as the chambers judge concluded, “require a case-by-case analysis that is ill suited to class-wide adjudication.”

[140] If, however, the Government Surcharge/Material Ban is a fixed percentage, the inquiry changes. Questions of liability and damages are significantly separated. There is a proper place and value to inquiring whether, in the first instance, the terms of the CSAs allowed Revolution to impose a flat, uniform or arbitrary 18% surcharge on its clients, or at least on many of them. This question may not determine liability, but its answer will advance the ultimate determination of outcome.

[141] To be clear, a slightly reformulated common issue (b)—“Whether Revolution breached the terms of the CSAs by charging a Government Surcharge/Material Ban in the amount of 18%”—advances the litigation in several ways. First, it will necessarily address the question of whether Revolution’s ability to charge the Government Surcharge/Material Ban was limited to the Fines clause found in a CSA or whether it included the Weights, Waste Material, and Rate Adjustments clauses as well. The chambers judge, in addressing the concerns he had with proposed common issue (b), said, “The problem is exacerbated by the need to rule out, before a breach can properly be found, the applicability of the other terms in the CSAs that Revolution relies upon to justify the Surcharge.” This difficulty would be obviated.

[142] Second, it addresses the question of whether these clauses, either individually or in combination, allowed Revolution to charge its clients a fixed surcharge of 18%. Though a common issue need not resolve questions of liability, it is important to note that a breach of contract claim does not require proof of loss. In *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528, this Court said:

> [31] The case at bar involving Tahtsa was founded on the employment contract between Tahtsa and the appellant. As Ogus explains [in A.I. Ogus, *The Law of Damages* (London: Butterworths, 1973)], at p. 23:
>
> > A case for nominal damages arises on a breach of contract where loss to the plaintiff is neither proved nor presumed. Breach of contract is similar to torts actionable *per se* in that, to establish a cause of action, the plaintiff need not show actual loss.

See also *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 at para. 32.

[143] The foregoing principle is relevant because many, if not most, of Revolution's concerns about the variability of its relations with its clients would appear, with a reformatted common issue (b), to now address questions of damages and not liability.

[144] Third, it appears likely to answer the questions of what kinds of waste the Tipping Fee Bylaws covered and what types of fines or surcharges, from the GVSDD or others, Revolution was permitted to include in the "Government Surcharge/Material Ban." This is different from answering the question of what fines or surcharges were actually levied in relation to a particular customer. Each of these various questions is raised by the pleadings of the parties, each is likely to be addressed in a reformulated common issue (b), and each is likely to advance the litigation for members of the Surcharge Class.

[145] Ultimately, the fact that some of Revolution's clients were exempt from paying the Government Surcharge/Material Ban, and that some CSAs or other agreements set different limits or fixed amounts on the surcharges Revolution could charge, and that some clients had other forms of oral or written agreement with Revolution, does not matter. Such clients are not likely, as I have said, to be part of the Surcharge Class. If they are members of the Surcharge Class, the answer to the common question need not matter equally to all members. The answer to common question (b) seems unlikely, however, to "pull in opposite directions" for members of the class. Still further, the definition of the Surcharge Class and common issue (b), as clarified, bear a rational relationship to each other. Finally, the fact, for example, that more recent CSAs may identify different grounds for rate adjustments than are contained in earlier CSAs can likely be addressed through the creation of one or more subclasses.

[146] Revolution raises two further concerns in relation to a recast proposed common issue (b).

[147] First, Revolution argues that the question of "whether the CSA could justify Revolution's arbitrary imposition of an 18% surcharge on the class members" recasts 676's claim in a way that is divorced from its pleadings. This submission

has two components. The first is that the assertion that “the Surcharge” was imposed in an arbitrary manner speaks to “the manner of charging” rather than to “overcharging.” The 4th ANOCC, it argued, does not support this characterization of the alleged breach. Second, and in a related vein, it argued that the 4th ANOCC actually does advance a claim based on customers having been charged more for “the Surcharge” than Revolution incurred for that customer.

[148] I have said both that the 4th ANOCC is the fifth pleading filed by 676 and that the characterization of the proposed common issue that it now advances is not readily apparent in that pleading. At the same time, para. 12 of the 4th ANOCC states that “Revolution charged the Class surcharges for fines … that exceeded and/or bear no relation to the fines charged to Revolution by the GVRD”. The primary lay meaning of the word “arbitrary,” as defined in *The Concise Oxford English Dictionary*, 11th ed, revised, is “based on random choice”. That meaning is reasonably consistent with the words “bear no relation” found in para. 12 of the 4th ANOCC. The words “bear no relation” do speak to the “manner” in which the Surcharge was imposed. Furthermore, the words “that exceed and/or bear no relation” advance either alternative or supplemental positions. Accordingly, I consider that para. 12 adequately captures an aspect of the claim and thesis now being advanced by 676 in its proposed common issue (b).

[149] On the other hand, the fact that the Government Surcharge/Material Ban was imposed at a fixed rate, much less that it was fixed at 18%, is simply absent in 676’s 4th ANOCC. That fact is a necessary component of the claim that 676 advances and it is a material fact that should have been pleaded. Accordingly, I do not consider that proposed common issue (b) is, as currently pleaded, an appropriate common issue. This failure in the pleadings can, however, be rectified through a further amendment to 676’s pleading. Unlike its claim in unjust enrichment, I am satisfied that 676 has articulated potential amendments to its pleadings in relation to proposed common issue (b) that would satisfy the requirements of the *CPA*, and I would grant 676 leave to make those amendments.

[150] Second, Revolution relies on various authorities, including *Pro-Sys Consultants*, where the Court at para. 108 said, “Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.”

Building on such statements, Revolution argues that the proposed common issue will not “move the ball forward for all class members”.

[151] Several other decisions have since further clarified the “common success” requirement. In *Vivendi*, the Court confirmed that this requirement does not denote that success for one class member must mean success for all, but rather that success for one class member must not mean failure for another: at para. 45. See also *Pioneer* at paras. 105, 108. The proposed common issue for 676’s contract claim, properly amended, satisfies this requirement.

[152] Subject to the amendments I have identified, I am of the view that proposed common issue (b) is suitable. I would grant 676 leave to amend its pleadings on this issue and to re-apply for certification of common issue (b) in its breach of contract claim.

c) Proposed Common Issues (c) and (r)

[153] I have said that the chambers judge determined that common issue (c), which asks the question, “If the answer to common issue (b) is yes, is Revolution liable to the Class Members for breach of contract and, if so, in what amount?”, was dependent on common issue (b). Because (b) failed, so too did (c). If a revised common issue (b) is appropriate, the validity of common issue (c) must necessarily be revisited.

[154] Once again, Revolution argues that 676 cannot circumvent individual inquiries in its intended damage assessment. It further argues that 676’s assertion that class members may rely on aggregate damages for common issue (c) is inconsistent with the relevant authorities and, in particular, with *Pioneer*. In this regard it is relevant that 676 in its 4th ANOCC has expressly pleaded that the damages sought by 676 and other members of the Surcharge Class can be calculated on an aggregate basis, and that proposed common issue (r) mirrors the language of this pleading.

[155] In *Pioneer*, the certification judge had certified various common questions related to aggregate damages: see para. 114. An aspect of the claim that was advanced in *Pioneer* dealt with a provision of the *Competition Act*, R.S.C. 1985, c. C-34, that required proof of loss as essential to a finding of liability (see paras. 117−18), and parts of the judgment speak to this issue. I have explained

why this is not the case for 676's breach of contract claim. Nevertheless, Brown J. confirmed at para. 118 that the aggregate damages provisions of the *CPA* are only available to a trial judge if, following the common issues trial, that judge is satisfied that all class members suffered some loss, or that those who have not suffered loss can be distinguished from those who have.

[156] Justice Brown, at para. 120, in the context of the decision to certify aggregate damages as a common issue, then described the various options that might be available to a trial judge following the common issues trial. Those options include an award of aggregate damages to all class members, or if the trial judge finds that an identifiable subset of class members did not suffer a loss, the trial judge could exclude those members from participating in the award of damages. Still further, the trial judge might conclude that some class members had suffered a loss while some had not. In that case, individual issues trials would be required.

[157] Importantly, Brown J. confirmed at paras. 120–21 that "[a]t the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach", and that "neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue." See also *Markson v. MNBA Canada Bank*, 2007 ONCA 334 at paras. 48–49.

[158] This guidance is directly relevant in this case. The concerns raised by Revolution do not form a basis to oppose common issues (c) or (r).

[159] I would grant 676 leave to re-apply for certification of common issues (c) and (r).

3. The Restraint of Trade Claim: Common Issues (d)–(i)

[160] Each of common issues (d)–(i) pertain to the proposed Restraint of Trade Class. Common issue (d) asks whether the "Term, Right to Re-negotiate and Failure to Perform clauses in the [CSAs] limit the ability of the Class Members to terminate their contracts with Revolution." Common issue (e) asks whether those clauses "limit the ability of the Class Members to enter into contracts for the same or similar services with other waste disposal companies." The chambers judge

considered that both questions raised suitable common issues. No appeal is taken from that determination.

[161] The chambers judge then said, “The next four proposed common issues, (f) – (i), apply to the Restraint of Trade Class. They are intended to resolve the question of whether the three impugned clauses should be declared void or unenforceable, in whole or in part, as a restraint of trade.”

[162] The chambers judge relied on *Yellowhead Petroleum Products Ltd. v. United Farmers of Alberta Co-Operative Limited*, 2004 ABQB 665, where the trial judge had set out the following analytical structure:

> [42] While many tests have been articulated in cases involving restrictive covenants, the following two questions appear to be fundamental:
>
> 1. Is the covenant one that is in restraint of trade?
> 2. If so, can the covenant be justified as being reasonable both in the interests of the parties and of the public?

[163] This same analytical framework has been expressed many times in various ways: see e.g., *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916 at 923; *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865 at 871; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras. 15–17; *IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 at para. 16.

[164] “Following [this] formula”, the chambers judge noted that common issue (f) asks whether the impugned clauses “operate to create a restraint of trade.” The chambers judge commented that common issue (f) “appears to be similar in nature to questions (d) and (e), which [he had] already found to be suitable common issues because they focus on the meaning and effect of the impugned preprinted clauses themselves, without regard to any individual dealings between Revolution and its customers.” He therefore considered that question (f) was a suitable common issue.

[165] Revolution again argues, in relation to proposed common issue (f), that the variation in the language of the Termination Clauses in question in the CSAs that it has with its many clients is directly relevant. It says a “case-by-case analysis of each particular customer at each particular service location is required to

determine whether there are any individually negotiated terms that impact the restraint of trade analysis."

[166] This submission, together with aspects of the further submissions made by Revolution in relation to the remaining proposed restraint of trade issues, muddies the relevant analysis. The case law supports three distinct inquiries. Proposed common issues (f), (g), and (h) relate to those three inquiries.

[167] The first question, as reflected in the "formula" the chambers judge referred to, is whether "the covenant … is in restraint of trade". This is a simple threshold inquiry. In G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 379, the author states, "A contract, or covenant, in restraint of trade is one by which a party restricts his future freedom to act in relation to his trade, business or profession." The concluding words "trade, business or profession" simply reflect the usual context within which the restraint of trade issue is raised. Similarly, in *Shafron* at para. 15, the Court said, "A restrictive covenant in a contract is what the common law refers to as a restraint of trade. Restrictive covenants are frequently found in agreements for the purchase and sale of a business and in employment contracts." Once again, aspects of this statement reflect the usual context within which the analysis occurs. While the present case does not arise within one of these typical contexts, the circumstances in which a restraint of trade can potentially arise are flexible and variable and the doctrine may apply to a broad range of commercial settings and contractual arrangements: see John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 534–35.

[168] The chambers judge's conclusion that common issue (f) "appears to be similar in nature to questions (d) and (e) … because they focus on the meaning and effect of the impugned preprinted clauses themselves, without regard to any individual dealings between Revolution and its customers" reveals that the chambers judge properly appreciated the content of common issue (f). I am of the view that the concerns Revolution raises in relation to common issue (f) lack a proper basis, and I would dismiss this aspect of its cross appeal.

[169] Before turning to the remaining common issues that the chambers judge addressed in relation to 676's restraint of trade pleading, it is necessary to return to the relevant legal framework. All restraint of trade clauses are contrary to public

policy and, *prima facie*, void. For a restraint to be valid it must be: (i) reasonable in the interests of the contracting parties; and (ii) reasonable in the interests of the public.

[170] In *Elsley*, Dickson J., as he then was, observed that the effects of a covenant in restraint of trade depend on circumstances of "infinite variety" that surround every contract. He said at 923–24:

> A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power. In assessing the opposing interests the word one finds repeated throughout the cases is the word "reasonable." The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other cases may help in enunciating broad general principles but are otherwise of little assistance.
>
> It is important, I think, to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny. The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.

[171] With this backdrop, the next proposed common issue, (g), asks whether, assuming a positive answer to question (f), the three impugned clauses are "reasonable as between Revolution and the Class Members".

[172] The chambers judge properly recognized that common issue (g) was directed to the next consideration within the relevant legal framework, that being the reasonableness of the impugned clauses as between the parties themselves. After referring to several authorities, including *Payette*, the chambers judge said:

> [108] … the factors to be considered in determining whether a particular restraint of trade is reasonable as between the parties are fact and context-specific. Some of those factors may lend themselves to a class-wide inquiry (such as whether a benefit has issued to both sides; whether Revolution has a legitimate commercial interest in restricting its customers' right to terminate the CSA or enter into a replacement agreement with a competitor; or whether Revolution has made an investment in the relationship that it is entitled to protect). Others, however, will not (such as whether the parties were of relatively equal bargaining power at the time they entered into the CSA; whether they were

> represented by counsel; whether the customer, at any point, expressly acknowledge the impugned clauses to be fair and reasonable).
>
> …
>
> [110] In light of the manifest need for individual inquiries in assessing the question of reasonableness as between the parties, I have concluded that question (g) is not a suitable common issue.

[173] 676 does not appeal the foregoing conclusion. Revolution, on the other hand, relies on this conclusion to argue that proposed common issue (h), which asks whether, assuming a positive answer to question (f), the impugned clauses are "contrary to the public interest", requires similar individual inquiries and is a similarly unsuitable common issue. Specifically, Revolution argues that the chambers judge "incorrectly assumed the trial judge could determine the reasonableness of the contract in relation to the public interest by looking at the face of the contract. In other words, the chambers judge erred in assuming this element of the test for a restraint of trade could be considered by only looking to the wording of some of the CSA clauses in isolation, excluding any other individual circumstances."

[174] The chambers judge, in relation to question (h), said:

> [111] Proposed common issue (h) asks whether, assuming a positive answer to question (f), the impugned clauses are contrary to the public interest. It may be possible for 676 to show that the impugned clauses are void or unenforceable because they are contrary to the public interest, regardless of whether they may be said to be "reasonable as between the parties" under the aforementioned test.
>
> [112] For example, 676 alleges that the effect of the impugned clauses, particularly the Right to Re-negotiate clause, is to restrict current customers of Revolution from entering into replacement contracts with a competitor for an indefinite period of time. A restraint of trade that is effectively unlimited in its duration may be found to be void and unenforceable as contrary to the public interest for that reason alone. In *Payette*, Wagner J. wrote as follows at para. 63:
>
> > [63] A non-competition clause in a commercial contract must of course be limited as to time, or it will be found to be contrary to public order and a court will refuse to give effect to it. …
>
> [113] On that basis, I find that question (h) is a suitable common issue.

[175] To the extent the foregoing comments suggest that the reasonableness of the Termination Clauses "with reference to the public interest" can be determined without a consideration of the surrounding circumstances, they would be mistaken.

Assessing the reasonableness of, for example, a restrictive covenant "with reference to the public interest" still requires a fact-specific assessment of the relevant circumstances. In *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 140 D.L.R. (3d) 659 at 671 (Ont. C.A.), the court said, "In both *Elsley* and *Doerner*, the Supreme Court emphasized that the question of reasonableness in the public interest must be determined on the facts of each case."

[176] The question, however, is what facts or circumstances might be relevant to this specific inquiry. Revolution again suggests, in relation to question (g), that "the sophistication of the parties and their counsel may be relevant to determine whether a contract that restrains trade is reasonable." It argues that "the bargaining power of the parties, the legal representation of the parties, the parties' intentions, and the nature of the contractual modifications, among other possible circumstances, cannot be artificially excluded from a legal determination of whether various iterations of the impugned clauses are unreasonable vis-à-vis the public interest." Thus, Revolution seeks to revisit the same inquiries and circumstances that are relevant to whether a particular covenant "is reasonable as between the parties."

[177] This, however, is wrong. First, it is relevant that the onus of establishing "reasonableness as between the parties" rests with the party who relies on the restrictive covenant, whereas the onus of proving that a restrictive covenant is "contrary to the public interest" lies on the party attacking the covenant: see *IRIS* at para. 17. The considerations that are engaged at each stage must necessarily be different. In *Tank* at 671, the court succinctly confirmed: "The considerations relevant to the interests of the parties and of the public are separate and distinct and this has become more apparent in recent years. The dual test in the doctrine recognizes that the assertion of a private right can create a public wrong." See also Fridman at 397–98.

[178] What facts or circumstances might be relevant in answering whether the Termination Clauses are reasonable "with reference to the public interest" is determined, at least in significant measure, by the pleadings of the parties, and in particular of 676. In *Doerner* at 875, the Court identified that the defendants' pleadings, in asserting that a particular covenant was unreasonable with regard to the public interest, alleged that the plaintiffs' practices consisted, *inter alia*, of improper accounting for inventory and business purposes, dumping of products in

the United States, misuse of government grants, monopolistic and anti-competitive pricing, and avoidance and evasion of taxes. It was these specific issues that the trial judge had addressed in the context of the “public interest”, and all levels of court agreed that the covenant was not contrary to the public interest. However, the Supreme Court of Canada noted, at 877, that only the allegation that the plaintiffs engaged in monopolistic and anti-competitive pricing could have any relevance to the public interest issue, as the other alleged misconduct would not have been influenced by the covenant.

[179] 676’s pleadings are more limited than those in *Doerner*. They allege that the Termination Clauses restrict the ability of class members “to enter into contracts for the same or similar services with companies other than Revolution” and that the Termination Clauses “create indefinite agreements.” These allegations require more than a mere consideration of the language of the Termination Clauses. They likely require an assessment of the marketplace within which Revolution and its clients operate and other similar factors. They do not, however, appear to require any assessment of the specific relationship that Revolution has with individual clients.

[180] One further comment is necessary. I have said that the chambers judge, relying on *Payette* at para. 63, commented, “A restraint of trade that is effectively unlimited in its duration may be found to be void and unenforceable as contrary to the public interest for that reason alone.” Respectfully, some care must be taken with this proposition insofar as it appears to suggest that there is a bright-line rule against indefinite terms. The two cases that were referred to in *Payette* at para. 63 do not support this blunt conclusion. Importantly, it has long been the case that restrictive covenants with an indefinite term may nonetheless be valid and that it remains necessary to consider the reasonableness of such a clause in light of the circumstances of the particular case: see e.g. *Cope v. Harasimo* (1964), 48 D.L.R. (2d) 744 (B.C.C.A.); *Provigo Distribution inc. c. Complexe commercial de l'Île inc.*, 2020 QCCA 970, leave to appeal ref’d [2020] S.C.C.A. No. 350; *Dow Chemical Canada ULC v. NOVA Chemicals Corporation*, 2020 ABCA 320; McCamus at 525; Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) at 241.

[181] I am satisfied, subject to the cautions I have expressed, that the chambers judge’s conclusions in relation to the suitability of common issue (h) were correct.

I would dismiss this aspect of Revolution's cross appeal.

[182] Common issue (i) asks whether, assuming a negative answer to question (g) or a positive answer to question (h), the three Termination Clauses, or any parts of them, are void or unenforceable. The chambers judge said, "I have found that question (g) is not a suitable common issue but that question (h) is. Question (i) is likewise a suitable common issue provided it is redrafted so that it depends upon an affirmative answer to question (h) exclusively."

[183] Though Revolution asserts that the chambers judge erred in allowing common issue (i), it did not further develop the nature of that error. I am satisfied that common issue (i), with the modification proposed by the chambers judge, is a suitable common issue.

4. Associated Common Issues

[184] The chambers judge found that 676 had proposed appropriate common issues relating to both punitive damages (common issues (s) and (t)) and interest (common issue (u)) for the Restraint of Trade Class. Revolution argues that "[i]f the restraint of trade claims are not certified, these claims cannot proceed independently."

[185] I have concluded that, subject to some clarifications or amendments, various common issues, in relation to both the contract claim and the restraint of trade issues that are raised in the pleadings, are appropriate. Accordingly, the issue raised by Revolution does not arise and I would dismiss this aspect of its cross appeal.

E. Section 4(1)(e): 676 as a Representative Plaintiff

[186] The chambers judge granted 676, or a replacement representative plaintiff, leave to re-apply to certify the restraint of trade claims. This was subject to various conditions that I described at para. 29 of these reasons for judgment. 676 seeks "[a]n order appointing 676083 BC Ltd as the representative plaintiff for … the Restraint of Trade Class." It does not, however, explain why the chambers judge's conclusions on this issue were in error. I see no basis to question this aspect of the chambers judge's conclusions.

[187] The chambers judge did not address whether 676 would be a suitable representative plaintiff for the Surcharge Class. The parties did not argue this issue on appeal. I would leave this issue for consideration on 676's re-application for certification of the Surcharge Class.

IV. CONCLUSION

[188] I would dismiss Revolution's cross appeal. I would allow aspects of 676's appeal, but I do not consider that 676's action, as it is currently pleaded, is appropriate for certification as a class proceeding.

[189] This appeal is taken from the chambers judge's order, not his reasons. Accordingly, I would not interfere with his refusal to certify the proceedings as a class proceeding. I also would not interfere with his orders granting 676 leave to re-apply to certify the claim in restraint of trade and proposed common issues (d), (e), (f), (h), (i), (s), (t), and (u), subject to various conditions.

[190] I would modify the chambers judge's order by granting leave to 676 to re-apply to certify the claim in breach of contract and proposed common issues (b), (c), and (r), subject to the amendments and conditions I have detailed in these reasons. I would not grant leave to 676 to amend its pleadings in unjust enrichment or to re-apply for certification of that claim.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Grauer"