IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.,* 2019 BCSC 2007

Date: 20191122
Docket: S172912
Registry: Vancouver

Between:

676083 B.C. Ltd.

Plaintiff

And

Revolution Resource Recovery Inc.

Defendant

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:	J. Winstanley J. Fung
Counsel for the Defendant:	A. Delmonico J. Maryniuk
Place and Dates of Hearing:	Vancouver, B.C. October 7, 8 and 10, 2019
Place and Date of Judgment:	Vancouver, B.C. November 22, 2019

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I. INTRODUCTION

[1] This is an application by the plaintiff, 676083 B.C. Ltd. (“676”), under s. 2(2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] for an order certifying this action as a class proceeding.

[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.

[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.

[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.

[5] 676 argues that it has met the test for certification in relation to both claims.

[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.

[7] For the reasons that follow, I have concluded that the application should be refused, but with leave to re-apply on different terms.

II. THE FACTUAL BACKGROUND

A. Revolution and its Business

[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"). It customers include small family businesses and large corporations, societies, partnerships, strata corporations, religious organizations, and sole proprietorships.

[9] According to Revolution, its customers have diverse needs. It 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.

[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.

[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.

[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.

[14] The principal regulators of Revolution's business within the Metro Vancouver region and City of Vancouver are the Greater Vancouver Sewerage & Drainage District ("GVSDD"), one of four corporate entities operating under the umbrella of "Metro Vancouver", and the City of Vancouver. The regulatory mandate of the GVSDD and the City of Vancouver is carried out through the enforcement of bylaws promulgated by each. Those bylaws identify the materials that can be disposed of at facilities approved or operated by the GVSDD (the "GVSDD Disposal Sites") and the City of Vancouver (the "City Disposal Sites"), as well as those that are banned from disposal there.

[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.

[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.

B. 676 and its Customer Service Agreement

[17] In November 2009, 676 entered into a form of customer service agreement ("CSA") with Revolution for the provision of waste disposal and recycling services. The original CSA was replaced by a new CSA executed on November 3, 2011. That second CSA remained in effect until February 2017, when it was terminated by agreement of the parties in circumstances that I will discuss more fully below.

[18] The more recent version of the CSA between Revolution and 676 contained the following preprinted clauses, among others, under the heading "General Conditions":

> **WEIGHTS: Solid waste pricing based on 50 kgs per yard unless otherwise specified in "Special Instructions"**
>
> Customer agrees not to place any construction materials, white goods, mattresses, landscaping waste, bed frames, pallets or any other material not deemed by [Revolution] as standard material into the containers provided. Customer agrees to pay "additional charges" for any materials that requires special handling or exceed the special "kg's per yard". Overflow may accumulate on or around the container(s). Company employees may load the overflow into their vehicle on the regular day of pickup and an additional charge will be assed on a yardage basis.
>
> **TERM**. This Agreement is for a term commencing on the date hereof and continuing until sixty months after the date service begins (the "Renewal Date") and will be renewed for successive sixty month term without further action by the parties unless terminated by [Revolution] upon 30 days written notice to the Customer or by Customer (after satisfying its obligation under the "right to re-negotiate" clause) providing to [Revolution] written notice by registered mail received not more than 120 days and not less than 90 days prior to any Renewal Date. . .
>
> **RIGHT TO RE-NEGOTIATE**. Customer and [Revolution] agree that not more than 180 days and not less than 150 days prior to any Renewal Date or within 60 days after the termination of the agreement, Customer either receives a bonna [sic] fide offer from an arms-length third party (the "Third Party") or enters into an agreement with any Third Party for the provision to Customer of the same or similar services (the "Services") as [Revolution] provides Customer pursuant to this Agreement (the "Offer"). Customer will, within 10 days thereof, deliver a full and complete copy of the Offer by registered mail to [Revolution]. [Revolution] is hereby granted the right of first refusal to provide the Services to Customer upon the expiration of the Term of this Agreement and upon the same terms and conditions comprised in the Offer and may notify Customer of its intention to provide Services on the terms of the Offer at the expiration of the then current Term of this Agreement by notice in writing to Customer not less than 30 days after receipt of a full and complete copy of the Offer by [Revolution]. [Revolution] may also, at any time either before or after receipt of a copy of an Offer, re-negotiate or extend the terms of this Agreement with Customer, including

adjusting the rates payable under this Agreement. Any modifications or amendments to this Agreement or any adjustments to the rates payable by Customer under this Agreement will take effect only upon the next Renewal Date of the Agreement. In the event that [Revolution] elects under this paragraph to re-negotiate, modify or extend the terms or this Agreement, including any adjustments to the rates, Customer and [Revolution] agree that this Agreement as amended will continue in full force and effect between them and will supersede and take precedence over any other agreement between Customer and any Third Party which was entered into after the initial date of this Agreement or any earlier agreements between [Revolution] and Customer. Notwithstanding the foregoing, in the event that the Third Party Offer provides that the Proposed Services will be provided by the third party supplier for a period of less than sixty months. [Revolution] shall be deemed to have matched the Third Party Offer by proposing a term of sixty months.

. . .

FINES. Customer agrees to be responsible for and pay to [Revolution] in addition to all other charges payable hereunder, any and all fines, surcharges or levies, including but not limited to overweight fines, container permit fees, municipal graffiti ordinances, mixed load surcharges, material ban surcharges incurred by [Revolution] in the course of providing the Services to Customer.

WASTE MATERIAL. The solid waste and recyclable material to be collected and disposed of by [Revolution] pursuant to this Agreement are solid waste and recyclable material generated by Customer excluding radioactive, volatile, highly flammable, explosive, biomedical, toxic or hazardous material. The term "hazardous material" will include, but not be limited to, any amount waste listed or characterized as hazardous or special waste by any federal or provincial law. [Revolution] will acquire title to the solid waste and recyclable material when loafed into [Revolution's] trucks. Title to and liability for any waste excluded above will remain with Customer and Customer expressly agrees to defend, indemnify and hold harmless [Revolution] from and against any and all damages, penalties, fines and liabilities resulting from and arising out of such waste excluded above. Customer will be solely responsible for the safekeeping of and for the proper loading of all waste and recyclable material into the Equipment.

. . .

RATE ADJUSTMENTS. [Revolution] reserves the right to adjust rates hereunder based upon increases in fuel costs, insurance rates, disposal facility costs and transportation costs due to a change in location of disposal facilities, decreases in the local market prices for recyclable material, changes in the composition, weight or volume of material disposed of by Customer, or contamination of recyclable material. Disposal facility charges to Customer may vary with location, handling and carrying costs. [Revolution] may also adjust the rates hereunder from time to time to reflect the percentage increase in the local Consumer Price Index for all items published by Statistics Canada. [Revolution] may also adjust the rates in an amount in excess of such percentage increase with Customer's consent upon notice from [Revolution] at least twenty days prior to the effective date of the adjustment. Customer's consent may be evidenced by the practices and actions of the parties. The rates set out above are based upon an estimate of the actual weight and/or volume of the type, composition and

> quantity of solid waste and recyclable material normally disposed of by Customer, as represented by Customer to [Revolution] or as estimated by [Revolution] based on the service requested by Customer. If [Revolution] determines that the actual weight and/or volume of the solid waste and recyclable material disposed of by Customer is greater than originally estimated, [Revolution] reserves the right to adjust the rates and charges hereunder to reflect the actual weight and/or volume of the solid waste and recyclable material actually disposed.
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> …
>
> **FAILURE TO PERFORM**. If Customer purports to terminate this Agreement prior to the expiration of its term, [Revolution] will have the option to either (a) affirm this Agreement, in which instance if Customer does not forthwith, withdraw such purported termination and agree to honor the terms and conditions of this Agreement, Customer hereby irrevocably agrees and consents to any all permanent, interlocutory and interim relief that [Revolution] may seek from the Courts to enforce its rights hereunder, including without limitation any interim, interlocutory and/or permanent injunction that [Revolution] may seek restraining Customer from placing any containers or other equipment owned by Customer or a third party at or near the Service Location for the purpose of Customer receiving services which are the same as or similar to those provided by [Revolution] under this Agreement and enjoining Customer or anyone on Customer's behalf from receiving such service or (b) accept the purported termination by Customer and terminate this Agreement, in which instance, Customer agrees to pay [Revolution], as liquidated damages, an amount equal to the greater of (1) sum of Customer's monthly billing for the most recent twelve months, or, if Customer has not been serviced for twelve months, Customer's average monthly billings for the months serviced, or if none, the billing projected by [Revolution] for the first month, in each case multiplied by twelve or (2) the sum of amounts due to [Revolution] for the balance of the term remaining on this Agreement. Customer acknowledges that the foregoing liquidated damages are reasonable in light of the anticipated loss to [Revolution] caused by the termination and are not imposed as a penalty. In the event Customer fails to pay [Revolution] all amounts which become due under this Agreement, or fails to perform its obligations hereunder, and [Revolution] refers such matter to a lawyer, Customer agrees to pay, in addition to the amount due, any and all costs incurred by [Revolution] as a result of such action, including to the extent permitted by law, reasonable lawyer's fees on a solicitor and own client basis.
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> . . .

[19] In his affidavit, Amrit Toor, one of the co-owners of 676, states that when he executed the CSA, he believed that those General Conditions were non-negotiable. No one from Revolution, he says, drew his attention to the termination provisions in particular.

[20] Contrary to Mr. Toor's assertion, however, it appears that 676 did, on both of the occasions when it executed a CSA with Revolution, negotiate at least some changes to

the preprinted terms. Those changes are reflected in the handwriting that was added in the "Special Instructions" section appearing in the middle of the main page of both documents. In the initial version executed November 16, 2009, for example, the special instructions section contains the following handwritten annotation: "One year terms [as opposed to "sixty months"]. 2% fuel surcharge. One month free service." In the most recent CSA executed November 3, 2011, the following handwritten annotation appears in the same place: "Negotiate rates, increase service on garbage & card board service."

C. Other Versions of the Customer Service Agreement

[21] Revolution has adduced in evidence over 100 different CSA's with others of its customers. Ron McRae, Revolution's President, describes those that are attached to his affidavit as a "representative sampling." There are seven versions of the template CSA in evidence, identified on their face as 5F, 5G, 60B, 60C, 60D, 60E and 60F, respectively. Revolution says that it used all of them during the proposed class period (from April 2015 to the present). 676's most recent CSA was an example of version 60C.

[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]."

[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.

D. The Surcharge

[24] The first aspect of 676's claim relates to a surcharge identified as "Government Surcharge/Material Ban" that appeared regularly on the monthly invoices that Revolution rendered to 676 from April 2015 until its CSA was terminated. I will refer to it as the "Surcharge." The 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.

[25] 676 alleges that the CSA, particularly the preprinted Fines clause, permitted Revolution to pass on only fines, surcharges and levies that it had actually incurred. In the MVRD, Revolution was required to pay certain municipal fines, levies and surcharges under certain bylaws, including the so-called "Tipping Fee Bylaws", among others. I will refer to these, collectively, as the "MVRD fines."

[26] 676 has adduced evidence showing that Revolution paid a total of $15,211 in MVRD fines during 2015, with approximately 8% of its inspected loads having yielded an MVRD fine that year. In 2016, the equivalent figures were $8,916 and 4%, respectively.

[27] 676 alleges that Revolution, in breach of the CSA's, imposed the Surcharge on all or most of its customers from April 30, 2015 forward at a standard rate of 18% on the gross amount invoiced, without regard to the actual amount of MVRD fines that Revolution actually incurred.

[28] Revolution does not dispute that the Surcharge was imposed on most of its customers with a view to recuperating a broader array of operational costs, beyond just the MVRD fines, where they applied. Mr. McRae describes the actual scope of the Surcharge as follows:

> On or around April 30, 2015, Revolution began imposing a [Surcharge] as a means of addressing increased operational costs arising from compliance with the banned material mandates implemented by the GVSDD and City of Vancouver.
>
> …

> The [Surcharge] relates to different costs incurred by Revolution from government surcharges and from the diversion of banned materials. Only a small portion of the [Surcharge] relates to fines, surcharges, or levies imposed by the GVSDD under the Tipping Fee Bylaws, City of Vancouver under the City Bylaws, or private waste disposal and recycling facilities for complying with these mandates. Other operational costs of complying with the mandates of the GVSDD and City of Vancouver related to the diversion of banned materials were accounted for in the [Surcharge] including: additional manpower to divert different banned materials, equipment costs to source[,] separate and process banned materials, increased transportation costs, other costs associated with processing materials at multiple facilities, and additional administrative expenses of complying with the GVSDD and City of Vancouver mandates.
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> …
>
> The [Surcharge] 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 [Surcharge] as a result. …

[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.

[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:

> 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.

[32] The contractual authority to pass on the broad array of operational costs recuperated through the Surcharge lies, argues Revolution, not just in the Fines clause but also in the handwritten and other preprinted terms in the CSA's, such as the Weights, Rate Adjustments and Waste Material clauses.

[33] Revolution says that it ceased imposing the Surcharge on new customers when it adopted a different pricing formula in January 2017, before this action was commenced on March 29, 2017. Many of Revolution's then existing customers have continued to pay it, however. Mr. McRae estimates that, as of March 2018, approximately 6,742 of Revolution's customers had paid the Surcharge at some point, and that approximately 2,629 were still doing so at that time.

E. Efforts to Terminate Customer Service Agreements

[34] Mr. Toor recounts that he tried without success to terminate 676's CSA with Revolution on a number of occasions before it was finally terminated successfully. Initially, he tried to do so by delivering a notice of termination by facsimile but was told that Revolution would only accept a notice of termination if it was delivered by way of registered mail, and then only during the prescribed window falling between 120 and 90 days prior to the expiry of the term. Later, he was told that 676 could only terminate the CSA, even within the prescribed window, if it also relayed the quote it had received to continue service with a competitor and gave Revolution the chance to match it. In the end, Revolution relented and allowed 676 to terminate the CSA despite the fact that, according to Revolution, 676 had not given Revolution a valid notice of termination as required by the CSA.

[35] There is evidence that other customers have complained of having had similar difficulties when they tried to terminate a CSA with Revolution. 676 has reproduced an online discussion forum that records other customers making similar complaints about the process.

III. THE TEST FOR CERTIFICATION

[36] The essential requirements for certification are set out in s. 4(1) of the *CPA*, which states, in relevant part, as follows:

> (1) … the court must certify a proceeding as a class proceeding on an application under section 2 … if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[37] 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 that the plaintiff advances a valid cause of action: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*].

[38] The parties join issue on each element of the certification test.

IV. DISCUSSION

A. Subsection 4(1)(a) - The Causes of Action

[39] Although Revolution concedes that 676 pleads at least some viable causes of action, it argues that the following pleaded causes of action, or aspects of them, cannot succeed:

(a) unjust enrichment; and

(b) unconscionability and restraint of trade, with respect to Revolution's former customers, like 676.

1. The Test under ss. 4(1)(a)

[40] In *Microsoft*, 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) as follows at para. 63:

> [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).

2. Unjust Enrichment

[41] After setting out the causes of action in contract, restraint of trade and unconscionability in Part 3 of the Fourth Amended Notice of Civil Claim, 676 pleads "[f]urther, or alternatively" that:

(a) Revolution was enriched by receipt of the Surcharge;

(b) it and the other members of the proposed class have suffered a corresponding deprivation; and

(c) "[t]here is no juristic reason for Revolution to retain any part of the [Surcharge], and Revolution must disgorge and make restitution" of it to 676 and the proposed class.

[42] Revolution argues that 676's claim in unjust enrichment, as pleaded, suffers from a number of fatal defects. First, Revolution says that there is a valid juristic reason for the alleged enrichment, namely the CSA. Second, Revolution says that the unjust enrichment claim, insofar as it depends upon a finding that the CSA was invalid, is intolerably inconsistent with 676's primary claim seeking damages for breach of contract. Third, Revolution says that 676's pleading is deficient for failure to plead the fact of an enrichment and corresponding deprivation. Fourth, Revolution says that 676's pleading is deficient for failure to specify in Part 2 the relief sought in relation to that claim. 676 argues that the claim is viable and meets the pleadings test.

[43] With respect to Revolution's first two arguments, I agree that, on the facts pleaded by 676, 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. 676 pleads that Revolution was entitled under the CSA to "charge its customers surcharges, fines, or levies where those costs were incurred by Revolution." 676 also pleads that Revolution did in fact incur such costs. The CSA therefore serves, by 676's own admission, as a valid juristic reason for Revolution's enrichment by those amounts at least. 676's claim in unjust enrichment and restitution, as currently pleaded, is therefore bound to fail insofar as it seeks disgorgement of <u>all</u> monies received by Revolution through the Surcharge.

[44] That does not mean, however, that 676 may not plead a valid cause of action in unjust enrichment and restitution to recover that portion of the Surcharge that it and the other members of the proposed class paid beyond the amount of the surcharges, fines, or levies actually incurred by Revolution.

[45] The situation in this case is distinguishable from that in *Ileman v. Rogers Communications Inc*., 2014 BCSC 1002 appeal dismissed: 2015 BCCA 260 [*Ileman*], where Justice G.C. Weatherill struck a claim seeking damages in unjust enrichment and

restitution because the plaintiff had not pleaded that the contract, which expressly provided for the impugned enrichment, was invalid in whole or in part. Whether the CSA's provided for the disputed part of the enrichment alleged here, expressly or otherwise, is the very issue in dispute between the parties. It is therefore not necessary for 676 to plead the invalidity of the CSA, in whole or in part, in order for it to advance a viable claim in unjust enrichment and restitution.

[46] The circumstances in which a contract can serve as a juristic reason sufficient to defeat a claim of unjust enrichment were discussed by Kelleher J. in *Tyk v. Graham*, 2017 BCSC 920, as follows at para. 101:

> [101] While the existence of a contract can be a sufficient juristic reason for enrichment, the benefit obtained must be within the scope of the contract. This was noted by Myers J. in *Noh v. Plaza 88 Developments Ltd*., 2010 BCSC 1491, aff'd 2011 BCCA 461 as follows:
>
> > [55] . . . Whether a contract [exists] is certainly a major part of the juristic reason analysis, but it is not the ending point. Where a valid and enforceable contract requires the plaintiff to benefit the defendant, the contract is, no doubt, a sufficient juristic reason for the enrichment. On the other hand, where the benefit is bestowed outside the scope of the contract, or where a contract has failed for lack of consideration or frustration, the contract might not constitute a sufficient juristic reason.
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> [Emphasis added].

[47] This Court has recently held that a plaintiff should be permitted to seek damages in unjust enrichment and restitution in the alternative to those in breach of contract, particularly where it is possible that the claim in contract could fail while that in unjust enrichment could succeed: see *Murray Market Developments v. Casa Cubana,* 2018 BCSC 568. Admittedly, it is difficult to imagine how 676's unjust enrichment claim could possibly succeed if its contract claim has failed. Nevertheless, I am not prepared to find, at this early stage, that 676's alternative claim in unjust enrichment and restitution, if properly recast, is bound to fail simply because it overlaps with its claim in contract.

[48] Given that the claim in unjust enrichment, if 676 still intends to proceed with it, will need to be recast in any event, it is unnecessary to address Revolution's other arguments about the technical defects in the claim as currently pleaded.

3. Unconscionability and Restraint of Trade – the Case of Former Customers

[49] Revolution argues that 676, as a former customer, cannot properly seek the declaratory relief set out in the prayer for relief and therefore that the associated claims do not disclose a valid cause of action meeting the first branch of the certification test. The authorities supporting that submission were canvassed by Duncan J. in *Regional District of East Kootenay v. Augustine*, 2017 BCSC 322, at paras. 55-58 as follows:

> [55] In *Lee v. Li*, 2002 BCCA 209, at para. 19, the court, citing *Solosky*, identified two constraints on the broad discretion to give declaratory relief: "An action for a declaration must be in relation to a right and must have some utility…". This first requirement, that a declaration concern the rights of the parties, is reflected in the language of Rule 20-4(1), allowing "binding declarations of right".
>
> [56] There is binding authority in British Columbia that declarations should not be given to establish that some past conduct was wrong. While there may be a finding that underlines rights now existing between the parties, it is not of itself a declaration of right.
>
> [57] In *Rusche v. ICBC*, (1992) 4 C.P.C. (3d) 12 (B.C.S.C.), the court considered a jury that had found that a trespass had occurred, but only awarded nominal damages. The court held that it could not make a declaration under Rule 5(22), the predecessor to Rule 20-4(1):
>
> > In the present case the jury found, in answering the first question put to them, that there had been a trespass. I had first thought that this might form the basis of some declaratory relief. Rule 5(22) allows the court to make binding declarations of right whether or not consequential relief is or could be claimed. The declaration must, however, be of a right and cannot be "that certain past conduct is wrong". (*Architectural Institute of British Columbia v. Lee's Design and Engineering* (1979), 96 D.L.R. (3d) 385 (B.C.S.C.) at p. 430.) This means, I think, that I could not convert the jury's finding that there had been a trespass into a judgment containing declaratory relief.
>
> [58] The BC Court of Appeal recently cited *Rusche* in *Warde v. Slatter Holdings Ltd.*, 2016 BCCA 63 at para. 48, for the principle that "a court is not empowered under [Rule 20-4(1)] to make a declaration that past conduct was wrong."

[50] 676 responds that it is not necessary for a proposed representative plaintiff to have the right, by itself, to pursue every one of the causes of action pleaded, as long as at least some members of the proposed class do: *MacKinnon v. Instaloans Financial*

Solutions Centres (Kelowna) Ltd., 2004 BCCA 472 *[MacKinnon]*; *Bank of Montreal v. Marcotte*, 2014 SCC 55.

[51] I agree with 676 that the claims it advances for declaratory relief disclose valid causes of action meeting the first branch of the certification test, given that at least some members of the proposed class, if not 676 itself, may properly pursue them.

B. Subsection 4(1)(b) - Identifiable Class

[52] In *Jiang v. Peoples Trust Company,* 2017 BCCA 119 [*Jiang*], Chief Justice Bauman, writing for the Court, conveniently summarized the principles to be applied in determining whether there is an identifiable class as required by s. 4(1)(b), as follows at para. 82:

> [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.

[53] 676 seeks, in the first instance, to certify a class defined as follows:

> … 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”).

[54] Revolution argues that a class cannot properly be certified in those terms because it would be over-inclusive, in that many of its members have no claim. First, with respect to the claims in contract and unjust enrichment, customers who signed a CSA after January 1, 2017 or existing customers whose CSA expressly prohibited Revolution from imposing the Surcharge will not have paid it. Second, with respect to

the claims in unconscionability and restraint of trade, former customers, like 676, have no interest in obtaining the declarations sought and should therefore not be included, it is argued.

[55] In *Douez v. Facebook, Inc.*, 2018 BCCA 186, Groberman J.A., writing for the Court, elaborated on the problem of "overbreadth" as follows at paras. 68-69:

> [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.

[56] I agree with Revolution that the definition proposed by 676 should not be adopted because it is "unnecessarily broad" in the sense that it includes, as Revolution argues, "identifiable groups of people who manifestly have no claim."

[57] Anticipating that possibility, 676 also advances an alternative proposal, which is to certify two separate classes, defined as follows:

> … 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"); or
>
> (b) continue to have a contract with Revolution (the "Restraint of Trade Class").

[58] Revolution argues that even this revised definition is too broad because it includes customers who consented to the contract terms in issue, others who agreed to modify them and others still who deleted them. Moreover, Revolution argues that many of the class members in the proposed Surcharge Class have CSA's that raise individual issues. With respect to the proposed "Restraint of Trade Class," Revolution raises a further problem. Because there is no CSA with a current customer in evidence, it is argued, the Court cannot determine if any members of that proposed class have CSA's containing the impugned preprinted terms that are the target of the declaratory relief that 676 seeks.

[59] I am 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. It has been held to be an error in principle to import a consideration of such issues into this branch of the test: *Jiang* at paras. 83-120, where Bauman C.J. specifically overruled cases like *Ileman* that suggest otherwise.

[60] 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."

[61] I find, in summary, that 676's alternative class definition satisfies the requirements of ss. 4(1)(b). The evidence establishes to the requisite standard that there are at least two customers who paid the Surcharge or 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 or former customers will know if they are in the proposed "Surcharge Class" by determining if the Surcharge appeared on at least one of their invoices and was paid and not refunded. 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. Those falling into either one or both of those proposed classes may seek relief under at least one of the two branches of 676's claim.

C. Subsection 4(1)(c) - The Proposed Common Issues

1. The Commonality Requirement and Standard Form Contracts

[62] The factors to be considered in determining whether the claims of the class members raise common issues for the purpose of s. 4(1)(c) were conveniently summarised by Bauman C.J. (then of this Court) in *Watson v. Bank of America Corporation,* 2014 BCSC 532 [*Watson*]*,* as follows, at paras. 65-67:

> [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. Section 1 of the CPA defines "common issues" as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".
>
> [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 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.

[63] On the appeal from that decision, indexed as 2015 BCCA 362, which was allowed in part on other grounds, Saunders J.A., writing for the Court, summarised the authorities explaining the test under s. 4(1)(c) as follows at para. 152:

> [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.

[64] 676 relies on a number of authorities holding that claims involving standard form contracts are ideally suited to being tried as class actions, including *Sherry v. CIBC Mortgage Inc.*, 2014 BCSC 1199; 2015 BCSC 490; *Sandhu v. HSBC Finance Mortgages Inc.*, 2014 BCSC 2041; *Cooper v. Merrill Lynch*, 2006 BCSC 1905; *Lam v. University of British Columbia,* 2010 BCCA 325 and *Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561, aff'd 2017 BCCA 361 [*Finkel*].

[65] Revolution argues that those cases are distinguishable. It says that the CSA's before the Court in this case are not really in a standard form at all, as that concept is understood in the jurisprudence. In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, Justice Wagner (as he then was), writing for the majority, held that the rules of contractual interpretation adopted by the Court in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, should not necessarily be applied in the same way when dealing with standard form contracts. He explained the basis for that distinction as follows at para. 25:

> [25] The statements made in *Sattva* on the standard of review of contractual interpretation must be considered in their full context. That case concerned a complex commercial agreement between two sophisticated parties — not a standard form contract. Professor John D. McCamus has described standard form contracts as follows:
>
> > . . . the document put forward will typically constitute a standard printed form that the party proffering the document invariably uses when entering transactions of this kind. The form will often be offered on a "take it or leave it" basis. In the typical case, the other party, then, will have no choice but either to agree to the terms of the standard form or to decline to enter the transaction altogether. Standard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate, in any meaningful sense, the terms of many of the transactions entered into in the course of daily life.
> >
> > (*The Law of Contracts* (2nd ed. 2012), at p. 185)
>
> Sattva did not consider the unique issues that standard form contracts raise.

[66] Relying on that passage, Revolution argues that the CSA's in issue here were not offered to its customers on a "take it or leave it" basis. The customers were not left with the binary choice of either accepting the preprinted terms or refusing the service. Instead they were able to and in most cases did in fact renegotiate the preprinted terms to arrive at a consensual position on many terms, including those that are the subject of 676's claims. In support of that submission, Revolution notes that many of the CSA's reproduced in evidence show the preprinted clauses to have been modified in various ways or struck out altogether.

[67] Revolution also refers me to *Charlton v. Abbott Laboratories, Ltd*., 2015 BCCA 26. In that case, Willcock J.A., writing for the Court, adopted the list of "general

propositions" that had been assembled by the Court in *Singer v. Schering-Plough Canada Inc.,* 2010 ONSC 42. Among them was the following:

> A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant.

[68] Revolution says that the common issues proposed here suffer from that defect.

[69] 676 responds that the CSA's are generally in a standard form, despite the occasional exceptions emphasized by Revolution. 676 notes that there are barely 100 CSA's in evidence, with some duplicates, but there are approximately 6,742 members in the proposed Surcharge Class. That means that only a very small fraction of the CSA's that would be in issue at a common issues trial are actually before the Court on this application.

[70] 676 notes that although Mr. McRae described the CSA's he has produced as a "representative sample" he does not explain how he went about selecting the CSA's that he chose to reproduce. 676 argues that Revolution's assertions about the CSA's as a group should not be taken at face value. In *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, Horkins J. rejected a similar kind argument. The Court distinguished between the evidentiary burden resting on the plaintiff and the defendant in assessing the factual basis for certification, as follows at paras. 219-225:

> [219] UPS also argues that the waybill and IPSO are not standard contracts because the plaintiffs did not present any evidence to establish that they are the "only two forms of documents" that UPS used to initiate a shipping transaction.
>
> [220] In essence, UPS is relying on assertions that are inconsistent with admissions in its statement of defence and not supported by evidence. If UPS used documents other than the waybill and the IPSO to contract with customers and ship goods into Canada, then this is a fact that would be within their knowledge and they should have presented evidence to support this assertion. It is UPS, not the plaintiffs, who would have access to such evidence, assuming it exists.
>
> [221] As Justice Cullity explained in *Lambert v. Guidant Corp*, [2009] O.J. No. 1910 at para. 68, leave to appeal dismissed [2009] O.J. No. 4464 (Div. Ct.), while the evidentiary burden on the plaintiff is low, the burden on the defendant is "inversely heavy":
>
> > The legislative history was relied on in *Hollick* as justifying the very weak evidential burden of "some basis in fact" that was held to apply to each of the statutory requirements for certification, other

> than that relating to the disclosure of a cause of action. It must, I believe, follow logically that, although a defendant would be entitled to deliver affidavit evidence in rebuttal, the standard of proof is inversely heavy. It is not enough for the defendant to establish on a balance of probabilities that facts that bear on the existence of "colourable" claims differ from those asserted by the plaintiff - the onus must be to demonstrate that there is no basis in the evidence for the latter. For this reason, the court has generally declined to choose between conflicting opinions of qualified experts on the requirement of commonality of issues, or on the existence of the claims of class members that are said to raise such issues.

[222] Further, at para. 81, Justice Cullity highlighted the risk that a defendant runs in relying on assertions, when facts, as in this case, are peculiarly within their knowledge:

> As has been insisted on many prior occasions, the certification motion is essentially procedural in nature. There is, of course, nothing to prevent the defendants from making full disclosure of facts that will assist in narrowing the class, or formulating the issues. Just as obviously, the proceedings are adversarial and they cannot be compelled to do this. If, however, they choose to rely on assertions of facts peculiarly within their own knowledge, and which cannot properly and adequately be tested on the motion, they cannot, in my opinion, insist that their evidence must be accepted as conclusive. The court must decide the weight that is to be given to it in the light of all the evidence and with strict attention to, and its focus on, the claims actually advanced by the plaintiffs on behalf of the class, and the standard of proof applicable to them.

[223] I add that in this case, UPS surely appreciated the importance of offering such evidence (assuming it exists), since they faced the plaintiffs' summary judgment motion immediately following certification.

[224] In any event, even if contracts other than the standard form IPSO and waybill were used (and there is no such evidence), this action does not include such contracts.

[225] Lastly, UPS argues that because the content of the waybill and IPSO are different, this is evidence that they are not standard form documents. I disagree. The premise of the plaintiffs' case is that UPS either used a waybill or the IPSO to confirm an agreement to ship using standard service. There is some evidence to support this. The fact that the two documents are not the same does not mean that they are not "standard" documents. One does not depend on the other to be "standard".

[Emphasis added.]

[71] Further, 676 says that many of the variations in the CSA's that Revolution relies on are not relevant to its claims or, to the extent they are, are not particularly significant.

For example, 676 says that the claim advanced for the proposed Surcharge Class turns on the Fines clause and there is only one example in evidence of an alteration having been made to it, which is immaterial (someone has crossed out the words “not limited to”, leaving the remainder of the clause intact). Any truly material differences among the CSA’s can, argues 676, be addressed together at the common issues trial or, if need be, at an individual trial following its conclusion. It relies in this regard on *Scott v. TD Waterhouse Investor Services*, 2001 BCSC 1299 [*Scott*] at paras. 95-96:

> [95] The defendants do not dispute the fact that they acted as broker for each class member to process the class member's securities transactions for a fee. They do not deny that there was a basic agreement as described above in the "Identifiable Class" analysis. What the defendants do say is that the contractual obligations of their many thousands of clients are not common, but rather must be determined on a client-by-client basis.
>
> [96] Even if that is so, the first step in determining their contractual obligations to each class member is to determine what rights and obligations flow from the basic agreement. Only then will it be necessary to determine whether those rights and obligations are modified in some way in individual instances.

[72] I accept 676’s submission that I have before me only a relatively small sample of CSA’s and that I cannot take Revolution’s assertion that it is a “representative” sampling as conclusive. There is a stark informational imbalance as between the parties at this early stage of the litigation. There has been no discovery yet. Nevertheless, that does not mean that Revolution was required to place in evidence all or even most of the CSA’s in order to demonstrate the complexities inherent in the inquiries that 676 is urging the Court to make. A large enough sample has been reproduced to demonstrate that the contracts in issue are not all in a standard form. I therefore agree with Revolution that the problems in this case run deeper than those addressed in many of the cases cited by 676.

[73] Unlike in *Scott*, for example, the defendant in this case does <u>not</u> concede that there was a “basic agreement,” reflected in the preprinted terms, that may have been modified subsequently by a course of conduct. Rather, the preprinted terms appear, at least in many cases, to have been only the starting point for the negotiations.

[74] 676 also relies on *Basyal v. Mac's Convenience Stores Inc.,* 2017 BCSC 1649, appeal allowed in part 2018 BCCA 235 [*Basyal*] and *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328 [*Dominguez*], in which common issues pertaining to an allegation of breach of contract were certified despite the fact that the class members had contracts with terms that varied from a standard form, at least to some extent.

[75] In *Basyal,* Justice Silverman found the variations in issue before him to be "inconsequential" (at para. 93). The same cannot be said here. Some of the variations in evidence go to the heart of 676's claims. 676's submission to the contrary assumes that the only handwritten changes that may be relevant in a common issues trial would be those made to the impugned preprinted clauses themselves. That is not necessarily so. The correct interpretation of those clauses may be affected by other terms, including other preprinted terms (some of which have themselves been struck out or altered in various ways), handwritten terms appearing elsewhere in the CSA and collateral agreements made orally and recorded in some other manner in the file.

[76] In *Dominguez,* Justice Fitzpatrick found that, despite the occasional departure from the standard form, there was indeed sufficient commonality in the contracts before her to raise genuine common issues. She explained her conclusion in that regard as follows at para. 138:

> [138] While the terms are not in all instances in each and every contract, there is sufficient commonality among these written contracts to raise the same issues, such that a decision on the interpretation of these terms will be of assistance in understanding the scope of the contractual undertakings of the defendants in relation to the putative class members.

[77] One of the central questions before me is whether there is in this case, as there was in *Dominguez*, "sufficient commonality among these written contracts to raise the same issues." That question suffuses the analysis with respect to many of the common issues proposed by 676.

[78] 676 has revised its list of proposed common issues since filing the notice of application. The latest iteration lists 21 proposed common issues. They are divided into the following categories: breach of contract (a) – (c), contract enforceability (d) –

(e), restraint of trade (f) – (i), unconscionability (j), unjust enrichment/restitution (k) – (q), aggregate damages (r), punitive damages (s) – (t) and interest (u). I will consider them individually in those categories.

2. Breach of Contract

[79] The first three of 676's proposed common issues, (a) - (c), address 676's claim in breach of contract, which applies to the proposed Surcharge Class.

[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.

[81] The second proposed common issue, (b), asks whether Revolution breached the terms of the CSA's by charging the Surcharge.

[82] The Fourth Amended Notice of Civil Claim pleads that the CSA's include "a term that Revolution may charge surcharges and fines where those costs were incurred by Revolution." Revolution is alleged to have breached that term "by charging the [Surcharge] without having incurred a corresponding fine or 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*, 219 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.

[88] In seeking to answer this proposed common issue by reference only to the preprinted terms, the Court could, at best, provide only a tentative answer that would have to be subject to further individual inquiry. I appreciate that a complication of that kind, by itself, is not necessarily fatal to certifying a question as a common issue. It is possible for an answer to a common issue to vary among the class members. The answer need not assist everyone, as long as success for one class member does not mean failure for another. Moreover, the extent of the individual issues remaining after the common issues are resolved is a matter more properly addressed in the context of the preferable procedure branch of the test.

[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.

[90] The last proposed common issue in this category, (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?" That question, as framed, depends on 676's having obtained a positive answer to question (b), which I have found not to be a suitable common issue. 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.

[91] I therefore find questions (a), (b) and (c) not to be suitable common issues.

3. Contract Enforceability

[92] The next two proposed common issues, (d) and (e), apply to the proposed Restraint of Trade Class.

[93] The first of them, (d), asks if the "Term, Right to Re-negotiate and Failure to Perform clauses in the [CSA's] limit the ability of the Class Members to terminate their contracts with Revolution." The second (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."

[94] Revolution argues that these questions are not suitable common issues because the CSA's, particularly the impugned clauses at which these questions are directed, are not in a standard form. Although 676's second CSA, unlike its first, contains all three clauses in an unamended form, many others do not. Many of the other CSA's that have been placed in evidence contain handwritten terms that either delete one or more of those clauses or alter them in material ways.

[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.

[96] 676 responds that the three impugned clauses that are the subject of these proposed common issues remain essentially unchanged in all seven versions of the template CSA's in evidence, with most of the variations in the preprinted clauses being either irrelevant, minor or inconsequential. With respect to the handwritten terms that may remove or amend one or more of those preprinted clauses in material ways, 676

argues that the answer to these proposed common issues may still advance the claims of the affected customers and that any individual issues arising from their CSA's can, if necessary, be dealt with later at the individual issues stage.

[97] I agree with 676 that there is "sufficient commonality" among the CSA's, at least in the preprinted clauses they contain, to justify classifying questions (d) and (e) as suitable common issues. Unlike the proposed common issues framed for the Surcharge Class, these focus on the effect of the impugned preprinted clauses themselves, without regard to the course of dealings between Revolution and each individual class member.

[98] I also agree that the answers to these two questions may, in varying degrees, advance the litigation even for those class members whose CSA's have handwritten or oral terms that delete or amend one or more of the impugned clauses in material ways. That is because the effect of the preprinted terms can serve as at least the starting point in the analysis in those cases as well. The affected class members would not be "pulling in the opposite direction" at a common issues trial. The degree to which individual issues will remain outstanding for them following a common issues trial, and the difficulties that may arise in resolving such issues, are questions that are more appropriately addressed at the preferable procedure stage of the analysis.

[99] I therefore find proposed questions (d) and (e) to be suitable common issues.

4. Restraint of Trade

[100] 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.

[101] The broader principles to be applied in making that determination were described by Justice Dickson, as he then was, in *Elsley v. JG Collins Insurance Agencies*, [1978] 2 S.C.R. 916, at p. 923 as follows:

> A covenant in restraint of trade is enforceable only if it is reasonable as 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 the right has been exercised by knowledgeable persons of equal bargaining power. …

[102] In *Yellowhead Petroleum Products Ltd. v. United Farmers of Alberta Co-operative Limited*, 2004 ABQB 665 [*Yellowhead*], Justice Verville described the applicable test in the following terms, at para. 42:

> [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?
>
> If the alleging party establishes that the covenant is in restraint of trade, it is *prima facie* unenforceable. The onus then shifts to the party seeking to uphold the covenant to establish that the covenant is reasonable.

[103] Following that formula, question (f) asks whether, assuming questions (d) and (e) are answered affirmatively, the three impugned clauses "operate to create a restraint of trade." That question appears to be similar in nature to questions (d) and (e), which I have 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. I therefore find question (f) to be a suitable common issue on the same grounds.

[104] The next question, (g), asks whether, assuming question (f) is answered affirmatively, the three impugned clauses are "reasonable as between Revolution and the Class Members."

[105] As noted above, a restraint of trade is enforceable only if it is reasonable both as between the parties themselves and with reference to the public interest. Question (g) appears to be directed at the first of those considerations, that is, the reasonableness of the impugned clauses as between the parties themselves.

[106] In *Yellowhead*, Verville J. canvassed a number of authorities discussing the factors that have been held to be relevant to the analysis in that regard, as follows at paras. 43-54:

> [43] Reasonableness should be determined by evaluating whether the covenant is no more than adequate for its intended purpose; the [covenantee] should be able to establish that the ratio between the restraint and the interest is reasonable: *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 140 D.L.R. (3d) 659 (Ont. C.A.) at pp. 665 and 666.
>
> [44] Other factors that have been considered with respect to reasonableness as between the parties include whether a benefit has issued to both sides; whether the covenantee has made a substantial investment worthy of protection; whether there was negotiation between parties of equal bargaining strength; whether the parties received legal advice; and whether the covenantor has expressly acknowledged the importance of the covenant in question.
>
> [45] In *McDonald's Restaurants of Canada Ltd. v. West Edmonton Mall Ltd.* (1994), 159 A.R. 120 (Q.B.) Mason J. noted in para. 47:
>
> > The covenant was negotiated between parties of equal bargaining strength. The evidence establishes that both sides had input into the framing of the terms of the restrictive covenant by the two principal officers in charge of such matters. Each party received qualified legal advice. The issue of the terms and ambit of the restrictive covenant were principally business decisions made by parties fully conversant with the commercial requirements of their respective operations. The supplementary agreement entered into by the parties underlined that the restrictive covenant was a basic condition of McDonald's entering into the lease. W.E.M. freely undertook by this supplementary agreement not to contest the validity of the covenant.
>
> [46] Some measure of interference with trade is acceptable, as long as it does not exceed the accepted standards and does not prohibit more than what is adequate in the circumstances. The principal limitation on restrictive covenants is the requirement that the scope and geographic and temporal elements of those covenants are no broader than reasonably necessary to protect the legitimate interests involved. Reasonableness is to be assessed at the time when the contract was entered into.
>
> …
>
> [48] The degree of scrutiny into the reasonableness of a restrictive covenant depends on the nature of the relationship between the parties. For example, in the two classic instances of restrictive covenants, attempts to regulate the after-termination conduct of employees are subject to a more searching analysis than cases involving the sale of a business, which are reviewed less closely.
>
> …
>
> [50] Cases dealing with commercial agreements between parties of equal bargaining strength generally fall at the less searching end of the spectrum. Courts have often been persuaded by the argument that freely contracting

parties are the best judges of what is reasonable as between them. *In Tank Lining Corp. v. Dunlop Industrial Ltd*. at p. 666 the Ontario Court of Appeal articulated this point stating that when two competently advised parties with equal bargaining power enter into a business agreement, it is only in exceptional cases that the Courts are justified in overruling their own judgment of what is reasonable in their respective interests.

[51] Blair J.A. in *Tank Lining* summarized the application of the test to restrictive covenants in commercial agreements. At p. 666 he stated:

> The courts also have always looked askance at parties who seek to escape the burden of contracts into which they have freely entered. Both practicality and morality require that solemn obligations be upheld and that parties be discouraged from repudiating them. This view is expressed by Lord Pearce *in Esso [Petroleum v. Harpers Garage*, [1968] A.C. 269] at p. 323, where he said:
>
> > It is important that the court, in weighing the question of reasonableness, should give full weight to commercial practices and to the generality of contracts made freely by parties bargaining on equal terms. Undue interference, though imposed on the ground of promoting freedom of trade, may in the result hamper and restrict the honest trader and, on a wider view, injure trade more than it helps it ... And it may enable a less honest man to keep the fruits of a bargain from which he afterwards resiles ... . Where there are no circumstances of oppression, the courts should tread warily in substituting its own views for those of current commerce generally and the contracting parties in particular.

[52] Similarly, in *McDonald's Restaurants of Canada Ltd. v. West Edmonton Mall Ltd.*, Justice Mason cites (at para. 40) Lord Pearce in *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport),* [1968] A.C. 269 as follows:

> ...when free and competent parties agree and the background provides some commercial justification on both sides for their bargain and there is no injury to the community, I think that the onus [of establishing the reasonableness of the restrictive covenant] should be easily discharged.

And later, at para. 47:

> As decided in the *Texaco* case, supra, it is a right principle for courts not to interfere in business decisions made by qualified parties negotiating on a level playing field where economic and business judgments are involved and where bargaining equality is established.

See also J.G. *Collins Insurance Agencies Ltd. v. Elsley Estate* at p. 923.

…

[54] At the end of the day, whether a particular covenant is reasonable in any particular case is largely fact-driven. While previous decisions can provide guidance, they rarely telegraph the result in other cases. In *J.G. Collins Insurance Agencies Ltd.* at p. 924 Dickson J. stated:

> 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.

[107] More recently, in *Payette v. Guay Inc*., 2013 SCC 45 [*Payette*], the Supreme Court of Canada had occasion to consider the law pertaining to the assessment of the reasonableness of a restrictive covenant as between two commercial parties. Although the case was decided under the civil law of Québec, the relevant principles appear to be similar to those applied at common law. Justice Wagner, as he then was, writing for the Court, stated as follows at paras. 61-62:

> [61] In a commercial context, a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted: *Copiscope Inc. v. TRM Copy Centers (Canada) Ltd.*, 1998 CanLII 12603 (Que. C.A.). Whether a non-competition clause is valid in such a context depends on the circumstances in which the contract containing it was entered into. The factors that can be taken into consideration include the sale price, the nature of the business's activities, the parties' experience and expertise and the fact that the parties had access to the services of legal counsel and other professionals. Each case must be considered in light of its specific circumstances.
>
> [62] To properly assess the scope of the obligation of non-competition (and that of non-solicitation), it is also necessary to consider the circumstances of the parties' negotiations, including their level of expertise and experience and the extent of the resources to which they had access at that time.

[108] It is apparent from these authorities that 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 had 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; or whether the customer, at any point, expressly acknowledged the impugned clauses to be fair and reasonable).

[109] Indeed, factors falling into the latter category appear to have played a prominent role in Verville J.'s ultimate conclusion that the impugned restrictive covenant in issue before him was not an unreasonable one as between the parties. He explained his decision in that regard as follows, at paras. 62-63 and 81:

> [62] As set out above, the Courts have drawn distinctions between the various types of restrictive covenants and are less likely to interfere with restrictive covenants contained in commercial contracts. There is a strong presumption that where two competent parties with equal bargaining power enter into a business agreement, the Court can only be justified in overruling their own judgment of what is reasonable in their respective interests in exceptional circumstances.
>
> [63] The presumption must be even stronger in a case such as this where both parties were represented by counsel and where the restrictive covenant in question was the subject of negotiation and re-drafting by the parties. Even more significant is the fact that Yellowhead expressly acknowledged that clause 15(a)(ii) was fair and reasonable. Yellowhead then proceeded to take the substantial benefit of the relationship with UFA for the term of the Agreements, only to turn around and refuse to honour its obligations under the same Agreements when it became inconvenient to do so. This practice of attempting to retrospectively re-negotiate terms that have already been agreed to is not something that this Court is eager to sanction.
>
> …
>
> [81] There is authority that requires equal contracting parties to be bound by their agreements (particularly in a case such as this where there are mutual benefits, equal bargaining strength, involvement of counsel, negotiation and re-drafting of the clause in question, express acknowledgment of reasonableness, and waiver of defenses). Accordingly, I am loathe to interfere with the bargain struck by the parties, particularly in light of Yellowhead's express agreement to be bound by that bargain, based on the case law and the principles surrounding restraint of trade.

[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.

[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.

[114] Proposed common issue (i) asks whether, assuming the answer to question (g) is no or the answer to question (h) is yes, the impugned clauses, or any parts of them, are void or unenforceable.

[115] 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.

[116] In summary, I have found questions (f), (h) and (i) to be suitable common issues.

5. Unconscionability

[117] The next proposed common issue, (j), applies to the proposed Restraint of Trade Class. It asks whether the impugned clauses "create a substantially improvident or unfair bargain, and are they unconscionable."

[118] Revolution objects to this proposed common issue on the basis that the outcome of the unconscionability analysis depends upon individual inquiries.

[119] In support of its contention that this question is a suitable common issue, 676 relies primarily on *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 [*Sherry*], a case involving mortgage prepayment penalties. One of the grounds of appeal raised by the defendant in that case was that the claim of unconscionability called for individual

inquiries and therefore ought not to have been certified as a common issue. The Court ultimately rejected that ground of appeal.

[120] Newbury J.A., writing for the Court, described the elements of an unconscionability claim as follows, at para. 82:

> [82] The leading case on unconscionability at common law in this province is *Harry v. Kreutziger*, [(1978), 9 B.C.L.R 166 (C.A.)], in which McIntyre J.A. (as he then was) for the majority quoted with approval the following passage from *Morrison v. Coast Finance Ltd.* (1965) 54 W.W.R. 257 (B.C.C.A.):
>
> > … a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Aylesford (Earl) v. Morris* (1873) 8 Ch App 484 … per Lord Selborne at p. 491, or perhaps by showing that no advantage was taken: see *Harrison v. Guest* (1855) 6 De GM & G 424 at 438, affirmed (1860) 8 HL Cas 481, at 492, 493 …. [At 259; emphasis added.]
>
> McIntyre J.A. reviewed the authorities further and then provided a well-known summary of the doctrine:
>
> > From these authorities, this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable. [At 173.]

[121] In considering whether such a claim could properly be tried as a common issue, Newbury J.A. observed that the authorities have gone both ways. She also observed, however, that where a claim in unconscionability has been certified as a common issue, it was advanced on behalf of a class comprised of consumers seeking relief under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*]. In *Sherry*, the claim was advanced both at common law and under that statute. For that reason, she decided to defer to the certification judge and allow that aspect of the order to stand, explaining her conclusion in that regard as follows, at paras. 87-88:

> [87] Since *Bodnar* was decided, many judges of the Supreme Court of British Columbia have found unconscionability based on consumer protection legislation to be suitable for certification as a common issue: see *Haghdust v. British Columbia Lottery Corp.* 2013 BCSC 16; *Sandhu v. HSBC Finance Mortgages Inc.* 2014 BCSC 2041; *Seidel v. Telus Communications Inc.* 2016 BCSC 114; see also *Parsons v. Coast Capital Savings Credit Union* 2007 BCCA 247 at paras. 37-40. On the other hand, in *Lam v. University of British Columbia* 2010 BCCA 325, this court agreed that an issue based on unconscionability could be determined only on an individual basis. At issue in that case was an exclusion of liability clause asserted as claims in common law negligence and breach of contract. No statutory liability was asserted by the plaintiff.
>
> [88] It may be that particularly in the context of the BPCPA, the concept of unconscionability is in the process of expanding beyond the individual circumstances of a particular consumer or transaction, to conduct that is more "systemic". Given the purposes and objectives of the BPCPA and the fact that the novelty of a claim should not necessarily be fatal, I would defer to the chambers judge on this point.
>
> [Emphasis added].

[122] As Newbury J.A. noted, the Court of Appeal had earlier reached a different conclusion in *Lam v. University of British Columbia,* 2010 BCCA 325 [*Lam*]. There, Finch C.J., writing for the Court, upheld the decision of the certification judge refusing to certify a proposed common issue addressing unconscionability, for the following reasons, at para. 75:

> [75] As set out above, the chambers judge concluded that the unconscionability issue could only be determined on an individual basis. As stated by Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.,* [1989] 1 S.C.R. 426 at 462, "Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded". Determining whether the parties are unequal in bargaining power will require an assessment of individual facts. As UBC correctly suggests at para. 74 of its factum, it cannot be said that as a class these were inherently vulnerable contracting parties. I would not interfere with the chambers judge's conclusion on this issue.

[123] 676 argues that this case is like *Sherry* and unlike *Lam* because 676 seeks to advance a claim of "systemic" unconscionability, relying on certain of what are alleged to be Revolution's "practices." 676 describes those practices as follows in its notice of claim:

> 16. As a practice, Revolution did not:

> (a) Draw the "Term", "Right to Re-Negotiate" or "Failure to Perform" clauses to the attention of the plaintiff, or the Class Members;
>
> (b) Ensure that the plaintiff or other Class Members understood and acknowledged the implications of the "Term", "Right to Re-Negotiate" or "Failure to Perform" clauses; and/or
>
> (c) Advise the plaintiff or the Class Members to obtain independent legal advice with respect to the "General Conditions."
>
> 17. When the plaintiff and other Class Members attempted to terminate the customer services agreements with Revolution, Revolution implemented a retention policy that was designed to further obstruct the ability of the plaintiff and other Class Members from terminating the customer service agreements by taking steps that included:
>
> (a) declining to accept notice(s) of termination;
>
> (b) declining to provide copies of the customer service agreements on request; and
>
> (c) declining to advise the plaintiff and other class members of their "Renewal Date" further to the "Term" clause.

[124] 676 argues that it can, with that pleading, make a case for "systemic" unconscionability here because the entire class was put at a relative disadvantage (particularly "ignorance") due to Revolution's improper concealment of information.

[125] I do not find that argument persuasive. The alleged misconduct upon which 676 relies in this regard can only be relevant to the analysis insofar as it can be shown to have actually led to an inequality in bargaining power. This proposed class is comprised primarily of commercial businesses, not consumers. Revolution's customers are not uniform. They are of various sizes and, I am prepared to infer, levels of sophistication. The evidence before me demonstrates that many of them, including 676 itself, had enough bargaining power vis-à-vis Revolution to enable them to renegotiate at least some of the preprinted terms in their favour, including those that 676 alleges to be unconscionable. It follows that the question of whether there will be sufficient evidence of the requisite inequality in bargaining power in any given case, whether it was brought about by Revolution's alleged concealment of information or otherwise, is one that can only be answered on an individual basis.

[126] In summary, I agree with Revolution that this case is, in that sense, more like *Lam* than *Sherry* and the other cases referred to by Newbury J.A. in which a common issue addressing unconscionability was certified.

[127] I am therefore not persuaded that question (j) is a suitable common issue.

6. Unjust Enrichment/Restitution

[128] 676 proposes seven common issues, (k) – (q), in this category, which applies to the proposed Surcharge Class. They are as follows:

(k) "Has Revolution been unjustly enriched by the receipt of the [Surcharge];"

(l) "Has the Class suffered a corresponding deprivation in the amount of the [Surcharge];

(m) "Is there a juridical [sic] reason why Revolution should be entitled to retain the [Surcharge];"

(n) In the alternative to k-m, has Revolution been unjustly enriched by the receipt of the amount of the [Surcharge] that exceeds the corresponding surcharges, fines or levies incurred by Revolution during the Class Period;

(o) "Has the class suffered a corresponding deprivation in the amount of the [Surcharge] that exceeds the corresponding surcharges, fines or levies incurred by Revolution during the Class Period";

(p) "Is there a juridical [sic] reason why Revolution should be entitled to retain the amount of the [Surcharge] that exceeds the corresponding surcharges, fines or levies incurred by Revolution during the Class Period;"

(q) "What restitution, if any, is payable by Revolution to the Class based on unjust enrichment?"

[129] 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. Nevertheless, I will address the proposed common issues in this category on the assumption that 676 seeks to recover only the difference between what it says Revolution was entitled to charge and what Revolution actually charged.

[130] Proposed common issues (k) and (l) ask whether Revolution was enriched and the proposed class deprived by the amount of the Surcharge. I assume that the inclusion of the word "unjustly" in questions (k) and (n) was a typographical error. If that is so, neither (k) nor (l) are disputed. In particular, Revolution does not dispute that the Surcharge Class members paid the Surcharge and that Revolution received it. The answers to those questions would not advance the litigation in a meaningful way.

[131] If, on the other hand, my assumption is wrong and 676 intended to formulate common issues (k) and (n) on the basis that the Court would determine, in that context, if the alleged enrichment of Revolution was "unjust," then I would reject those proposed common issues on the same grounds as proposed common issue (m).

[132] Proposed common issue (m) asks whether there is a juristic reason why Revolution should retain the Surcharge. I have already found that proposed common issue (b) - whether the Surcharge was imposed in breach of the CSA's – is not a suitable common issue. The question of whether the CSA's serve as a valid juristic reason for the alleged enrichment covers the same ground. It fails for the same reason.

[133] 676 proposes to have common issues (n) – (p) certified in the alternative. Those appear to be formulated with a view to recovering only the difference between the total amount that Revolution obtained though the Surcharge and the total amount in fines, surcharges and levies that Revolution actually incurred.

[134] Proposed common issues (n) and (o) ask whether Revolution received, and the class members paid, the Surcharge in an amount exceeding the "corresponding" fines, levies and surcharges that Revolution incurred. I assume that by using the term "corresponding," the question is intended to have the Court determine whether each

class member paid the Surcharge in an amount exceeding the amount that Revolution incurred in fines, levies and surcharges on that particular class member's behalf. If so, these proposed common issues fail because they would require individual inquiries before they could be properly answered. If not, then they fail because they seek to establish liability in the aggregate, contrary to *Microsoft* at paras. 128-134 and *Godfrey* at paras. 116-117.

[135] Proposed common issue (p) fails for the same reason as proposed common issues (b) and (m). Proposed common issue (q) fails for the same reason as proposed common issue (c).

[136] In summary, I find questions (k) - (q) not to be suitable common issues.

7. Aggregate Damages

[137] Proposed common issue (r) asks whether "the restitution and/or damages sought by [676] and other [Surcharge] Class Members above [can] be calculated on an aggregate basis for the [Surcharge] Class as provided by the [*CPA*]?"

[138] The conditions that must be satisfied before an award of aggregate damages can properly be made are set out in s. 29 of the *CPA*, which states as follows:

> 29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[139] It has been held that the availability of aggregate damages can be certified as a common issue only if there is a "reasonable likelihood" that the preconditions in s. 29(1) would be satisfied and an aggregate assessment would be made if the plaintiffs are

otherwise successful at the common issues trial: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, at para. 44, leave to appeal ref'd at 2007 CanLII 50082 (S.C.C.). *Cassano v. Toronto-Dominion Bank*, (2007), 87 O.R. (3d) 401 (Ont. C.A.) at para. 47*; Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at paras. 124-125.

[140] Given that I have found there to be no suitable common issues for the proposed Surcharge Class, let alone one that could determine liability, this question cannot be a suitable common issue either.

8. Punitive Damages

[141] The next two proposed common issues appear to be intended to apply to both proposed classes. Question (s) asks if Revolution is "liable to pay punitive damages having regard to the nature of its conduct?" and question (t) asks "[i]f so, what amount of punitive damages should be awarded?"

[142] There have been many cases in which a claim for punitive damages has been certified as a common issue: *Rumley v. British Columbia*, 2001 SCC 69, at para. 39; *Sherry* at para. 89 and *Finkel* at para. 20. While acknowledging this, Revolution argues that the availability of punitive damages is not properly certified as a common issue where, as here, individualized inquiries will be required before such an award can properly be made: *Fischer v. IG Investments Management Ltd.*, 2011 ONSC 292; aff'd 2012 ONCA 47; aff'd 2013 SCC 69 [*Fischer*].

[143] 676 pleads as follows in advancing its claim for punitive damages:

> [676] pleads that Revolution's wrongful conduct including by unlawfully collecting the [Surcharge] from the Class, and including use of the "Term", "Right to Re-negotiate" and "Failure to Perform" clauses as standard terms in their [CSA's] was high-handed, entirely without care, deliberate, wilful, without good faith, and an intentional disregard of the rights of the Class. Such conduct renders Revolution liable to pay punitive damages.

[144] The only questions that I have found to be suitable as common issues are those pertaining to 676's restraint of trade claim. There will be no determination of liability on behalf of the proposed classes for the other "wrongful conduct" alleged. There can therefore be no class-wide award of punitive damages for that conduct either.

[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.

[146] Nevertheless, this is not a case like *Sherry* or *Chalmers v. AMO Canada Co.*, 2010 BCCA 560 [*Chalmers*], in which the question of punitive damages must await the quantification of any compensatory damages to be awarded. Here, there will be no award of compensatory damages awarded to either class. I have not found any common issues for the proposed Surcharge Class. For the proposed Restraint of Trade Class, 676 seeks only declaratory relief.

[147] Nor is this a case like *Fischer* in which individualized inquiries will, for other reasons, be necessary to determine whether punitive damages are justified. In this case, the focus of the inquiry will be on Revolution's alleged misconduct in having included the impugned clauses in its template CSA's.

[148] Finally, if it becomes necessary to await the resolution of the individual issues before considering the question of punitive damages, that need can be accommodated by bifurcating the common issues trial as ordered in *Sherry* and *Chalmers*, so that the question of punitive damages is addressed for the entire class only at that stage.

[149] For those reasons, I am satisfied that this question is a suitable common issue.

9. Interest

[150] The last proposed common issue, (u), asks, "[w]hat is the liability, if any, for court order interest." Although I have not found there to be any suitable common issues for the proposed Surcharge Class, I have found common issues that could lead to an award of punitive damages for the proposed Restraint of Trade Class. Whether such an award should attract court order interest is itself a suitable common issue.

D. Subsection 4(1)(d) - Preferable Procedure

1. The Preferability Test

[151] The factors to be considered on this branch of the test were conveniently summarised by Dickson J.A., writing for the Court, in *Finkel*, at paras. 24-26 as follows:

> [24] The preferable procedure requirement is animated by the goals of class proceedings: behaviour modification, judicial economy and access to justice. It is governed by s. 4(2) of the *Class Proceedings Act*:
>
> > (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
> >
> > > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> > >
> > > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> > >
> > > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> > >
> > > (d) whether other means of resolving the claims are less practical or less efficient;
> > >
> > > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
>
> [25] Two questions predominate in a preferability analysis: (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives. As to the first question, the common issues must be considered in the context of the action as a whole and their relative importance taken into account when preferability is determined. As to the second, the impact of a class proceeding on class members, the defendants and the court must be considered and a practical cost-benefit approach applied: *AIC* at paras. 21, 23; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230; affirmed 2015 BCCA 252; leave to appeal dismissed [2015] S.C.C.A. No. 326 (S.C.C.).
>
> [26] In *AIC*, Justice Cromwell explained the analytical approach to the preferability issue from the access to justice perspective. In doing so, he noted that the preferable procedure requirement has interconnected substantive and procedural aspects. The substantive aspect is concerned with whether class members will receive a just and effective remedy if their claims are established; the procedural with whether they will have access to a fair process, bearing in mind the existence of economic and other possible barriers. As Chief Justice Strathy stated in *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, *AIC*

> requires the court to consider the barriers to access to justice; the potential of a class action to address those barriers; and the alternatives to a class action, including the extent to which the alternatives address the relevant barriers and how the two proceedings compare: *AIC* at paras. 4, 24, 27, 37-38; *Fantl* at para. 27.

2. Are the common issues predominant?

[152] I have found proposed common issues (d), (e), (f), (h), (i), (s), (t) and (u) to be suitable common issues. Those questions ask whether the "Term", "Right to Re-negotiate" and "Failure to Perform" clauses in the CSA's should be declared, in whole or in part, void or unenforceable as being in restraint of trade on grounds of public policy, and whether Revolution should be ordered to pay punitive damages and interest. The common issues trial will finally resolve the restraint of trade claims for those current customers whose CSA's contain all three of the impugned clauses in an unamended form.

[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.

[154] I am satisfied, in any event, that the restraint of trade claim yields common issues that predominate over the individual issues that are likely to be left to be resolved following the common issues trial.

3. Do Revolution's current customers have an interest in litigating individually?

[155] I have seen no evidence to suggest that there are current customers with an interest in bringing separate actions of their own.

[156] Revolution argues, however, that because 676 is not itself a current customer, and therefore not a member of the proposed Restraint of Trade Class, it would be against the interests of its current customers for this action to proceed as 676 proposes. There is, for example, no evidence that any of them would wish to have the impugned clauses in their CSA's declared unenforceable.

[157] I am not persuaded by that submission. As noted above, there is some evidence that other customers have complained about the effect of the impugned clauses. The fact that no other customers have commenced an action to challenge their enforceability could just as plausibly be attributed to the disproportionate cost of doing so, rather than to a lack of interest on their part. In any event, I see no valid basis for the concern that having the impugned clauses declared unenforceable, in whole or in part, would adversely affect the interests of any of the current customers. The effect of such a declaration would merely be to broaden the array of circumstances in which the customer could validly terminate the CSA.

4. Has the claim been the subject of other proceedings?

[158] I have been referred to two decisions in the Provincial Court of British Columbia involving claims brought by Revolution (then known by its former name) against former customers seeking damages for wrongful termination of a CSA. At issue in each of those cases was, among other things, whether the "Failure to Perform" clause was an unenforceable penalty or a genuine pre-estimate of damages.

[159] In *Northwest Waste Solutions Inc. v. Hui et al*, 2013 BCPC 262 [*Hui*], Revolution was unsuccessful for a variety of reasons, one of which was that the "Failure to Perform" clause was found to be an unenforceable penalty. In reaching that conclusion, the adjudicator was also harshly critical of some of the other preprinted clauses that are in issue in this case, describing them as "difficult to understand or for the customer to

comply with" (in the case of the "Right to Re-negotiate" clause) and "unreasonable" and "draconian" (in the case of the termination provisions in the "Term" clause).

[160] In *Northwest Waste Solutions Inc. v. Andreas Restaurants Ltd.*, 2016 BCPC 395, on the other hand, Revolution was successful in its claim. The Court found, among other things, the "Failure to Perform" clause to be a genuine pre-estimate of damages rather than a penalty, without commenting directly on the other provisions in issue here.

[161] Although neither judgment considered whether one or more of the impugned clauses was unenforceable for being in restraint of trade, it is noteworthy in this context that Revolution has not seen fit to make any substantial changes to the "Right to Re-negotiate" and "Term" clauses in later versions of the CSA's, despite the pointed criticism directed at those clauses by the adjudicator in *Hui*. That fact militates against the possibility that a non-binding "test case" would be a better or more efficient means of resolving the issues raised here. It also tends to undermine Revolution's submission (although made in relation to the Surcharge) that "behaviour modification" has no role to play in this case because the impugned behaviour has already been modified.

5. Is there a preferable alternative?

[162] As an alternative to a class action, Revolution suggests that 676 and the other proposed class members, to the extent they were truly interested in doing so, could pursue their claims individually before the civil resolution tribunal (the "CRT") pursuant to the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 55. Revolution concedes, however, that the CRT cannot grant declaratory relief. Given my finding that the only common issues capable of being certified are those pertaining to the claim in restraint of trade, coupled with the fact that the primary relief sought for the proposed Restraint of Trade Class is a declaration, I can only conclude that the CRT is not a realistic forum for the adjudication of the proposed common issues in this case.

[163] In summary, I am not persuaded that there is a realistic alternative to a class action to resolve the claims of the proposed Restraint of Trade Class seeking to have the impugned clauses of the CSA's declared void or unenforceable as a restraint of trade on grounds of public policy.

6. Conclusion on Preferability

[164] This case does not conform exactly to the classic paradigm for a class action in which the proposed class members advance relatively modest monetary claims that become economical to pursue only when aggregated with other similar claims. The primary relief that is sought on behalf of the proposed Restraint of Trade Class is a declaration – a form of relief that does not become any more economical to pursue when aggregated with others like it. Because 676 also advances an ancillary claim for punitive damages and interest, however, the usual considerations militating in favour of allowing the case to proceed as a class action may still apply.

[165] I agree with 676 that customers who encounter difficulties in terminating a CSA may lack sufficient financial incentive to bring their own action to have the impugned clauses standing in their way declared unenforceable on the grounds alleged here. Allowing such claims to be aggregated and combined with a claim for punitive damages and interest can therefore be said to advance the goals of access to justice, judicial economy and behaviour modification.

[166] I am satisfied, in summary, that a class action is the preferable procedure for resolving the restraint of trade claims for the proposed Restraint of Trade Class and that there is no realistic alternative to proceeding in that manner.

E. Subsection 4(1)(e) – The Representative Plaintiff

[167] Revolution argues that 676 is not a suitable representative plaintiff for three reasons:

(a) 676 is not a member of the proposed Restraint of Trade Class;

(b) 676 has a conflict of interest with the proposed Restraint of Trade Class; and

(c) 676's litigation plan is inadequate.

1. The Test under ss. 4(1)(e)

[168] The test to be applied under ss. 4(1)(e) was summarised by Bauman C.J. in *Watson*, as follows at paras. 71-75:

> [71] Finally, under subsection (e), the plaintiff must show some basis in fact that she is an appropriate representative plaintiff with reference to the three specified requirements of the CPA. First, the plaintiff must fairly and accurately represent the interests of the class. The Court considered the nature of this requirement in *Dutton* (at para 41):
>
> > [41] …In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class [citations omitted].
>
> [72] Further, the most important attributes of a representative plaintiff are a common interest with class members and the ability and desire to vigorously prosecute the claims (*Campbell v. Flexwatt Corp*. (1997), 44 B.C.L.R. (3d) 343 (C.A.). at para. 75, citing *Endean v. The Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.).
>
> [73] Second, the plaintiff must have a litigation plan with a workable method of advancing the proceeding and of notifying the class members. The purpose of this requirement was described in *Fakhri v. Alfalfa's Canada Inc*., 2003 BCSC 1717 at para. 77:
>
> > [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members [citations omitted].
>
> [74] Moreover, the plan must support the idea that a class action is the preferable procedure for the resolution of the claim. The amount of detail in the plan must correspond to the circumstances and the complexity of each specific case, but the plan must at least be individualized and not a mere outline of the steps that would occur in any case. The plan must also deal with individual issues that will be left over after the common issues are resolved: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 79 [Infineon]; *Pardhan v. Bank of Montreal*, 2012 ONSC 2229 at paras. 334-337.

> [75] Third, the plaintiff must not have a conflict of interest with other class members on the common issues. In some cases opt-out provisions may be relied on, or subclasses may be created, to alleviate any conflicts of interest (for example, *Kotai v. Queen of the North (Ship)*, 2007 BCSC 1056), while in other cases the interests of the plaintiff and the class or subclass might be irreconcilable (for example, *MacDougall v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164 (S.C.), aff'd [2007] O.J. No. 573 (Div. Ct.)).

2. Is 676 disqualified from serving as the representative plaintiff because it is not a class member?

[169] 676 is not a current customer of Revolution and therefore not a member of the proposed Restraint of Trade Class, the only proposed class that I have found to be capable of being certified.

[170] Although it is permissible for the Court to appoint a representative plaintiff who is not a class member, there is an additional condition that must be satisfied in those circumstances. Sub-section 2(4) of the *CPA* states as follows:

> (4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

[171] There is scant authority discussing the kind of situation that can justify appointing a representative plaintiff outside the class under this provision. The parties did not address the point in their submissions.

[172] In *MacKinnon,* the Court of Appeal, sitting as a five-member division, had occasion to consider whether the plaintiff, Mr. MacKinnon, could properly obtain an order certifying his action against all of the participants in an impugned industry, even though he had a personal claim against only one of the named defendants. In ruling in his favour on that point, the Court refused to follow earlier Ontario authority holding otherwise. The divergent result in British Columbia was said to be justified precisely because the *CPA* contains a provision like s. 2, not found in the equivalent legislation in Ontario, expressly allowing for a representative plaintiff to be appointed outside the class, at least in certain circumstances. Saunders J.A., writing for the Court, explained her conclusion in that regard as follows at para. 50:

> [50] Although s. 2(4) only allows a nonmember of a class to be the representative plaintiff where it is necessary "to avoid a substantial injustice to

> the class", the fact that the [*CPA*] allows such a situation at all indicates, in my view, that the cause of action nexus is not solely between defendants and the representative plaintiff, but also between defendants and the plaintiff class as a whole. This shifts the focus in the cause of action analysis from the representative plaintiff onto the class, and is consistent with a litigation process that seeks to resolve common issues, rather than to resolve entire claims.

[173] Unlike Mr. Mackinnon, however, 676 is not a member of any certifiable class. Although I have found that the claims of the proposed Restraint of Trade Class raise common issues, 676 itself has no such claim and therefore no interest in any of those common issues. This case is therefore unlike *MacKinnon*. For the same reason, it is also unlike those cases in which a proposed representative plaintiff, although a member of the main class, is not a member of a proposed sub-class, such as a sub-class comprised of non-residents, who otherwise advance the same or a similar claim.

[174] In these circumstances, ss. 2(4) is more directly engaged. This case is, in that sense, more like *Leonard v. Manufacturers' Life Insurance Co*., 2016 BCSC 534. There, the plaintiff was found to be unqualified to serve as the representative plaintiff for a variety of reasons, one of which was that, not being a member of the proposed class, he had not satisfied the condition in ss. 2(4) by adducing evidence to show that appointing a representative plaintiff outside the proposed class was necessary to avoid a substantial injustice to that class. As in that case, I have no such evidence before me.

[175] In an effort to respond to Revolution's argument contesting its suitability to serve as the representative plaintiff in this case, 676 has adduced a supplementary affidavit on the point from Mr. Toor. In that affidavit, Mr. Toor recounts an incident in which an employee of Revolution approached him with an offer to settle 676's claim in exchange for generous consideration, an offer that he says he rejected. 676 argues that the episode demonstrates that it will vigorously advance the claims of the proposed class or classes, regardless of its own personal interests, making it a suitable representative plaintiff. Revolution objects to that affidavit on the basis that the communications it purports to record are covered by settlement privilege.

[176] I do not find the affidavit, admissible or not, to be particularly helpful, however. The legislation requires in ss. 2(4) that a certified class should be represented by one of

its own members unless it is shown that appointing a representative plaintiff outside the class is necessary to avoid a substantial injustice to the class. The extent to which 676, although not a member of the class, may still be adequately committed to the cause, says virtually nothing about whether its appointment is necessary in that sense.

[177] It may be that the risk that no one will advance the claim if 676 is denied the opportunity to do so, is itself a "substantial injustice to the class" that ought to be avoided. What is missing here, however, is evidence to justify the conclusion that appointing a non-member such as 676 is necessary to avoid that risk. That evidence would have to include, at a minimum, an explanation as to why appointing a class member to serve in that capacity is not feasible in this case: *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2009 ABQB 96.

[178] For those reasons, I find the application for certification to be deficient by virtue of 676's failure to satisfy ss. 2(4).

3. Does 676 have a conflict of interest with the proposed class?

[179] I have already rejected Revolution's argument to the effect that a class proceeding is not preferable for want of interest on the part of Revolution's current customers in having the impugned clauses in their CSA's declared void or unenforceable. My conclusion that Revolution's current customers would not be prejudiced by such a declaration, but on the contrary, could only benefit from it, also disposes of Revolution's argument that 676 has a disqualifying conflict of interest with them. Moreover, if any of them do not wish to pursue the claim, they need only opt out of the action when given the opportunity.

[180] I am therefore not persuaded that 676 has a conflict of interest that would disqualify it from serving as the representative plaintiff in this case.

4. Is the litigation plan adequate?

[181] The litigation plan that 676 has put forward is comprised almost entirely of boilerplate terms that have barely been modified to address the exigencies of this particular action. It appears to contemplate that the only claim to be advanced is that of

the proposed Surcharge Class. It makes no provision for the claim of the proposed Restraint of Trade Class, which is the only class I have found to be capable of being certified. Moreover, it makes no provision for the complexities arising from the many *sui generis* versions of the CSA's that are in evidence. The only acknowledgment in the litigation plan that there may be issues left outstanding after the common issues trial states as follows:

> If the common issues trial does not determine injury on a class-wide basis, liability and damages will be determined on an individual basis in a manageable process.

[182] There is no discussion of what that "manageable process" might look like. In that regard, the plan states, unhelpfully, only that "[t]he process which will be required is totally dependent on the nature of the decision at the common issues trial." The only specific step that is contemplated for that stage of the litigation involves the distribution of an anticipated award of aggregate damages to the class – a prospect that is no longer applicable to this case in light of my earlier findings.

[183] For those reasons, I agree with Revolution that 676's litigation plan does not meet the requirements of ss. 4(1)(e)(ii), inasmuch as it does not set out a "workable method of advancing the proceeding."

5. Conclusion on ss. 4(1)(e)

[184] I find that 676 has not demonstrated that it is a suitable representative plaintiff, for two reasons. First, it has not satisfied the requirements of ss. 2(4); and second, it has not produced an adequate litigation plan as required by ss. 4(1)(e)(ii).

V. SUMMARY AND DISPOSITION

[185] I have found that, with respect to the proposed Restraint of Trade Class alone, 676 has satisfied all of the elements of the certification test, except for the requirement in ss. 4(1)(e) to show that it is a suitable representative plaintiff for that class.

[186] That shortcoming is not necessarily fatal to the application, however. In *Harrison v. Afexa Life Sciences Inc*., 2018 BCCA 165 [*Harrison*], the Court dismissed an appeal

from a refusal to certify an action on various grounds, one of which was the unsuitability of the proposed representative plaintiff. In doing so, Groberman J.A., writing for the Court, suggested that if the other branches of the certification test are satisfied, the fact that the proposed representative plaintiff is not suitable should not be treated as an absolute bar to certification. He offered the following guidance when a certification judge faces that situation, at para. 60:

> … if a class proceeding is otherwise appropriate, it seems to me that a court should do what it can to ensure that it can proceed, either by giving directions to ensure the representative plaintiff proceeds efficiently with the litigation, or by allowing a substitution of a more suitable representative plaintiff than the one proposed.

[187] A similar situation was before the Court in *Graham v. Imperial Parking Canada Corp.,* 2010 ONSC 4982, leave to appeal ref'd, 2011 ONSC 991. In that case, Perell J. ordered the action certified despite the fact that neither of the two proposed representative plaintiffs had a viable claim against the defendant. The certification order was, however, made "conditional on the substitution of a new representative plaintiff to be added by motion on notice to Impark or on consent of the parties" (at para. 201), with the new representative plaintiff directed, at para. 202, to produce a new litigation plan. Perell J. evidently considered himself bound to disqualify the proposed representative plaintiffs by the strictures of the legislation, as he explained at para. 203:

> [203] It is unfortunate that Ms. Miceli and Ms. Graham are disqualified as representative plaintiffs, but the Ontario Act requires that the representative plaintiffs be a member of the class.

[188] As I noted earlier, in British Columbia, the *CPA* contains no such absolute bar. Instead, it contains a provision that specifically contemplates the appointment of a representative plaintiff outside the proposed class provided that such an appointment is shown to be necessary to avoid a substantial injustice to the class.

[189] In light of that and other differences in the legislation, I am not prepared to order this action certified at this stage. Any such order must, among other things, "appoint the representative plaintiff for the class" pursuant to s. 8(1)(b) of the *CPA*, an appointment I cannot make at this time. Having regard to the comments of Groberman J.A. in

Harrison quoted above, however, I have concluded that 676, or its replacement, should be given the opportunity to try again on a different footing.

[190] I am therefore refusing the application, but also granting 676, or its replacement, leave to apply again to certify the claim in restraint of trade and the associated common issues I have found to be suitable for the proposed Restraint of Trade Class, provided that any such application:

(a) is brought by either:

(i) a different representative plaintiff who is a current customer of Revolution; or

(ii) 676, if the application is supported by evidence showing that its appointment is necessary to avoid a substantial injustice to the class; and

(b) includes a revised litigation plan that satisfies the requirements of ss. 4(1)(e)(ii) for that class.

"Milman J."
The Honourable Mr. Justice Milman