COURT OF APPEAL FOR ONTARIO

CITATION: Shah v. LG Chem Ltd., 2018 ONCA 819
DATE: 20181012
DOCKET: C64559

Rouleau, Roberts and Fairburn JJ.A.

BETWEEN

Khurram Shah and Alpina Holdings Inc.

Plaintiffs (Appellants)

and

LG Chem Ltd., LG Chem America, Inc., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., Sanyo Electric Co., Ltd., Sanyo North America Corporation, Sanyo Energy (U.S.A.) Corporation, Sony Corporation, Sony Energy Devices Corporation, Sony Electronics Inc., Sony of Canada Ltd., Samsung SDI Co., Ltd, Samsung SDI America, Inc., Samsung Electronics Canada Inc., Hitachi, Ltd., Hitachi Maxell, Ltd., Maxell Corporation of America, Maxell Canada, GS Yuasa Corporation, NEC Corporation, NEC Tokin Corporation, NEC Canada, Toshiba Corporation, Toshiba America Electronic Components, Inc., and Toshiba of Canada Limited

Defendants (Respondents)

Reidar Mogerman, Jean-Marc Leclerc and Bridget Moran, for the appellants

John F. Rook, Q.C., Christiaan A. Jordaan and Emrys Davis, for the respondents Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., Sanyo Electric Co., Ltd., Sanyo North America Corporation and Sanyo Energy (U.S.A.) Corporation

J. Kevin Wright and Todd Shikaze, for the respondents Hitachi Maxell, Ltd. and Maxell Corporation of America

Laura F. Cooper and Vera Toppings, for the respondents Toshiba Corporation, Toshiba America Electronic Components, Inc. and Toshiba of Canada Limited

Maureen Littlejohn, for the respondents LG Chem. Ltd. and LG Chem America, Inc.

Heard: May 7, 2018

On appeal from the order of the Divisional Court (Justices Frances P. Kiteley, Ian V.B. Nordheimer, and William M. LeMay), dated April 26, 2017, with reasons reported at 2017 ONSC 2586, varying the order of Justice Paul M. Perell of the Superior Court of Justice, dated October 5, 2015, with reasons reported at 2015 ONSC 6148.

By the Court:

A. OVERVIEW

[1] The appellants are representative plaintiffs in a certified class action. They sued the defendant manufacturers and suppliers on the basis that they conspired to raise, maintain, fix and/or stabilize the price of lithium-ion batteries ("LIBs") sold in Canada between January 2000 and December 2011 ("the conspiracy period"). Their collusion is said to have impacted the entire LIB market by triggering an increase in the price for all LIBs and lithium-ion products ("LIB products") during the conspiracy period, beyond what the free-market would naturally produce. Accordingly, the conspiracy is alleged to have impacted all purchasers, those whose LIBs originated from the defendants (the "non-umbrella purchasers") and those whose LIBs originated from non-defendants (the "umbrella purchasers").

[2] The appellants sought to have multiple causes of action certified under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, including unlawful means

conspiracy and a statutory cause of action under s. 36 of the *Competition Act*, R.S.C., 1985, c. C-34, for breach of s. 45 of the Act (the "statutory claim"). The certification judge refused to certify the unlawful means conspiracy claim but certified the statutory claim, although only in relation to the non-umbrella purchasers. The certification judge provided several reasons for excluding the umbrella purchasers from the class pursuing relief in respect of the certified statutory claim, including that the defendants would be exposed to indeterminate liability if the claim by umbrella purchasers were allowed to proceed.

[3] The appellants sought leave to appeal the certification judge's decision to the Divisional Court. The Divisional Court granted leave to appeal on only two issues: (a) whether the certification judge erred in denying certification of the appellants' unlawful means conspiracy claim; and (b) whether the certification judge erred in removing the umbrella purchasers from class membership: *Shah v. LG Chem., Ltd.*, 2016 ONSC 4670, at para. 46. The Divisional Court found error on the first point, resulting in the certification of the unlawful means conspiracy claim, but no error on the second point, agreeing with the certification judge's concern over indeterminate liability.

[4] The Divisional Court also expressed the view that the appellants had failed to: (a) plead the requisite elements of the claims relating to the umbrella purchasers; (b) establish common issues for the umbrella purchasers; and (c) propose a separate representative plaintiff for the umbrella purchasers.

Accordingly, the Divisional Court upheld the certification judge's decision, refusing to certify the claims by umbrella purchasers.

[5] The appellants were granted leave to appeal from the Divisional Court decision. We note that not all of the defendants are participating on this appeal because some of them have settled the claims against them.[1] In these reasons, we will use the term "defendants" to refer to the defendants named in the Fresh as Amended Statement of Claim (the "statement of claim") and the term "respondents" to refer to only those defendants who are participating on this appeal.

[6] The issues for resolution in this court relate only to the umbrella purchaser claims - their statutory claim and their unlawful means conspiracy claim. The appellants argue that the Divisional Court erred in concluding that:

> (a) it is plain and obvious that the umbrella purchaser claims do not disclose a cause of action under s. 5(1)(a) of the *Class Proceedings Act* because,
>
> (i) the respondents would be exposed to indeterminate liability; and

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[1] It appears that only the Panasonic, Sanyo, Hitachi and Toshiba defendants remain involved in the action. The Certification Order states that the action was stayed, discontinued or dismissed against: Hitachi, Ltd.; Maxell Canada; NEC Canada, Inc.; NEC Corporation; NEC Tokin Corporation; Samsung Electronics Canada Inc.; GS Yuasa Corporation. As well, at the hearing of the appeal, the appellants' counsel informed the court that the claims against the NEC, Samsung and Sony defendants have also settled. Materials have been filed but the settlements have not yet been approved. We were informed at the outset of legal argument that the LG defendants have also settled, and the fact of the settlement has been disclosed to the court but no further materials have been filed.

(ii) the requisite elements of the claims have not been properly pleaded;

(b) the umbrella purchaser claims do not raise common issues within the meaning of s. 5(1)(c) of the *Class Proceedings Act*; and

(c) a separate representative plaintiff for the umbrella purchasers would be required under s. 5(1)(e) of the *Class Proceedings Act*.

[7] The respondents add that, even if the appellants succeed on these issues, this court should conclude that a class proceeding is not the preferable procedure for resolving issues related to the umbrella purchasers.

[8] For the reasons that follow, we conclude that:

(a) the principle of indeterminate liability does not apply to either the statutory claim or the unlawful means conspiracy claim;

(b) the claims were properly pleaded;

(c) with the exception of the quantification of damages for the umbrella purchasers, the issues can be resolved on a common basis;

(d) a separate representative plaintiff is not required for the umbrella class; and

(e) a class proceeding is the preferable procedure for resolving the issues in common.

[9] Accordingly, we would allow the appeal.

B. GENERAL BACKGROUND FACTS

(1) Claims Against the Defendants

[10] The claims against the defendants relate to the sale of LIBs and LIB products. LIBs are a form of rechargeable battery. They provide a source of energy to goods, devices and machines, but their most common use is in notebook computers and cellular phones.

[11] The statement of claim is brought on behalf of "all persons in Canada who, at least as early as January 1, 2000 and continuing until at least December 31, 2011 ... purchased [LIBs] ... and/or [LIB products]" (emphasis added). As the proposed class includes all those who bought LIBs and LIB products during the stated period, it includes those who bought LIBs (or LIB products containing LIBs) produced by the defendants as well as those produced by non-defendants. Accordingly, the proposed class includes the umbrella purchasers.

[12] The statement of claim alleges that the defendants and unnamed co-conspirators engaged in "illegal and secretive meetings and made agreements relating to the prices, market share divisions and production levels for lithium batteries." The claim asserts that the defendants and unnamed co-conspirators conspired to "enhance unreasonably the prices of [LIBs] and/or to lessen unduly competition in the production, manufacture, sale and/or supply of [LIBs] in North

America and elsewhere." The conspiracy is said to have moderated the downward pressure on the prices of LIBs and LIB products.

[13] The allegations include, but are not limited to, the following factual assertions about the defendants' behaviour:

- they had illicit meetings beginning in 2000;
- they agreed upon floor pricing;
- they conspired to allocate volumes of sales and reduce production, manufacture and supply;
- they used "code words" to communicate pricing;
- they agreed not to forward "sensitive e-mails";
- they had discussions about avoiding trails of correspondence and erasing correspondence; and
- they submitted collusive, non-competitive and rigged bids.

[14] The pleadings specifically allege that the co-conspirators "were aware of and intended" that the alleged conspiracy would "result in increased prices for [LIBs] and [LIB products]". Further, the pleadings suggest that the co-conspirators' "unlawful acts" were directed at the "proposed class", and that the defendants knew that those acts "were likely to cause injury to the Plaintiffs and other members of the proposed class".

[15] The defendants are said to have controlled the majority of the LIB market in Canada during the conspiracy period. For instance, in 2008, the defendants

controlled about 70 percent of the international LIB market. By 2011, they controlled about 75 percent of that same market. Their market share was even higher in Canada. The appellants maintain that because the alleged cartel held so much of the market share, the increase in the cartel's prices caused non-conspirators to also raise their prices. This is referred to as an "umbrella" effect, about which we will have more to say shortly.

(2) Umbrella Purchaser Claims in Canada

[16] Liability to umbrella purchasers is a contested issue as demonstrated by the back and forth between courts in Ontario and British Columbia.

[17] Following the certification judge's decision in this case, the umbrella purchaser issue came before the British Columbia Supreme Court in *Godfrey v. Sony Corp.*, 2016 BCSC 844 ("*Godfrey BCSC*"), where that court rejected the reasoning of the certification judge in this case and certified the umbrella claim.

[18] The Divisional Court in this case then addressed the *Godfrey BCSC* judgment, and specifically rejected that court's reasons in relation to indeterminate liability.

[19] The British Columbia Court of Appeal then considered and rejected the Divisional Court's reasoning relating to the indeterminate liability point: *Godfrey v. Sony Corporation*, 2017 BCCA 302, 1 B.C.L.R. (6th) 319 ("*Godfrey BCCA*").

Then leave to appeal to the Supreme Court of Canada was granted in *Godfrey*: [2017] S.C.C.A. No. 408. That appeal is yet to be heard.

C. ANALYSIS

(1) Overview

[20] Section 5 of the *Class Proceedings Act* contains the criteria for certifying class actions. The portions of s. 5(1) that are relevant to this appeal follow:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action; ...
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues;
>
> (e) there is a representative plaintiff ...

[21] This language indicates that the court "shall" certify a class proceeding if the requirements of s. 5(1) have been satisfied. The onus is on the representative plaintiff(s) to show why the certification criteria have been met.

[22] The certification stage is not intended to test the merits of the claim or inquire into whether the claim is likely to succeed at the trial of the common issues: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57, [2013] 3 S.C.R.

477, at para. 102. Rather, in assessing whether the requirements of s. 5(1) have been met, the court will determine whether there is any basis in fact establishing the certification requirements, not whether there is any basis in fact "for the claim itself": *Hollick,* at para. 25; *Pro-Sys*, at para. 100.

[23] We will address the relevant certification criteria in turn.

(2) Section 5(1)(a): Do the Pleadings Disclose a Cause of Action?

(a) Plain and Obvious Test

[24] Section 5(1)(a) of the *Class Proceedings Act* requires that the certification judge ask whether, assuming the pleaded facts to be true, it is "plain and obvious" that a claim does not exist or, to put it another way, whether the claim has no reasonable prospect of success: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17, 22; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.), at p. 679; *Cloud v. Canada (Attorney General)* (2005), 73 O.R. (3d) 401 (C.A.), at para. 41; *Hollick*, at para. 25.

(b) The Divisional Court's Reasons

[25] The non-umbrella purchasers have two certified claims: their statutory claim and their claim for unlawful means conspiracy. In excluding the umbrella purchasers from those claims, the Divisional Court agreed with the certification judge that to allow the umbrella purchasers, who did not purchase LIBs or LIB

products containing LIBs originating from the defendants, to proceed would expose the respondents to indeterminate liability.[2]

[26] The appellants contended before the Divisional Court, and continue to contend in this court, that the principle of indeterminate liability does not apply to claims involving an intentional component. They say indeterminate liability - which is a relevant consideration in assessing whether a *prima facie* duty of care in the negligence context is negated by residual policy considerations - is not relevant to the statutory claim or the unlawful means conspiracy claim.

[27] The Divisional Court rejected the appellants' indeterminate liability argument. While acknowledging that there are some situations where negligence concepts may not apply to intentional torts,[3] the Divisional Court saw no reason why claims for conspiracy should not be assessed for indeterminacy. The court concluded that this was particularly so, given that the claims in this case are for pure economic loss and advanced on behalf of a large, and currently unknown number of people: *Imperial Tobacco,* at para. 100; *Design Services Ltd. v. Canada,* 2008 SCC 22, [2008] 1 S.C.R. 737, at para. 62.

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[2] Although the certification judge gave four reasons for why the umbrella purchasers' claims should not be certified, the Divisional Court only agreed with the reasoning related to indeterminate liability. The respondents do not object to the Divisional Court's rejection of the other three reasons given by the certification judge in support of his decision refusing to certify the umbrella purchasers' claims. Consistent with the parties' approach on appeal, we only address the question of indeterminacy and whether it justifies removing the umbrella purchasers from the claims.

[3] The Divisional Court acknowledged that reasonable foreseeability does not apply to the intentional tort of battery: *Bettel v. Yim* (1978), 88 D.L.R. (3d) 543 (Ont. Co. Ct.).

[28] The court found that to allow the umbrella class to proceed with their proposed claims would be to expose the defendants to indeterminate liability because the defendants had no control over: (a) the non-defendant manufacturers' conduct; or (b) the volume of LIBs and LIB products that the non-defendants chose to produce and sell. In addition, the court noted that the respondents had no dealings with the umbrella purchasers and would not know how many such purchasers they may be liable to. Accordingly, the court concluded that the umbrella purchasers' claims did not satisfy the s. 5(1)(a) criterion.

(c) Indeterminate Liability: The Statutory Claim

(i) Interpretation of ss. 36 and 45 of the *Competition Act*

[29] The statutory cause of action arises from s. 36(1) of the *Competition Act,* which allows for the recovery of damages that result from, among other things, conduct that is contrary to the provisions of Part VI of the *Act.* Section 36(1) reads:

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

[30] The appellants contend that the acts listed in the statement of claim constitute a conspiracy within the meaning of s. 45(1) of the *Competition Act*, which falls within Part VI of the *Competition Act,* "Offences in Relation to Competition". That provision was amended during the conspiracy period by the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 410, but the core elements for the s. 45 offence remained the same. For the purposes of this appeal, the salient portions of the two versions read:

> Pre-Amendment
>
> 45 (1) Every one who conspires ... with another person ...
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture ... or supply of a product, ... or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both. ...
>
> (2.2) For greater certainty, in establishing that a conspiracy ... is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy ... but it is not necessary to prove that the parties intended that the conspiracy ... have an effect set out in subsection (1). [Emphasis added.]
>
> Post-Amendment

> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires ...
>
> (a) to fix, maintain, increase or control the price for the supply of the product; ...
>
> or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.
>
> (2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both. [Emphasis added.]

[31] We turn now to the interpretation of these sections, remembering the guiding rule on statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

(ii) Plain Meaning

[32] The appellants assert that the Divisional Court was wrong to superimpose the principle of indeterminate liability upon the clear language of ss. 36 and 45.

[33] On its face, s. 36(1) confers a private right of action to "[a]ny person who has suffered loss or damage" arising from "conduct that is contrary to", in this

case, s. 45 of the *Competition Act.* The language is broad and inclusive. Conspicuously absent from s. 36(1) is any restriction on who can claim losses.

[34] On a plain reading, if the umbrella purchasers can prove loss resulting from a proven conspiracy under s. 45, s. 36(1) grants those purchasers a statutory means by which to recover those losses. Taking the language at face value, the umbrella purchasers' right of recovery is limited only by their ability to demonstrate two things: (1) that the respondents conspired within the meaning of s. 45; and (2) that the losses or damages suffered by the appellants resulted from that conspiracy.

[35] Thus, a plain reading of ss. 36 and 45 supports the appellants' position. Admittedly, however, the plain meaning is not the end of the matter. We turn next to the purpose of the *Competition Act*.

(iii) Purpose of the *Competition Act*

[36] Section 1.1 of the *Competition Act* sets out its purpose, including the desire to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy", as well as providing consumers with "competitive prices and product choices."

[37] Various authorities have extended the purpose of the *Competition Act* beyond what is set out in s. 1.1, including reference to the Act's promotion of compensation and deterrence: *Infineon Technologies AG v. Option*

consommateurs, 2013 SCC 59, [2013] 3 S.C.R. 600, at para. 111; *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, at paras. 24-27; *Pro-Sys*, at paras. 46-49. Moreover, the "overall objective" of the *Competition Act,* has been described as serving to promote "vigorous and fair competition throughout Canada": *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 256-257.

[38] It seems self-evident that when clandestine agreements between competitors are made to increase prices and lessen competition, ones that result in actual harm to consumers, that the purposes of the *Competition Act* are thwarted. Conspiracies among competitors to fix prices and lessen competition are the very antithesis of the *Competition Act*'s objective of promoting competition. Undoubtedly, where there is a wider berth for liability, the greater the availability of compensation for harm flowing from prohibited conduct, the greater the deterrent effect flowing from the award of damages, and the greater the protection for a strong, vibrant and healthy economy. In our view, interpreting s. 36(1) in a way that includes all those who have suffered losses as a result of a conspiracy – both umbrella and non-umbrella purchasers – accords with the purposes of the *Competition Act.*

(iv) Relevant Legal Norms

[39] The respondents urge the court to apply a contextual approach, one that draws from the legal norms that inform the setting within which s. 36(1) resides. They maintain that the Divisional Court correctly took that broader context into account when applying the principle of indeterminate liability to s. 36(1) of the *Competition Act*, thereby placing the statutory provision beyond the reach of umbrella purchasers.

[40] In making that argument, the respondents point to two cases in which negligence principles have been applied to statutory claims in the past: *Taylor v. 1103919 Alberta Ltd.,* 2015 ABCA 201, 19 Alta. L.R. (6th); *Haughton v. Burden*, [2001] O.J. No. 4704 (S.C.). The *Taylor* judgment involves the principle of remoteness being applied to a statutory claim under the *Land Titles Act*, R.S.A. 2000, c. L-44. The *Haughton* judgment involves that same principle being applied to a statutory claim under the *Liquor Licence Act*, R.S.O. 1990, c. L.19. The respondents suggest that because remoteness has been applied to statutory claims, then indeterminate liability should apply to s. 36 of the *Competition Act*.

[41] The appellants, on the other hand, urge this court to find that the principle of indeterminate liability has no application outside of the negligence context. They maintain that indeterminate liability is a concept that resides only within the second prong of the *Anns/Cooper* test, a test that is designed to ascertain

whether a duty of care exists in the negligence context: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K. H.L.); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. At a minimum, they say the principle of indeterminate liability cannot be applied to claims that are rooted in intentional conduct, like claims of conspiracy.

[42] The respondents answer the appellants' submission by saying that s. 36 creates liability for entirely non-intentional conduct that can be proven on a negligence standard, such as "deceptive telemarketing" and "deceptive notice of winning a prize".

[43] It is important to remember what is and what is not at issue on this appeal. We need not decide whether negligence concepts, such as indeterminate liability, can never apply outside of the negligence context, whether indeterminate liability can never apply to a claim that requires proof of intention, or whether indeterminate liability might apply to non-conspiracy rooted claims under Part VI of the *Competition Act.* Nor do we have to decide whether statutory claims are impermeable to negligence principles. Rather, we need only decide a narrow question: does the principle of indeterminate liability apply to the statutory claim under s. 36 for recovery arising from conspiratorial conduct under s. 45?

[44] Turning to that question, we agree with the respondents that the court is obliged to consider the context within which the provision resides: *ATCO Gas &*

Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 48. Indeed, to give life to its meaning, the court is required to look to the purpose of the provision and to the "relevant legal norms" amplifying it: *R. v. Alex,* 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31. (See also: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 43; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), at s. 2.9.) However, while we agree those interpretative principles must be applied, we disagree with the way the respondents say they apply in this context.

[45] It is helpful to review how the concept of indeterminate liability comes into play in the negligence context. In that context, a court will apply the *Anns/Cooper* test in assessing whether the defendant owes a duty of care to the plaintiff. At the first stage of the test, the court considers proximity and foreseeability. If the court concludes the defendant owes a *prima facie* duty of care to the plaintiff, it will go on at the second stage of the test to consider whether residual policy concerns, such as indeterminate liability, negate the imposition of a duty of care. In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 43, the majority described what is meant by indeterminate liability:

> Indeterminate liability is liability of a specific character, not of a specific amount. In particular, indeterminate liability should not be confused with significant liability.... Certain activities — like flying commercial aircraft, manufacturing pharmaceutical drugs, or

> auditing a large corporation — may well give rise to significant liability..... [T]he liability arising from these "high risk" undertakings may only be characterized as "indeterminate" if the scope of such liability is impossible to ascertain (Black's Law Dictionary (10th ed. 2014), sub verbo "indeterminate"). In other words, liability is truly "indeterminate" if "the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy — are insufficient to resolve the question".... More specifically, there are three pertinent aspects to so-called "indeterminacy" in these cases: (1) value indeterminacy ("liability in an indeterminate amount"); (2) temporal indeterminacy ("liability . . . for an indeterminate time"); and (3) claimant indeterminacy ("liability . . . to an indeterminate class").... [Citations omitted.]

[46] The second stage of the *Anns/Cooper* test comes down to a "normative" assessment of "whether it would be better, for reasons relating to legal or doctrinal order, or reasons arising from other societal concerns, not to recognize a duty of care in a given case": *Livent*, at para. 40. A court may decline to recognize a *prima facie* duty of care on the basis of indeterminate liability, although indeterminate liability is merely a policy consideration, not a policy veto, and rarely should a concern for indeterminate liability persist if a proper proximity and foreseeability analysis is done at stage one of the *Anns/Cooper* test: *Livent*, at paras. 42, 45.

[47] In our view, normative concerns about indeterminate liability do not apply in the context of the statutory claim in this case because, when it comes to a claim under s. 36 for loss or damage resulting from a conspiracy under s. 45 of

the *Competition Act*, the normative concerns have already been taken care of by Parliament. In other words, concerns that might otherwise drive the application of the principle of indeterminate liability disappear in the face of the exacting statutory provisions.

[48] All claims under s. 36 require the plaintiff to establish that he or she "suffered loss or damage as a result of ... conduct that is contrary to any provision of Part VI". He or she may only recover "loss or damage proved to have been suffered" as a result of that conduct.

[49] When the alleged conduct is a conspiracy under s. 45, the plaintiff must start by proving the defendant actually conspired to engage in anti-competitive conduct. The essence of conspiracy under s. 45 is an agreement – a meeting of the minds – to do one of the things enumerated in that provision. Here, the defendants are alleged to have agreed to fix prices, unlawful conduct under the former s. 45(1)(b) and the current s. 45(1)(a). They are also alleged to have agreed to "unduly" lessen competition in the production, manufacture, sale and/or supply of LIBs, unlawful conduct under s. 45(1)(c) of the former provision. This conduct is said to have resulted in increased prices. The pleadings suggest that the defendants directed their conduct at the proposed class (including umbrella purchasers), knowing and intending that the proposed class was likely to be injured.

[50] Although the *actus reus* under s. 45 changed slightly when the provision was amended, it remained focused on whether the alleged conspirator was part of an agreement and whether that agreement was to do something that is prohibited by virtue of s. 45. The *mens rea* contained in s. 45 has both subjective and objective components. The subjective component requires that the defendant intend to agree, with knowledge of the terms of that agreement. The objective component requires that the defendant objectively intend to achieve the prohibited end, in this case, increasing the price of LIBs and lessening, unduly, competition: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 659-60; *Watson v. Bank of America Corp.*, 2015 BCCA 362, 79 B.C.L.R. (5th) 1, at paras. 74-76; *R. c. Proulx*, 2016 QCCA 1425, [2016] Q.J. No. 11393, at para. 20.

[51] The respondents argue that because a plaintiff does not have to prove that an alleged conspirator's conduct is specifically directed at harming that plaintiff, indeterminate liability remains a concern in the context of the statutory claim. We reject the argument that indeterminate liability should be imported into the interpretation of the provisions for that reason. Even though s. 45 does not require proof that the conspirator was directing his or her actions at a specific plaintiff, it contains significant internal constraints. Section 45 limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct. When combined with s. 36(1), requiring proof of actual loss

or damages arising from the conspiracy, concerns regarding overbroad liability evaporate.

(v) Conclusion

[52] On our interpretation of ss. 36 and 45, Parliament did not intend that the principle of indeterminate liability would apply to claims under s. 36 for recovery of damages arising from conspiratorial conduct caught by s. 45. The combined operation of ss. 36 and 45 of the *Competition Act* do all of the necessary work in terms of limiting liability. Thus, it is not plain and obvious that the umbrella purchasers' statutory claim has no reasonable prospect of success.

(d) Indeterminate Liability: The Tort of Unlawful Means Conspiracy

[53] The Divisional Court certified the claim in unlawful means conspiracy for the non-umbrella group. The appellants maintain that the umbrella purchasers should not be excluded from that claim. We agree.

[54] The tort of unlawful means conspiracy requires that:

- the defendants' conduct was unlawful;
- the defendants' conduct was directed at the plaintiffs "alone or together with others";
- the defendants knew that, in the circumstances, injury to the plaintiff was "likely", or "should have known that injury to the plaintiff would ensue"; and

- actual injury resulted: see *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-472; *Pro-Sys*, at para. 80.

[55] The elements of unlawful means conspiracy contain stronger inherent limitations than those contained within the *Competition Act.* By requiring that the conduct be directed at the plaintiffs, the tort of unlawful means conspiracy contains a more difficult hurdle than a claim under s. 36 of the *Competition Act.* Indeed, in arguing that the statutory claim is subject to the principle of indeterminacy, the respondents rely upon that difference to suggest that the tort of unlawful means conspiracy has indeterminate liability already built into it. As the respondents submit, "[i]n the tort context, the requirement of intention erects an inherent limit to the potential liability commensurate with the defendant's culpability. ... As a result, indeterminate liability is already excluded by the proximity that the tort requires through the 'directed at' element."

[56] We agree that the intentional component of the unlawful means conspiracy tort eliminates any concern for indeterminate liability. The requirement for the plaintiffs to prove that the defendants' conduct was directed at them, and that the defendants knew or should have known that injury was likely, creates an inherent limit on potential liability, one that the respondents acknowledge and that we agree is "commensurate with the defendant's culpability".

[57] Accordingly, we also conclude that the principle of indeterminate liability does not apply to the tort of unlawful means conspiracy.

(e) Alternative: There is No Concern for Indeterminate Liability

[58] Even if the principle of indeterminate liability is relevant to the statutory claim or the unlawful means conspiracy claim, we would not conclude the umbrella purchasers' claims fail on the basis of indeterminate liability.

[59] As for the statutory claim, we agree with *Godfrey BCCA*, at paras. 229-34, that concerns over indeterminate liability are mitigated by the limitations set out in ss. 36 and 45 of the *Competition Act.* The requirement of proving intentional wrongdoing, in accordance with the fault requirements under s. 45, combined with the need under s. 36 for the plaintiff to demonstrate loss resulting from that intentional wrongdoing, serves to limit any concerns about overly broad liability. We have already reviewed those statutory limitations. If the principle of indeterminate liability does apply in this context, those limitations serve to carefully circumscribe liability. As the court noted in *Godfrey, BCCA,* at para. 232, and as supported by our previous analysis: "the tort of civil conspiracy provides even stronger built-in limitations controlling the scope of liability than those inherent in the *Competition Act*".

[60] Even though the addition of umbrella purchasers would increase the plaintiff base and the potential damages to be paid, it is important not to confuse indeterminate liability with significant liability: *Livent,* at para. 43. Certain activities, like conspiring to fix prices for batteries that are in high demand for

contemporary society, may well come with significant liability. Although the addition of umbrella claimants would add additional exposure, that exposure would be in relation to specific products and limited by a defined class and a defined class period. It would not be limitless exposure.

[61] We do not agree with the respondents' assertion that they had "no control" over the actions of the non-defendants and so there is an indeterminacy problem. The Divisional Court addressed the "no control" point in its reasons. It concluded that the situation in this case was similar to the situation in *Imperial Tobacco*, where the Supreme Court concluded that the prospect of indeterminate liability was fatal to the tobacco companies' claims of negligent misrepresentation against the federal government. The Supreme Court held that indeterminacy was a problem because, insofar as the claims were based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes: *Imperial Tobacco*, at para. 99.

[62] Like *Imperial Tobacco,* the Divisional Court concluded in this case that the defendants had "no control over the actions of non-defendant manufacturers". In particular, they had no control over whether the non-defendant manufacturers chose to match the prices of the defendants and they had no control over the volume of sales by the non-defendant manufacturers.

[63] The "no control" argument fails to account for the manner in which the claim has been pleaded and the very essence of an umbrella purchaser claim: the umbrella effect.

[64] As for the manner in which the claim has been pleaded, the plaintiffs specifically allege that the defendants intentionally directed their conduct at the proposed class – a class that includes umbrella purchasers – and knew that their conduct was likely to cause injury to that class. Taking those pleadings as true, as we must at this stage, we would not agree that the defendants had no control over the non-defendants. The point is that they had control over the market and their intention was to move that market: *Godfrey BCCA,* at paras. 238-39.

[65] The umbrella effect must be taken into account at the certification stage. The theory of liability rests on the defendants' alleged cartel activity, creating what the certification judge described in this case as "supra-competitive prices that enable non-cartel members to set their prices higher than they otherwise would have under normal conditions of competition": *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, at para. 159. If their claims are ultimately proven, the umbrella purchasers are financial victims of the defendants because of the "umbrella pricing effects", a phenomenon that is described in the following passage:

> Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a

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

[66] As the pleadings allege that the defendants were aware of and intended that the conspiracy would result in the increase in prices of LIBs and LIB products, the increase in prices across the market were intended and foreseen. Accordingly, including the umbrella purchasers would not make the respondents liable for unforeseen damages.

[67] The respondents also argue that allowing umbrella purchasers to claim relief under s. 36 could result in "economic ripples downstream" of the umbrella purchasers, causing further concern for indeterminate liability. They give the example of purchasers of services that rely upon LIB products, who could claim that they paid more for their services because their service provider paid more for the LIB products. That is not this case. The pleadings are specifically limited to those who purchased LIBs and LIB products during the conspiracy period.

[68] In summary, even if indeterminate liability is relevant, the umbrella purchaser claims do not fail s. 5(1)(a) on the basis of indeterminate liability.

(f) Are the pleadings sufficient?

(i) The Divisional Court's Reasons

[69] While recognizing that the decision on indeterminate liability was sufficient to dispose of the umbrella purchaser claims, the Divisional Court went on to consider other difficulties with certifying them. Among other things, the court found there was a pleadings problem:

> While that conclusion [with respect to indeterminate liability] would be sufficient to address the second issue on which leave to appeal was granted, I believe two other points should be made, because they also undermine the argument for including the Umbrella Purchasers within the class. First and foremost is the fact that, as the respondents point out, the appellants have failed to plead the requisite elements of the claim that could be advanced for the Umbrella Purchasers. It seems to me that, at a minimum, that claim would require a pleading that:
>
> (a) the respondents conspired to fix prices for LIBs and LIB products;
>
> (b) that the respondents fixed those prices at a level higher than they otherwise would have been, if the conspiracy had not been engaged in;
>
> (c) that prices so fixed by the respondents allowed the non-defendant manufacturers to charge higher prices;
>
> (d) that the non-defendant manufacturers did, in fact, charge higher prices, and;

> (e) that the non-defendant manufacturers charged higher prices as a direct result of the opportunity created by the respondents.
>
> On the most generous reading of the Fresh as Amended Consolidated Statement of Claim, only the first two facts are pleaded. None of the other requisite facts are pleaded either directly, indirectly, expressly or implicitly. The failure to plead the requisite facts in support of a claim is fatal: *Copland v. Commodore Business Machines Ltd.*, *Rules of Civil Procedure*, r. 25.06(1).

(ii) Sufficiency of the Pleadings

[70] The respondents argue that the pleadings are deficient because they do not assert a causal link between the defendants' alleged price fixing and the allegedly inflated prices charged by non-defendant LIB manufacturers. In essence, the respondents' position is that, as suggested by the Divisional Court, a specific plea that "the non-defendant manufacturers charged higher prices as a direct result of the opportunity created by the respondents" was required.

[71] The respondents also maintain that a pleading of generalized market effects is not sufficient and that a causal link to harm must be specifically pleaded. In support of this submission, the respondents rely on fraud on the market cases such as *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2010] O.J. No. 1057, and *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (Gen. Div.), for the proposition that a causal link is required and reliance cannot be presumed.

[72] We disagree.

[73] The pleadings in the present case allege, in effect, that:

i. the defendants conspired to unduly lessen competition and enhance the prices of LIBs and LIB products, contrary to Part VI of the *Competition Act*;

ii. the conspiracy was directed towards the proposed class members and the defendants knew it was likely to cause injury to the proposed class members, rendering the defendants liable for the tort of civil conspiracy;

iii. LIB and LIB product prices were fixed at artificially inflated levels as a result of the conspiracy;

iv. members of the proposed class paid more for LIBs and LIB products than they would have, absent the conspiracy.

[74] Although the pleading is somewhat lacking in particulars, specifically with respect to the claim that umbrella purchasers were harmed by the conspiracy, a generous approach must be taken when assessing the adequacy of the pleadings at this stage: *Imperial Tobacco*, at para. 21.

[75] Though umbrella purchasers are not explicitly mentioned, they did not need to be. The allegation of damage at para. 76(c) of the statement of claim is broad enough to encompass the harm caused to umbrella purchasers. That paragraph reads as follows:

> 76. The Plaintiffs and other members of the proposed class have suffered damages as a result of the conspiracy alleged herein. The Defendants' conspiracy had the following effects, among others: ...

> (c) the Plaintiffs and other members of the proposed class paid more for lithium batteries and lithium battery products than they would have paid in the absence of the conspiracy.

[76] Reading the statement of claim as a whole, it is clear that the appellants allege that non-defendant manufacturers and suppliers raised their prices as result of the defendants' conspiracy. In our view, that is sufficient for the purpose of certification and it is not fatal that the pleading does not expressly link the effects of the conspiracy to the pricing decisions of non-defendants.

[77] Finally, the respondents' reliance on case law in the securities class action context, in which courts have rejected the presumption of reliance created by the "fraud on the market" theory, is, in our view, misplaced. These cases have no application to cases such as the present. In fraud on the market cases, it cannot be assumed that all members of the class made their purchase in reliance on the misrepresentations by the defendants. If their purchase was not made as a result of the misrepresentation, the misrepresentation did not cause any damages. In contrast, where price fixing is alleged to have occurred, all purchasers suffered damages.

[78] In conclusion, the pleadings are sufficient to meet the s. 5(1)(a) requirement.

(3) Section 5(1)(c): Do the claims raise common issues?

[79] In light of our conclusion on the s. 5(1)(a) requirement, we must consider whether the other requirements for certification are met with respect to the umbrella purchaser claims. We turn first to the common issues requirement.

[80] The certified common issues as a result of the Divisional Court's decision were, to paraphrase: (a) whether the defendants breached s. 45 of the *Competition Act*, giving rise to liability pursuant to s. 36 of the *Competition Act*, and whether the class members suffered damage as a result; and (b) whether the defendants are liable in tort for the conspiracy to fix prices of LIBs, and associated issues with respect to the duration and effects of the conspiracy and the defendants' efforts to conceal the conspiracy. With respect to damages, the common issue certified was whether damages for the class could be determined on an aggregate basis and, if so, the amount owing to the class. The court also certified the question of whether the costs of the investigation should be assessed on a global basis under s. 36 of the *Competition Act* and, if so, in what amount.

[81] In its brief reasons, the Divisional Court expressed the concern that no common issues had been proposed respecting the claims advanced by the umbrella purchasers. In our view, this concern can be addressed quite simply. The proposed class included both the non-umbrella and umbrella purchasers. As

a result, the common issues proposed were, in essence, the same. Any specific issues relating to umbrella purchasers were, in effect, subsumed in the common issues proposed and accepted for the non-umbrella purchasers.

[82] In their submissions before this court, the respondents, however, focused on the adequacy of the expert evidence underlying the appellants' assertion of commonality. Specifically, the respondents submit that the appellants have not advanced a plausible methodology by which harm to the umbrella purchasers can be proven, and quantified, on a basis that is common to the rest of the class. As we will explain, we disagree with the first part of this submission. In our assessment, there is some basis in fact that harm to the class can be established in common. However, we are not satisfied that the umbrella purchasers' damages can be quantified on a common basis. For that reason, a subclass must be created for the non-umbrella purchasers. We turn now to these issues.

(i) Class-wide harm

[83] Where, as here, expert evidence is relied upon to provide some basis in fact, it must offer a plausible methodology with a realistic prospect of establishing loss on a class-wide basis: *Pro-Sys,* at para. 118. In our view, the appellants' expert, Dr. Reutter, offered such a methodology.

[84] According Dr. Reutter, if the alleged collusion occurred, all members of the proposed class would have been impacted by such collusion. This conclusion is rooted in a two-pronged approach to establishing harm to the class.

[85] First, Dr. Reutter identified four economic conditions present in the LIB market: a lack of economic substitutes, a commodity-like product, a concentrated market, and barriers to entry. In his view, assuming the alleged collusion occurred, these market conditions indicate that the alleged conspiracy would have resulted in higher prices for LIB products across the market.

[86] With respect to the market concentration factor, Dr. Reutter noted that the respondents represented over 70 percent of global LIB sales during the conspiracy period. He described that, during the conspiracy period, the LIB market was bifurcated between "high quality" defendant manufacturers in Japan and Korea, and lower quality manufacturers in China. In his view, economic theory indicates that, to the extent that non-defendant Chinese manufacturers participated in the "high quality" market with the defendants, these non-defendants also would have charged higher prices due to the reduced competition caused by the alleged conspiracy.

[87] The second part of Dr. Reutter's approach to establishing class-wide harm is the creation of a supply and demand curve. In his opinion, based on the economic conditions described above, the LIB market is characterized by a

typical supply and demand relationship. Accordingly, if the price of LIBs increased, the supply curve for LIB products would shift upwards and a new equilibrium would be established at a higher price across the industry. Dr. Reutter therefore concluded that the respondents "are likely to have had an impact on the market price of all LIBs, and all Lithium Battery Products, sold globally and in Canada."

[88] The respondents argue that Dr. Reutter's evidence does not go far enough to establish that there is some basis in fact that harm to the class can be established on a common basis. They submit that the economic market conditions identified by Dr. Reutter would only permit conspirators to increase their own prices. Those conditions do not establish that the respondents had the ability to control the pricing decisions of other market participants. Further, on cross-examination, Dr. Reutter admitted that the response of non-defendant manufacturers to an alleged price increase would depend on individual decisions made by each manufacturer. He acknowledged that non-defendants might match their competitors' increased prices, or they might lower or maintain their existing prices to increase market share. However, in the respondents' submission, nowhere in Dr. Reutter's report does he explain how the independent pricing decisions of non-defendants can be determined in common with the defendants, without conducting individual inquiries.

[89] In addition, the respondents liken the deficiencies in Dr. Reutter's evidence to those identified in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357, [2017] B.C.J. No. 2635. They submit that, like the expert evidence in *Ewert*, Dr. Reutter's report demands an assumption that the econometric model proposed to determine harm to the non-umbrella purchasers can be applied to umbrella purchasers, without providing any methodology for doing so. In *Ewert*, the court also expressed concern about the availability of the data required to implement the expert's proposed methodology.

[90] Finally, the respondents put forward expert evidence to the effect that any method to determine a potential impact of the alleged conspiracy on non-defendant prices would necessarily be different than the assessment of an impact on the respondents' prices. This is due to the additional causal question of whether non-defendants increased their prices in reaction to the alleged collusion. As such, the question of harm to the class requires, in the respondents' view, an individualized analysis and the question cannot be determined in common.

[91] We acknowledge that Dr. Reutter's methodology of proving harm does not expressly mention umbrella purchasers and that it is short on detail. The majority of his report focuses on the quantification of damages for the class rather than the threshold question of establishing harm.

[92] Nonetheless, we are satisfied that Dr. Reutter has presented a theory and a methodology that offers a realistic prospect of establishing loss on a class-wide basis. In addition to Dr. Reutter's two-pronged approach to establishing harm to the class, Dr. Reutter proposes using regression analysis to prove that all members of the class, including umbrella purchasers, suffered harm. Although his regression analysis was designed to quantify damages, it offers insight as to whether the non-defendants in fact adopted higher prices as a result of the alleged collusion. For example, Dr. Reutter appears to be able to infer, from the stable market shares of the defendants and non-defendants during the conspiracy period, that non-defendants were not pricing to gain market share, which was the possible reaction suggested by the respondents' expert as an alternative to charging a higher, allegedly colluded price.

[93] We also note that the majority of the data Dr. Reutter identifies as necessary for implementing his proposed methodology of proving class-wide harm appears to be available through public documents or the discovery process. Thus, in our view, *Ewert* is distinguishable.

[94] In *Ewert*, the court declined to certify any of the claims advanced by the class, which included indirect and umbrella purchasers. The focus of the court's analysis was on the expert's failure to inquire into whether the data required to implement his proposed common methodology was available. These deficiencies are not present in Dr. Reutter's report. Dr. Reutter does not rely on unnamed

sources of data and the majority of the data he identifies as necessary for implementing his proposed methodology of proving class-wide harm appears to be readily available in specified industry reports and government resources.

[95] Dr. Reutter expects that the data relevant to other parts of his methodology, which appears to mainly consist of the respondents' transaction data, will be made available during the discovery process. As noted in *Ewert*, a plaintiff's expert is not expected to have access to the defendants' internal documents prior to discovery, and it can generally be assumed that defendant companies will produce sales and financial data: para. 48.

[96] We are also satisfied that, although short on detail about the harm to umbrella purchasers, Dr. Reutter's report sufficiently speaks to that question. In that way, this case is also distinguishable from *Ewert*.

[97] The judge in *Ewert* noted that the expert report did not address how harm to the umbrella purchasers could be shown. In other words, the proposed methodology was designed to show harm only to the non-umbrella purchasers. In our view, Dr. Reutter's report does not suffer from this deficiency. As we have explained, regardless of whether he expressly refers to the umbrella purchasers, Dr. Reutter's opinion is that his proposed method will show that the alleged conspiracy increased the prices of LIBs and LIB products across the market, causing harm to the class as a whole. The language used in Dr. Reutter's report

refers to the market-wide characteristics of the LIB market, which indicate, in conjunction with a typical supply and demand curve, that the equilibrium price of all LIBs would have been higher as a result of the conspiracy.

[98] The fact that the respondents' expert disagrees with Dr. Reutter that class-wide harm can be established on a common basis is of no moment at this point in the litigation. At the certification stage, the court is not required to resolve conflicting evidence: *Pro-Sys*, at paras. 102, 126. In fact, at this stage, the court is not equipped to engage in such an analysis: *Cloud*, at para. 50. The resolution of the disparities in the expert evidence is a matter for the trial judge, who will have the benefit of a full record at the trial of the common issues: *Pro-Sys*, at para. 126.

[99] Ultimately, it may be shown that Dr. Reutter's methodology is not capable of proving harm to the umbrella purchasers. The comments of the Supreme Court in *Pro-Sys*, at para. 105, which refer to the British Columbia class proceedings legislation but apply equally to the Ontario *Class Proceedings Act*, are apposite here:

> I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is

> the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[100] These comments were echoed by this court in *Cloud*, where the court highlights, in the context of its preferable procedure analysis at para. 90, the "great flexibility" of process provided by the *Class Proceedings Act*. As the action unfolds, where it appears that the certification requirements cease to be met, the court may, pursuant to s. 10, amend the certification order, decertify the proceeding, or make any other order considered appropriate.

[101] We acknowledge therefore that issues may arise with respect to the umbrella purchasers when the expert evidence is further developed and tested on the merits at the common issues trial. However, the fact that a question may give rise to nuanced answers as between class members does not defeat commonality: *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 32; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 44.

[102] Accordingly, we are satisfied that the question of class-wide harm should be certified as a common question.

(ii) Quantification of damages

[103] We turn now to the issue of aggregate damages. Because the courts below excluded the umbrella purchasers from the class, they did not consider

whether aggregate damages for the class, when umbrella purchasers are included, could be certified as a common issue. Counsel gave limited treatment to this issue in their submissions. Based on our review of the statement of claim and the expert reports, we are of the view that, once the umbrella purchasers are included, aggregate damages for the class cannot be certified as a common question. A subclass composed of non-umbrella purchasers will have to be created for the aggregate damage issue.

[104] In order for aggregate damages to be certified as a common question, the appellants must establish that there is a "reasonable likelihood" that the conditions required in s. 24 of the *Class Proceedings Act* for determining aggregate damages would be satisfied if the appellants are otherwise successful at the common issues trial: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 44; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at para. 111.

[105] Section 24 provides:

> 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (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.

[106] Our concern is that both the statement of claim and Dr. Reutter's report appear to quantify the aggregate damages as those that were suffered by the non-umbrella purchasers. Further, neither address how aggregate damages for umbrella purchasers could be quantified.

[107] As set out above, para. 76(c) of the statement of claim pleads damages; namely, that all class members were harmed because they paid more for LIBs and LIB products due to the alleged conspiracy. However, the proposed quantification of those damages is pleaded as follows, at para. 77:

> The Plaintiffs assert that their damages, along with those of other members of the proposed class, are capable of being quantified on an aggregate basis as the difference between the amounts actually paid to the Defendants for the lithium batteries and lithium battery products and the amounts which would have been paid in the absence of the conspiracy. [Emphasis added.]

[108] In referring to the amounts "actually paid to the Defendants", the quantification of damages proposed in the statement of claim effectively excludes any overpayment allegedly made by umbrella purchasers who acquired LIBs or LIB products from non-defendants.

[109] On this issue, Dr. Reutter's report is somewhat confusing and of little assistance. The report does not directly address how aggregate damages for

umbrella purchasers could be calculated and the report appears to adopt the same approach to calculating aggregate damages set out in the statement of claim that is, the difference between the amounts actually paid to the defendants for LIBs and LIB products and the amounts that would have been paid in the absence of the conspiracy.

[110] We acknowledge that portions of Dr. Reutter's report suggest that his regression model and the method of estimating overcharges caused by the alleged conspiracy could be used to calculate the aggregate amount of overcharges by both defendant and non-defendant producers of LIBs. For example, at para. 92 of his report, he explains that the "law of one price suggests that the alleged conspiracy would have resulted in an overcharge that impacted both defendant and non-defendant Lithium Battery Products manufacturers by the same amount." Then again at para. 104, he concludes:

> The increased price of LIBs and Lithium Battery Products would have been passed through to end users and others in the distribution chain, thus impacting all members of the proposed Class. Further, as described herein, it is my opinion that standard econometric and statistical techniques are available to estimate any overcharges and Class-wide damages.

[111] While the above-noted excerpts suggest that he could calculate aggregate class-wide damage, including the damages suffered by umbrella purchasers, other portions of his report suggest otherwise. At paras. 84 and 85, for example, he states that class-wide damages arise from four different sources. In his

description of these four different sources, damages that might arise as a result of LIB purchases made from non-defendant producers of LIB are not included.

[112] The fact that Dr. Reutter's aggregate damage calculation does not include the damages suffered by purchasers of LIBs manufactured by non-defendants becomes clear from para. 60 of his reply report. There, under the heading calculating class-wide aggregate damages, he states:

> The first step in estimating Class-wide damages is to use standard regression analysis to estimate any direct purchaser overcharge in the price of LIBs due to the alleged conspiracy. Once estimated, any overcharge is then applied to the value of LIBs purchased directly from defendants, to yield an estimate of the value of world-wide aggregate damages. [Emphasis added.]

[113] We conclude, therefore, that consistent with the approach taken in the statement of claim, the methodology proposed by Dr. Reutter addresses only the calculation of damages for direct and indirect purchasers of LIBs manufactured by the defendants.

[114] In the absence of any explanation of how damages could be quantified for the class as a whole, it is difficult therefore to say that there is a "reasonable likelihood" that the conditions for s. 24 could be met. For this reason, the question of aggregate damages is not certified as a common issue for the entire class. Dr. Reutter has, however, provided a method offering a reasonable likelihood of being able to determine the aggregate damages suffered by non-umbrella purchasers. This was accepted by the courts below as they certified the

calculation of aggregate damages for the class, which then excluded the umbrella purchasers, as a common issue. As a result, a subclass should be created for non-umbrella purchasers with respect to the aggregate award of damages issue.

[115] The fact that damages cannot be assessed on an aggregate basis for the class as a whole does not mean the action should not proceed as a class proceeding. Furthermore, the question of whether damages can be aggregated is ultimately a question for the common issues trial judge. Failure to certify the question of whether aggregate damages are available for umbrella purchasers does not preclude a trial judge from invoking s. 24 if he or she considers it appropriate once liability has been found: *Pro-Sys*, at para. 134.

[116] Accordingly, the common issues certified are as follows:

a) Did the Defendants, or any of them, breach s. 45 the *Competition Act* (which is contained in Part VI of the *Competition Act*) giving rise to liability pursuant to s. 36 of the *Competition Act*?

    i. Between January, 1, 2000 and March 12, 2010, did the Defendants and/or any unnamed co-conspirators conspire, agree or arrange with each other to:

        A. prevent, limit or lessen, unduly, the manufacture or production of Lithium Batteries; and/or

        B. enhance unreasonably the price of Lithium Batteries?

ii. Between March 12, 2010 and December 31, 2011, did the Defendants and/or any unnamed co-conspirators conspire, agree or arrange with each other to:

A. fix, maintain, increase or control the price of Lithium Batteries;

B. allocate sales, territories, customers or markets for the production or supply of Lithium Batteries; and/or

C. fix, maintain, control, prevent, lessen or eliminate the production or supply of Lithium Batteries?

iii. Did Class members suffer loss or damage as a result?

b) Are the Defendants, or any of them, liable in tort for conspiracy to fix prices for Lithium Batteries? In particular:[4]

i. Did the Defendants and/or any unnamed co-conspirators engage in unlawful conduct (by contravening section 45 of the *Competition Act*)?

ii. Was the Defendants' unlawful conduct directed towards Class members?

iii. Did the Defendants know, or ought [they] to have known, in the circumstances that injury to Class members was likely to result?

iv. Did Class members suffer loss or damage as a result?

c) Over what period of time did the conspiracy take place?

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[4] The amended certification order following the Divisional Court's decision certifying the unlawful means conspiracy claim was not provided to the court. For the purposes of this appeal, we have assumed that the unlawful means conspiracy issue was certified by the Divisional Court in the form proposed in the Fresh as Amended Notice of Motion, with the necessary modifications to reflect the common issues that were not pursued on the certification motion. Any issues that may arise regarding the proper wording of the certification order are to be addressed by the certification judge.

d) Over what period of time did the conspiracy affect the price of Lithium Batteries and/or Lithium Battery Products?

e) Did the Defendants, or any of them, take affirmative or fraudulent steps to conceal the conspiracy?

f) Can damages of the non-umbrella purchaser subclass be measured on an aggregate basis and, if so, what are the aggregate damages for the subclass?

g) Should the full costs of the investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on a global basis pursuant to s. 36 of the *Competition Act* and if so, in what amount?

(4) Section 5(1)(e): Is there an appropriate representative plaintiff?

[117] The Divisional Court expressed the concern that there was some potential for conflict to arise between "direct" and umbrella purchasers, and that a separate representative plaintiff would be necessary. At para. 51, the court noted:

> The other point is that no common issues were proposed respecting the claims of the Umbrella Purchasers, as required by s. 5(1)(c), nor was there a proposed representative plaintiff for the Umbrella Purchasers. This latter point is of some consequence, since the appellants conceded that the Umbrella Purchasers would have to be a subclass, within the certified class. Given that there would appear to be at least the potential for some conflict to arise between the direct purchasers and the Umbrella Purchasers, a separate representative plaintiff for the Umbrella Purchasers would seem to be necessary. [Emphasis added.]

[118] We assume that the court's reference to "direct" purchasers was in reference to the non-umbrella purchasers. The court did not articulate the nature of any potential conflict between the umbrella and non-umbrella purchasers.

[119] In our view, the umbrella and non-umbrella purchasers have the same interest at the outset, that is, to demonstrate the existence of the conspiracy and the general increase in prices. Although we would create a subclass for non-umbrella purchasers, given that they have advanced the quantification of damages as a common issue, this does not put them in conflict with the umbrella purchasers.

[120] In our assessment, the proposed representative plaintiffs, one direct and one indirect purchaser, remain appropriate at this juncture. There is some basis in fact to find that they can satisfy the requirements of s. 5(1)(e); namely, that they would fairly and adequately represent the class, have produced a workable litigation plan, and are not in conflict with the other class members on the common issues. Although the litigation plan is not included in the materials before the court, the respondents do not appear to take issue with it. As we have explained, we do not, at this point, consider that there is a conflict between the two classes such that a separate representative plaintiff is required. If problems arise at subsequent stages of the proceedings, separate representation can easily be established: *Anderson*, at p. 684.

(5) Section 5(1)(d): Is a class proceeding the preferable procedure?

[121] The respondents submit that a class proceeding is not the preferable procedure for resolving issues related to the umbrella purchasers. Although that issue was not touched on by the Divisional Court, the respondents note that the certification judge, in a brief passage in his reasons, expressed doubt that the umbrella purchasers as a subclass could have satisfied the preferable procedure condition, even assuming that they had a cause of action. The certification judge and the respondents express concern that, if the umbrella purchaser claims are certified, difficult issues with respect to commonality will arise and the action will become unmanageable because loss by the class members cannot be determined on common evidence. The respondents submit that the loss-based questions give rise to excessive individual issues that will overwhelm the common issues and make a class proceeding unmanageable.

[122] We disagree.

[123] The preferable procedure analysis aims to answer two questions: first, whether a class proceeding would be a fair, efficient and manageable method of resolving the claim; and second, whether a class proceeding is preferable, in a comparative sense, to other available procedures: *Hollick*, at para. 28. The inquiry into preferable procedure must be informed by the three principal goals of class proceedings: judicial economy, behaviour modification, and access to

justice: *Hollick*, at para. 27; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at paras. 16, 22.

[124] We are satisfied that there is some basis in fact to conclude that a class proceeding is the preferable procedure for resolving the common issues. As already explained, nearly all of the issues are common to all class members, with one exception related to the quantification of damages. In the context of the action as a whole, the resolution of the common issues relating to the respondents' alleged wrongdoing, and the impact of that wrongdoing on the class members, would significantly advance the action: *Cloud*, at para. 76. The fact that individual issues, even a substantial number of individual issues, would remain to be determined after the common issues trial does not preclude certification in these circumstances: *Cloud*, at para. 75; *Hollick*, at para. 30.

[125] There is no reason to conclude, at this juncture, that the proceeding will be unmanageable. The respondents' submission on this point essentially relies on their position that harm to the class cannot be established on a common basis, which we have rejected.

[126] The fact that the resolution of the common issues would significantly advance the action suggests that proceeding as a class action would achieve judicial economy. Furthermore, even with respect to the issue of quantification of damages that has not been certified for umbrella purchasers, Dr. Reutter's report

appears to indicate that there is some overlap in the quantification of damages for the umbrella and non-umbrella purchasers, which would reduce duplication in fact-finding and legal analysis.

D. CONCLUSION

[127] In conclusion, therefore, we allow the appeal. Paragraphs 2, 3, 7 and 8 of the certification order are to be amended to include umbrella purchasers in the class definition and a subclass of non-umbrella purchasers is to be created. Paragraph 8(b) of the certification order is to be amended to provide that the aggregate damages issue is certified as common only with respect to the non-umbrella purchaser subclass. Paragraph 4 has already been amended by the substituted order of the Divisional Court certifying the claim of unlawful means conspiracy. As we have already noted in a footnote above, the substituted certification order was not provided to the court. Any issues that arise with respect to the terms of the certification order as a result of this decision are to be addressed before the certification judge. As agreed by the parties, there will be no order as to costs.

Released: OCT 12 2018

Robert J. Sharpe J.A.

L.B. Roberts J.A.

Farley J.A.