CITATION: Shah v. LG Chem, Ltd., 2015 ONSC 6148
COURT FILE NO.: CV-13-483540
DATE: 20151005

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
KHURRAM SHAH and ALPINA HOLDINGS INC. Plaintiffs	*Reider Mogerman, Jean-Marc Leclerc,* and *Linda J. Visser,* for the Plaintiffs
– 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	*Robert E. Kwinter* and *Litsa Kriaris* for the Defendants Samsung SDI Co., Ltd. and, Samsung SDI America, Inc. *Sandra A. Forbes* and *Kristin Jeffery* for the Defendants LG Chem, Ltd., and LG Chem America, Inc. *John F. Rook, Q.C.* and *Emrys Davis* for the Defendants 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 *Miranda Lam*, and *Emily MacKinnon* for the Defendants Sony Corporation, Sony Energy Devices Corporation, Sony Electronics, Inc., and Sony of Canada Ltd. *Laura F. Cooper* and *Zohaib Maladwala* for the Defendants Toshiba Corporation, Toshiba America Electronic Components, Inc., and Toshiba of Canada Limited *Mary Buttery* and *Kevin Wright* for the Defendants Hitachi Maxell, Ltd., and Maxell Corporation of America *Katherine L. Kay* and *Mark Walli* for the Defendant GS Yuasa Corporation *Tim O. Buckley* and *Subrata Bhattacharjee* for the Defendant Samsung Electronics Canada Inc.
Proceedings under the *Class Proceedings Act, 1992*	**HEARD**: August 31, September 1-3 , 2015

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the Plaintiffs, Khurram Shah and Alpina Holdings Inc., bring a competition law class action.

[2] As will be described further below, the Plaintiffs' action is brought on behalf of direct and indirect purchasers in two distribution channels in the marketplace for rechargeable Lithium Ion Battery Cells ("LIBs"):

- At the headwater (upstream) of one distribution channel are the Defendants; they design, manufacture, and sell LIBs.
- At the head of the second distribution channel are rival upstream non-Defendants, who are competitors that design, manufacture, and sell LIBs.
- The upstream Defendants and the upstream non-Defendants introduce the LIBs into the channels of distribution by either: (1) packing the LIBs into LIB Packs and then selling the LIB Packs to downstream direct purchasers; or (2) selling the LIBs to LIB Packers who pack the LIBs and then sell the LIB Packs to downstream direct purchasers of LIB Packs.
- In both channels, the LIB Packs are sold to Original Equipment Manufacturers ("OEMs"), who incorporate the LIB Packs into their consumer goods, the price of which are alleged to have been affected by the alleged price-fixing conspiracy. The LIB powered devices are: notebook computers; cell phones, including smartphones; tablet computers; e-book readers; MP3 players; personal digital assistants; handheld GPS; and handheld video players.
- The distribution channels then continue with sales and resales of the LIB powered devices, until the devices, with their incorporated LIB Packs, reach consumers, who are as a matter of economic theory regarded as indirect purchasers of LIBs. (Indirect purchasers are customers who did not purchase a product directly from the alleged price-fixer/over charger but who purchased it indirectly from a party further down the channel of distribution: *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 at para. 1.)

[3] To understand the problems of the case at bar, it needs to be kept in mind that one distribution channel ends with the indirect purchasers from the upstream Defendants and the other distribution channel ends with the indirect purchasers from upstream non-Defendants. The indirect purchasers of the second distribution channel are the so-called "Unconnected Purchasers" or "Umbrella Purchasers," much discussed below.

[4] The 26 named Defendants are: 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, [Inc.], Toshiba Corporation, Toshiba America Electronic Components, Inc., and Toshiba of Canada Limited.

[5] The action was discontinued or dismissed as against five Defendants, Hitachi Ltd., Maxell Canada, NEC Canada, Inc., Toshiba of Canada Limited (all discontinuances), and GS Yuasa Corporation (dismissal).

[6] Two Japanese corporations, NEC Corporation and NEC Tokin Corporation were successful in having the action dismissed on jurisdictional grounds. See *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628.

[7] The Plaintiffs allege that the 19 remaining Defendants (represented by seven separate lawyers of record) conspired to fix the price of LIBs manufactured and sold in Canada for the 11 years between January 1, 2000 and December 31, 2011.

[8] The Plaintiffs claim general and special damages of $75 million and punitive and exemplary damages of $10 million for conspiracy, interference with economic relations, unjust enrichment, and conduct that is contrary to Part VI of the *Competition Act*, R.S.C. 1985, c. C-34. The Statement of Claim alleges that the price-fixing conspiracy caused damages in Canada because the prices of LIBs sold directly or indirectly to the Plaintiffs and other proposed Class Members in Canada were at artificially inflated levels and the proposed Class Members paid more for LIBs and products containing LIBs than they would have in the absence of the wrongful conduct.

[9] The Plaintiffs bring this motion to have the action certified as a class action.

[10] The Defendants, who have filed a joint factum, resist certification and deny that the Plaintiffs have satisfied any of the five criteria for certification.

[11] For the reasons that follow, I certify this action as a class action under the *Class Proceedings Act, 1992.*

[12] More precisely, I certify only the statutory cause of action (s. 36 of the *Competition Act*) for conduct that is contrary to s. 45 of the *Competition Act,* and I certify the associated common issues. I am satisfied that the preferable procedure and representative plaintiff criteria are satisfied for the statutory cause of action. In the class definition, I remove what the parties called the "Unconnected Purchasers" or "Umbrella Purchasers" from class membership, because their claim does not satisfy the cause of action criterion or the preferable procedure criterion and may also have run aground in satisfying the common issues criterion.

[13] I do not certify the Plaintiffs' causes of action for: unlawful means conspiracy and unjust enrichment based on a contravention of the *Competition Act* because these claims fail to satisfy the cause of action criterion. I conclude that these causes of action, while they exist, have been precluded by the statutory cause of action. I do not certify the predominant purpose conspiracy on the different grounds that it does not satisfy the preferable procedure criterion. I do not certify the interference with economic relations tort claim, because the Plaintiffs did not seek to certify this claim. As detailed later in these Reasons for Decision, I have modified a few of the proposed common issues, and I did not certify those common issues associated with the causes of action that I did not certify.

B. METHODOLOGY

[14] In order to explain my reasons for the above conclusions, it is helpful at the outset to analyze and explain the substantive law associated with competition law class actions. I shall begin the exploration of competition law in the next section of my Reasons for Decision, and then I shall complete the legal analysis of competition law later when I discuss the various criteria for certification. Thus, the analysis of competition law will come, in part, before and, in part, after describing the evidentiary and factual background to this proposed class action.

[15] The analysis of competition law is necessary to understand the parties' arguments about the certification criteria and about the novel cause of action advanced by the Plaintiffs on behalf of the Umbrella Purchasers. In particular, the analysis of competition law is necessary to understand the Defendants' arguments that: (a) as a matter of statutory interpretation, the Plaintiffs' causes of action - other than the statutory cause of action under the *Competition Act* and the predominant purpose conspiracy - do not satisfy the cause of action criterion for certification; and (b) the Plaintiffs' proposed common issues want for commonality, with the fallout that the class action also fails the preferable procedure criterion and, therefore, cannot be certified.

[16] I foreshadow to say that the first part of the analysis of competition law will expose a fundamental flaw in the Defendants' core submission that the proposed class action is not suitable for certification because of the failure to satisfy the common issues criterion. The Defendants' core argument is that for the Plaintiffs' action to be certified as a class action, the common issues must have the commonality of demonstrating that each and every Class Member was harmed by the Defendants' alleged misconduct. From this core argument, the Defendants argue that the Plaintiffs have not and cannot show some basis in fact for such a common issue, and, the Defendants argue that the methodology proposed by the Plaintiffs' expert to address the common issues is defective in demonstrating commonality for the liability questions and for the questions about harm to the class.

[17] The economic, legal, and evidentiary problems and some of the judicial history of competition law class actions has recently been examined by the Supreme Court of Canada in: *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57, *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, *supra*, and *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, but earlier case law and much of the judicial history of competition law litigation must also be explored, including more than a few British Columbia Court of Appeal decisions including: *Macaraeg v. E. Care Contact Centers Ltd.*, 2008 BCCA 182; *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, *Wakelam v. Wyeth Consumer Healthcare*, 2014 BCCA 36, leave to appeal to S.C.C. denied, [2014] SCCA No. 215 and *Watson v. Bank of America Corporation*, 2015 BCCA 362. As will shortly become apparent, it is necessary to carefully examine all this - and so much more - case law.

[18] By way of methodology, after these introductory and overview sections of my Reasons, I shall describe the law for competition law class actions and then describe the evidentiary, procedural, and factual background of the immediate case including the evidence of the economist expert witnesses. Then, I will return to the discussion of competition law as I work my way through the five criteria for certification.

C. THE LAW FOR COMPETITION LAW CLASS ACTIONS

1. Countervailing Legal Policy and the Role of Statutory and Judge Made Law

[19] To understand competition law, the first point to note is that from a legal policy perspective, competition law must balance two countervailing forces. Pulling the law towards regulation, deterrence, behaviour modification, and compensation for economically harmed participants in the marketplace is the policy imperative of discouraging anti-competitive commercial behaviour. The law stands against interference with trade. In *R. v. Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117, Chief Justice Crampton of the Federal Court of Canada stated at para. 54:

> 54. Price fixing agreements, like other forms of hard core cartel agreements, are analogous to fraud and theft. They represent nothing less than an assault on our open market economy. Buyers in free market societies are entitled to assume that the prices of the goods and services they purchase have been determined by the forces of competition. When they purchase products that have been the subject of such an agreement, they are effectively defrauded.

[20] Pulling in the other direction, towards non-intervention, is the *laissez faire* notion that the common law traditionally does not allow recovery of pure economic loss where a plaintiff has suffered neither physical harm nor property damage. In *Martel Building Ltd. v. Canada*, 2000 SCC 60 at para. 37, Justices Iacobucci and Major for the Supreme Court stated:

> 37. Over time, the traditional rule was reconsidered. In *Rivtow* and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits. ...

[21] The second point to note about competition law is that the law about the regulation of anti-competitive commercial behaviour is based partly on the common law and partly on statute and the apportionment between the two may change to the extent that the Parliament of Canada determines that further regulation is desirable in the public interest. This duality and also the tension between regulation and *laissez faire* was recognized by Justice Howland, as he then was, in *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (C.A.) at paras. 19-20, where he stated:

> 19. In Canada, the law respecting contracts in restraint of trade is based partly on the common law and partly on statute. In so far as the common law is concerned, the doctrine of restraint of trade is founded upon public policy. It has been, and will be, affected by the winds of change. The reconciliation of the rights of freedom of contract and freedom of trade, and the determination of what is in the public interest, will vary with the changes in economic conditions from time to time. As Lord Macmillan said in *Vancouver Malt & Sake Brewing Co. Ltd. v. Vancouver Breweries Ltd.*, [1934] 2 D.L.R. 310 at p. 314, [1934] A.C. 181 at p. 189, [1934] 1 W.W.R. 471:
>
> > It is no doubt true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More

> especially is this so where the doctrine represents a compromise between two principles of public policy; in this instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit.
>
> 20. The development of the common law will continue to take place as the Courts apply the doctrine to a changing society. At the same time it must be borne in mind that the Parliament of Canada has embodied in the *Combines Investigation Act* as a partial legal code, those provisions respecting conduct in the field of restraint of trade which are to constitute criminal offences. This is a statutory exposition of public policy. The scope of the common law doctrine may, however, be narrowed in the future to the extent that the Parliament of Canada determines that further regulation is desirable in the public interest.

[22] The third competition law point to note – and it shall be very important to keep this point in mind – is that up until 1975, the contribution of statute law, the former *Combines Investigation Act,* R.S.C. 1970, c. C-23, to competition law was a matter of the criminal law and the main contribution of the common law was the tort of unlawful means conspiracy, in which the unlawful means was the breach of the criminal law. The point to note is that in 1975, the apportionment between the common law and statutory law changed.

[23] Before 1975, in *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.), the Privy Council upheld the constitutionality of the *Combines Investigation Act* as a matter of Parliament's criminal law jurisdiction under s. 91 of the *Constitution Act, 1867 (U.K)* 30 & 31 Vict. c.3, and in *Cement LaFarge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, which was decided based on the pre-1975 statute, the Supreme Court of Canada held that the a breach of the criminal law found in the *Combines Investigation Act* could constitute the unlawful means for a civil law conspiracy tort.

[24] In 1975, Parliament introduced the civil statutory cause of action now found in s. 36 of the *Competition Act*. What was then s. 31.1 was introduced in Bill C-2, *An Act to Amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, S.C. 1974-75-76, c. 76*. Bill C-2 was tabled before the House of Commons on September 25, 1974. On October 16, 1974, it was referred to the Senate Standing Committee on Banking, Trade and Commerce. On October 28, 1974, it received a second reading and a referral to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, where there were discussions from December 3, 1974 to June 3, 1975. The Senate Standing Committee on Banking, Trade and Commerce released a report on March 19, 1975 and then discussed the Bill further from April 16, 1975 to December 9, 1975. The resulting statute received royal assent on December 15, 1975.

[25] Moving from the criminal law jurisdiction that ground competition law before 1975, in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, the Supreme Court upheld the constitutionality of the civil statutory cause of action as a matter of Parliament's jurisdiction with respect to trade and commerce.

[26] As will appear from the description next below and as found by the Supreme Court in *General Motors of Canada Ltd. v. City National Leasing*, Parliament moved from a purely criminal law statute and the partial codification of competition law described by Chief Justice Howland and introduced a comprehensive legislative scheme that included a new large component of civil and administrative law. Much of the discussion in the British Columbia cases

discussed below, and much of the debate in the case at bar between the parties focuses on whether the introduction of the statutory cause of action in 1976 changed the roles and relationship between statute law and the common law in regulating competition law.

2. The Scheme of the *Competition Act*

[27] The *Competition Act* was last amended in March 2015. The current *Act* is comprised of 11 Parts, and as the discussion in this section of my Reasons for Decision and again later when the certification criteria are discussed will reveal, it is necessary to appreciate the structure of the *Act*. To say the least it is a complex and elaborate structure.

[28] By way of a summary of the *Act's* structure, the *Competition Act* defines certain types of conduct such as price-fixing, predatory pricing, and bid-rigging as criminal offences. Other types of anti-competitive conduct, however, are not treated as crimes and rather are subject to civil and administrative law regulation. Examples of matters that are subject to civil law enforcement are refusal to deal, tied selling, and price maintenance. For its civil law regulation, the *Act* provides a statutory cause of action, much discussed below, and for court and tribunal orders to be made to stop or to remedy anti-competitive conduct.

[29] Pursuant to the *Act*, the federal government appoints an officer known as the Director of Investigations and a tribunal known as the Competition Tribunal. The Director is empowered to conduct inquiries about whether a person has committed criminal or civil anti-competitive conduct, and the Director may forward the information gathered to the Attorney General of Canada for possible criminal prosecution, or the Director may ask the Competition Tribunal to conduct a hearing and provide a civil remedy for the anti-competitive conduct. While the application to the Competition Tribunal is made by the Director, typically, he or she will be responding to an individual's complaint, and the Tribunal's order will attempt to provide a remedy tailored to that complaint. The *Act* also requires businesses to give the Director notice of certain very large acquisitions, amalgamations, combinations, or joint ventures.

[30] Thus, Part I (*Purpose and Interpretation*) is an interpretive section providing definitions and setting out the purpose of the *Act*. Section 1.1 states:

> *Purpose of the Act*
>
> 1.1. The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[31] Part II (*Administration*) of the *Act* empowers the federal government to appoint the Commissioner of Competition to administer and enforce the *Act*. The Commissioner is empowered, among other things, to make inquiries, and the Commissioner is given investigatory powers, including search and seizure. The Commissioner may refer matters to the Attorney General of Canada, who may initiate prosecutions or other criminal proceedings under the *Act*. The Commissioner may initiate administrative proceedings under the *Act*.

[32] Part III (*Mutual Legal Assistance*) empowers Canada to enter into treaties with other nations that provide for mutual legal assistance in competition matters.

[33] Part IV (*Special Remedies*) brings the court into the regulatory scheme, and makes available for the enforcement of competition law, injunctions and prohibition orders, and for present purposes, most importantly, it provides a statutory cause of action for the recovery of damages. Section 36 of the *Act* states:

> *Recovery of damages*
>
> 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, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> ....
>
> *Limitation*
>
> (4) No action may be brought under subsection (1),
>
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (i) a day on which the conduct was engaged in, or
>
> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later; and
>
> (b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from
>
> (i) a day on which the order of the Tribunal or court was contravened, or
>
> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later.

[34] Part V has been repealed, and Part VI (*Offences in Relation to Competition*) (sections 45-62) is the part of the *Competition Act*, largely derived from the former *Combines Investigation Act,* that criminalizes anti-competitive conduct and establishes offences including, among other crimes, conspiracies, bid-rigging, pyramid selling, and false or misleading misrepresentations.

[35] At issue in the case at bar is s. 45, both as it existed before and after March 12, 2010, when its current version came into force. The current version of s. 45 states:

> *Conspiracies, agreements or arrangements between competitors*
>
> 45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

...

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

...

Definitions

(8) The following definitions apply in this section.

"competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

"price" includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

[36] The former version, pre-March 12, 2010 version, of s. 45 stated:

Conspiracy

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Idem

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

Evidence of conspiracy

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

Proof of intent

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

[37] Part VI also contains s. 62, the significance of which is discussed below. Section 62 states:

Civil rights not affected

62. Except as otherwise provided in this Part, nothing in the Part shall be construed as depriving any person or any civil right of action.

[38] Part VII (*Other Offences*) establishes criminal offences largely associated with interfering with the operation and enforcement of the *Competition Act*.

[39] Part VII.1 (*Deceptive Marketing Practices*) describes a variety of "reviewable conduct." Examples of reviewable conduct are: making false or misleading representations to the public; and, advertising a product for sale and supplying the product at a higher price. Pursuant to s. 74.1 (1), where, on application by the Commissioner, a court determines that a person is engaged in or has engaged in reviewable conduct under Part VII.1, the court may, among other things, order the person to not engage in the conduct. Part VII.1 contains a provision similar to s. 62; i.e., s. 74.08 of the *Act* provides:

Civil Rights not affected

74.08 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action.

[40] Part VIII (*Matters Reviewable by Tribunal*) describes more reviewable matters including a variety of anti-competitive trade practices for which the Commissioner or, in a few instances (refusal to deal, price maintenance, and exclusive dealing), a person who is granted leave by the Tribunal, may apply to the Competition Tribunal for a remedial order.

[41] Part IX (*Notifiable Transactions*) requires the parties to a proposed transaction of the very large types described by this Part to notify the Commissioner before the transaction is completed and to provide the Commissioner with prescribed information.

[42] Part X (*General*) provides miscellaneous provisions, including an application to the Commissioner for a written opinion, references to the Competition Tribunal, representations to other boards, commissions or other tribunals, report to Parliament, and federal regulations as necessary for carry out the *Competition Act*.

3. Operative Legal Principles

[43] Moving from legal policy and the structure of the *Competition Act* to operative legal principles, before the introduction of the statutory civil cause of action found in the *Competition Act,* plaintiffs relied on economic torts, including the tort of conspiracy, for civil redress for economic losses. As recognized by *Cement LaFarge Ltd. v. B.C. Lightweight Aggregate, supra,* direct purchasers had a civil cause of action to redress anti-competitive misbehavior, including manipulating the market, bid-rigging, and price-fixing.

[44] The legal history and development of the law to add indirect purchasers as plaintiffs to a competition law claim is described by Justice Rothstein in *Pro-Sys Consultants v. Microsoft, supra,* which was a class action brought by indirect purchasers who alleged that Microsoft and its subsidiaries had engaged in wrongful anti-competitive conduct, including breaches of the *Competition Act* by illegally overcharging for its computer operating system software.

[45] As Justice Rothstein explained, the law in Canada and in the United States is that direct purchasers have a civil cause of action for having paid higher prices for goods purchased from price-fixers. In *Pro-Sys Consultants,* the class members, who were indirect purchasers, advanced a claim for compensation for paying more than they would have absent Microsoft's alleged unlawful conduct. The critical issue in *Pro-Sys Consultants* was whether indirect purchasers had a cause of action for price-fixing.

[46] As explained by Justice Rothstein in the context of claims by direct purchasers, the established law is that a price-fixer does not have, what has been called the passing-on defence. See: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38; and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[47] The rejected passing-on defence posits that direct purchasers injured by price-fixing will pass on any overpayment to others in the distribution channel, and, thus, the direct purchasers suffer no damages from having been overcharged and, therefore, should not be compensated. The established law, however, rejected the passing-on defence, and Microsoft argued that the offensive use of passing-on by indirect purchasers to recover overcharges passed on to them should also be rejected. The issue debated in *Pro-Sys Consultants* was whether it necessarily follows from the court's rejection of the passing-on defence in claims by direct purchasers that indirect purchasers do not have a cause of action notwithstanding that they ultimately pick up the tab for the overpricing and anti-competitive conduct.

[48] The suggested legal policy rationales for denying indirect purchasers a cause of action are twofold. First, it was submitted in *Pro-Sys Consultants* that recognizing that indirect purchasers had a cause of action would be futile because it failed to provide a legal deterrent because given the small value of individual indirect purchaser losses and the high costs and risks of litigation, indirect purchasers (largely end consumers) were unlikely to seize upon the cause of action and sue, and, therefore, from a policy perspective, it was preferable to let the cause of action rest exclusively with the more incentivized direct purchasers, who are nearer the headwater of the distribution channel and more proximate to the perpetrator of the price-fixing.

[49] Second, and on the other hand, it was submitted in *Pro-Sys Consultants* that if the downstream indirect purchasers had a cause of action, then the prospect of their suing would be unfair to defendants, who would be exposed to the double counting of damages, because both the

direct and the indirect purchasers would have claims for the same overpayment coursing through the distribution channel. In resisting the prospect of a claim by the indirect purchasers, Microsoft submitted that there was the real danger that there would be double or even multiple recovery for the entire amount of the overcharge.

[50] Indeed, in the United States (in the states that have not statutorily reversed the decision of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)), the law is that indirect purchasers do not have a cause of action for having been unlawfully overcharged. In Canada, however, the Supreme Court, in the trilogy of *Pro-Sys Consultants*, *Sun-Rype Products Ltd.*, *supra*, and *Infineon Technologies AG, supra*, decided that Canadian law would be different than in the states in America that follow *Illinois Brick Co. v. Illinois*. Thus, in Canada, indirect purchasers do have a cause of action notwithstanding their more remote position downstream in the distribution channel and notwithstanding the difficulties of proving how much of the overpricing tab they experienced when they purchased consumer products.

[51] For the present purposes of this certification motion, it is necessary to understand very precisely what the Supreme Court decided about indirect purchaser claims and about the constituent elements of those claims. The main conclusion is that indirect purchasers do have a cause of action against price-fixers.

[52] In *Pro-Sys Consultants* at paras. 36-41, Justice Rothstein explained that the risk of double recovery was not a reason for not recognizing a cause of action for indirect purchasers because "practically the risk of duplicate or multiple recoveries can be managed by the courts." Justice Rothstein said that two juridical tools were available to courts to manage the problem of double recovery; namely: (1) "it will be open to the defendant to bring evidence of this risk before the trial judge and ask the trial judge to modify any award of damages accordingly" (para. 39); and (2) "if the defendant is able to satisfy the judge that the risk is beyond the court's control, the judge retains the discretion to deny the claim" (para. 39).

[53] In *Sun-Rype Products Ltd. v. Archer Daniels Midland Co., supra,* Justice Rothstein discusses a third tool to manage the risk of double recovery. This tool is provided by class action legislation. The third tool to control double recovery becomes available in a class action, like the case at bar, where the class of purchasers is comprised of both direct and indirect purchasers. In this hybrid class situation, the court may be able to calculate the damage inflicted on the participants of the entire distribution channel and then devise a scheme to allocate the losses amongst the class members without any double counting. (See: *Eidoo v. Infineon Technologies AG*, 2014 ONSC 6082; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2014 BCSC 1936, *Option Consommateurs c. Infineon Technologie a.g.*, 2014 QCCS 4949 as examples.)

[54] In other words, using the resources of the *Class Proceedings Act, 1992,* once the cause of action by both direct and indirect purchasers is proven, the court may be able to calculate the aggregate loss suffered by all the direct and indirect purchasers in the market for the price-fixed goods and determine a fair and reasonable scheme to distribute the judgment (or the settlement) among the direct and the indirect purchasers that constitute the hybrid class.

[55] Thus, in *Pro-Sys Consultants,* the Supreme Court rejected the argument that there were legal policy reasons for not allowing competition law claims by indirect purchasers. The Court also rejected the argument that the remoteness of the overcharge and the complexities of tracing the loss created insurmountable problems of proof. In rejecting this argument, Justice Rothstein stated at para. 45:

> 45. In bringing their action, the indirect purchasers willingly assume the burden of establishing that they have suffered loss. This task may well require expert testimony and complex economic evidence. Whether these tools will be sufficient to meet the burden of proof, in my view, is a factual question to be decided on a case-by-case basis. Indirect purchaser actions should not be barred altogether solely because of the likely complexity associated with proof of damages.

[56] Thus, *Pro-Sys Consultants* established that: (1) both direct and indirect purchasers have causes of action for anti-competitive misconduct; and (2) the courts could and should employ techniques to prevent any double counting of the quantum of the defendant's liability.

[57] For present purposes, it very important to note that the indirect purchasers' cause of action is actually built on the idea that they ultimately will have to prove that they did pick up the tab for the overcharge in the distribution channel. In other words, proof of passing-on is a constituent element of the indirect purchasers' cause of action recognized by the Supreme Court in *Pro-Sys Consultants*.

[58] This last thought brings the discussion to the point that I mentioned above; that there is a fundamental flaw in the Defendants' argument in the case at bar, which they say is derived from *Pro-Sys Consultants*. The Defendants submit that to be certifiable as a class action, the Plaintiffs' proposed common issues must have the commonality of demonstrating that each and every Class Member was harmed by the Defendants' alleged misconduct.

[59] In order to explain why this submission is wrong in law, it is necessary to describe what else the Supreme Court decided in *Pro-Sys Consultants*. In that case, in addition to deciding that the indirect purchasers had a cause of action and thereby satisfied the cause of action criterion for certification, the Supreme Court went on to decide whether the other certification criteria were satisfied, and in so doing, the Court elucidated what is necessary for the plaintiff to prove to achieve certification and ultimately what the plaintiff must prove at the common issues trial.

[60] In *Pro-Sys Consultants*, Microsoft argued that it would not be possible to find a common issue because with the overcharge passing through the channel of distribution, it would be unfeasible to prove loss to each of the class members. Justice Rothstein, however, rejected this argument, and he stated at paras. 109-110:

> 109. Microsoft argues that the differences among the proposed class members are too great to satisfy the common issues requirement. It argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these acts occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues.
>
> 110. The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[61] I shall not detail here what Justice Rothstein had to say about the use of expert evidence in establishing common issues about the class members' losses and about whether damages can be calculated on an aggregate basis, which matters I will discuss further later in these Reasons for Decision, but I shall focus here on his conclusion about common harm, which in my opinion, has been misunderstood by the Defendants in the case at bar and does not involve proving that

the injury was suffered by each and every indirect purchaser. At para. 118 of his judgment, Justice Rothstein stated:

> 118. In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied. [Emphasis added]

[62] The Defendants submit that this passage means that for a common issue that would support a class action being certified, there must be either: (a) a demonstrated methodology to show that each and every indirect purchaser would suffer a loss; or (b) a demonstrated methodology to show whether any particular member would suffer a loss. In other words, the methodology must be able to show that a class member qualifies for compensation because it shows that all the class qualifies for compensation or the methodology must show whether or not a particular class member qualifies for compensation. The Defendants submit that this is what Justice Rothstein meant in saying that: "the methodology must offer a realistic prospect of establishing loss on a class-wide basis."

[63] In my opinion, however, the Defendants have incorrectly interpreted Justice Rothstein's judgment. I conclude that the meaning of Justice Rothstein's judgment is that passing-on; i.e., the idea that indirect purchasers ultimately, in whole or in part, pick up the tab of the overpricing is a constituent element of their cause of action. The constituent element is that the price-fixing has reached the indirect purchaser level of the distribution channel.

[64] The consequential common issue from that constituent element is that there must be a methodology to show that the harm inflicted by the overpricing reached the indirect purchasers. Justice Rothstein did not say that it had to be shown that every member of the class suffered an individual loss, but rather he said that it had to be demonstrated that the indirect purchaser class as a whole; i.e., as a group, suffered from the harm inflicted by the wrongdoers. This means that if the indirect purchasers succeeded in showing that the loss reached their level of the distribution channel, then that success for the class did not necessarily lead to success for each and every member of the class. As a corollary, Justice Rothstein meant that if the indirect purchasers failed to show that the overpricing reached their level of the distribution channel, then their cause of action would fail for the whole class.

[65] In understanding what Justice Rothstein meant, it is helpful to refer to what Justices LeBel and Wagner later said in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45 about common success as an ingredient of determining commonality:

> 45. Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, 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.

[66] That Justice Rothstein just meant that for the indirect purchasers to have a claim, there must be overpricing reaching their place downstream in the distribution channel is made clear in

several other passages in his judgment, where he speaks of the "level" of the indirect purchasers in the distribution channel. Thus, he stated at para. 115 of his judgment:

> 115. The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of In *Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (ibid., at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the **overcharges have been passed on to the indirect-purchaser level** in the distribution chain. [Emphasis added]

[67] Paragraph 115 reveals that for the purposes of a certification motion, the plaintiff needs to show some basis in fact that the loss impacted the indirect purchaser class as a group. Practically speaking, this requires economic evidence, and as explained in *Pro-Sys Consultants* and again in *Sun-Rype v. Archer Daniels Midland, supra,* this means that the plaintiff's evidence must show some basis in fact for a methodology that loss is common across the indirect purchaser members of the class. The methodology, however, does not have to prove that each individual member of the hybrid class suffered an individual loss; the methodology just needs to show that the loss impacted the indirect purchasers as a group.

[68] Several other passages of the judgment in the Supreme Court reveal that the debate in the court of first instance at the certification motion in *Pro-Sys Consultants* (which was heard by Justice Myers) and which debate was rejoined in the Supreme Court was whether the plaintiff's expert had provided a methodology adequate to ascertain the extent of passing to establish loss at the indirect purchaser level as a group. (See *Pro-Sys Consultants* at paras. 121-124). These passages reveal that it was, however, not necessary to provide a methodology to show that each and every member of the indirect purchaser class in *Pro-Sys Consultants* had experienced an individual loss. Thus, at paragraph 140 of his judgment, in the context of discussing the preferable procedure criterion, Justice Rothstein made it clear that there might be individual issues for individual class members about the harm they suffered, but this did not detract from the commonality of a methodology with a realistic prospect of establishing loss on a class-wide basis. He stated:

> 140. In the present case, there are common issues related to the existence of the causes of action, but there are also common issues related to loss to the class members. Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of Myers J. that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. I would agree. In the circumstances, I would not interfere with his finding that the class action is the preferable procedure.

[69] Thus, for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of

the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing. If the plaintiff's expert's methodology failed in proof at trial, then the class members' claim would fail across the indirect class members' class because each and every one of them would have failed to prove a constituent element of their cause of action; i.e., that the price-fixing penetrated their place or "level" of the distribution channel, and the Defendants would secure a discharge of liability against all the class members. Conversely, if the methodology proved sound to show that overcharges reached the indirect purchaser place in the distribution channel, then there might have to be individual issues trials to determine each class member's entitlement.

[70] Or, if at trial the methodology to prove loss to the group was sound and a methodology for an aggregate assessment was also established, then the distribution mechanisms of the *Class Proceedings Act, 1992* could be used to determine what is a fair and reasonable distribution and it would not be necessary to have any individual issues trials.

[71] At this juncture of the discussion, a comparison to another cause of action involving economic losses may be helpful in understanding what Justice Rothstein decided. Negligent misrepresentation claims are an example of a claim for pure economic loss. The constituent elements of this claim are: (1) duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation: *Queen v. Cognos*, [1993] 1 S.C.R. 87. Of these five elements, common issues may be derived for the first three elements, and the conventional wisdom is that the reliance and the damage elements are individual issues. In comparison, for indirect purchasers, the constituent elements of their statutory cause of action for economic losses for overpricing, which is established by s. 36 of *Competition Act*, discussed further below, are: (1) a breach of an offence found in the *Act*; (2) overcharges having been passed on to the indirect purchaser level of the distribution chain; and (3) the class member suffering damages as a consequence of the overcharges having been passed on to the indirect purchaser level of the distribution chain. Common issues may be derived for the first two elements of the statutory cause of action but not for the third element, but it may not be necessary to have an individual issues assessment where the damages may be aggregated, after which it is no longer the defendant's concern how those damages are distributed among class members.

[72] Moving on in the discussion of the competition law, the point that complex competition law actions involving a hybrid class of direct and indirect purchasers are potentially certifiable and several other significant points about competition law are made in *Sun-Rype v. Archer Daniels Midland, supra.* One major issue in *Sun-Rype* was whether the additional challenges of a hybrid class justified not certifying the proposed class action. The Supreme Court concluded, however, that a hybrid class could be certified. The second major issue in *Sun-Rype* was whether the plaintiffs had satisfied the identifiable class criterion for certification. On this major issue, the Supreme Court decided that there was no basis in fact for the class definition, and in *Sun-Rype*, the Court refused to certify the hybrid class action.

[73] In *Sun-Rype,* the proposed representative plaintiffs were a direct purchaser and an indirect purchaser of high-fructose corn syrup. The defendants were manufacturers of high-fructose corn syrup, and they were accused of price-fixing and causing harm to beverage manufacturers, wholesalers, retailers, and consumers. For reasons that are not pertinent to the

present discussion, the direct purchasers were held to not have a cause of action, and as already noted above, the claim of the indirect purchasers failed because the proposed representative plaintiff could not show some basis in fact that there were two self-identifiable members of the indirect purchaser class.

[74] The direct purchasers of high-fructose corn syrup would know that they purchased the high-fructose corn syrup, and they would know how many goods they made using the defendants' syrup. However, the indirect purchasers had no way of identifying themselves as purchasing a product containing the defendants' syrup or as having purchased a product containing a non-defendant's syrup or containing a substitute sugar product. Thus, in *Sun-Rype*, the difficulty for the indirect purchasers' proposed representative plaintiff, Wendy Weberg, was that she was unable to meet the low evidentiary standard of showing some basis in fact that two or more persons would be able to determine if they were a member of the class. No similar problem exists in the case at bar, as the indirect purchasers will have little difficulty in knowing whether their notebook computers; tablet computers, cell phones, etc. contain LIB Packs. Information about what type of battery was installed in LIB Products is available online from the manufacturer of the LIB Products and, class members can self-identify if they are indirect purchasers of the LIBs.

[75] For present purposes, what Justice Rothstein had to say in *Sun-Rype v. Archer Daniels Midland* about hybrid competition law class actions, which reiterated his comments in *Pro-Sys Consultants,* is applicable to the case at bar. At paragraphs 19 and 20 of his judgment in *Sun-Rype*, Justice Rothstein observes that an advantage of a hybrid competition class action; i.e., an action including claims of both direct and also indirect purchasers, is that the action inherently avoids double counting if there is an aggregate assessment of damages. He said that if an aggregate assessment was established then any conflict in distributing (allocating) the aggregate damages was no concern of the defendants and no impediment to the certification of the action; he stated:

> 19. In this case, the appellants seek recovery of a defined sum equal to the aggregate of the overcharge. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. Recovery is limited to that aggregate amount, no matter how it is ultimately shared by the direct and indirect purchasers. This was the view of the B.C.C.A. in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 78, and of the Quebec Court of Appeal in *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), at para. 114. The appeal of the latter decision was heard together with *Pro-Sys* and this case. See *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600.
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> 20. To the extent that there is conflict between the class members as to how the aggregate amount is to be distributed upon the awarding of a settlement or upon a successful action, this is not a concern of the respondents and is not a basis for denying indirect purchasers the right to be included in the class action.

[76] At paragraph 38, of his judgment in in *Sun-Rype*, in the context of a discussion of the unjust enrichment claim, Justice Rothstein added:

> It is true that, absent indirect purchasers, the rejection of the passing-on defence entitles direct purchasers to 100 percent of the amount of the overcharge. However, this entitlement is altered when indirect purchasers are included in the action. As explained above, this does not mean, as the respondents suggest, that to allow indirect purchasers to join the action would be "to admit of the

> possibility that a plaintiff could recover twice - once from the person who is the immediate beneficiary of the payment or benefit ... and again from the person who reaped an incidental benefit" .... Rather, it means that the indirect and direct purchasers will share the aggregate amount recovered in the event that the action is successful. To the extent that there are competing claims among the direct and indirect purchasers, I agree with Rice J. that this may be sorted out at a later stage of the proceeding (B.C.S.C., at para. 195). At this stage, both groups share the common interest of maximizing the amount recoverable from the respondents. The indirect purchasers' cause of action in restitution should therefore not be struck out.

[77] Moving on to other points that are necessary to keep in mind to determine the immediate certification motion, in *Sun-Rype v. Archer Daniels Midland*, in the context of the class identification problem, Justice Rothstein again makes the point that there is a difference between establishing that the class - as a class - suffered a loss and whether individual class members suffered a loss. To satisfy the class definition criterion, the Court held that it was necessary to show some basis in fact that at least two persons could prove that they had suffered individual harm. There is, however, nothing in the *Sun-Rype* case that supports the proposition that it must be shown that every individual member of the class suffered economic harm.

[78] The Supreme Court decided *Infineon Technologies AG v. Option consommateurs*, *supra* at the same time as *Pro-Sys Consultants* and *Sun-Rype*.

[79] Under Québec's class proceeding legislation, *Infineon Technologies* was a hybrid class action of direct and indirect purchasers of dynamic random access memory ("DRAM"). The class members alleged that they had been injured by an international price-fixing conspiracy that increased the price paid for DRAM as it worked its way through the distribution channels of the numerous computer and other products that contain DRAM. The Supreme Court upheld the certification (authorization under Québec law) of the class action, and from the perspective of Québec class action law, which is very similar to the common law provinces, the Court replicated the analysis about indirect purchaser price-fixing conspiracies.

[80] Keeping this legal and economic problem in mind, I turn now to the evidentiary, procedural, and factual background of the immediate case. As noted above, I shall return to competition law when I discuss the criteria for certification.

D. EVIDENTIARY BACKGROUND

[81] The Plaintiffs supported their certification motion with evidence from the following witnesses:

- Jennifer Bald, who swore affidavits dated February 20, 2014 and February 6, 2015. Ms. Bald is a Law Clerk at Siskinds LLP, counsel for the Plaintiffs.
- Zain Ul Islam Sayed, who affirmed an affidavit dated February 18, 2014. Mr. Sayed is the President and Director of the Plaintiff, Alpina Holdings Inc., which corporation is a proposed Representative Plaintiff. Mr. Sayed was cross-examined.
- Khurram Shah, who swore an affidavit dated February 18, 2014. Mr. Shah is a Plaintiff and a proposed Representative Plaintiff. Mr. Shah was cross-examined.
- Keith Reutter, Ph.D., an Economist, who swore affidavits dated February 13, 2014 and February 6, 2015. Dr. Reutter was a principal of Berkeley Research Group and then the managing member of Reutter Economics LLC, a consulting firm. He was retained to

provide economic opinion evidence about the market for LIBs. Dr. Reutter was cross-examined.

- Tony Sandhu, who swore an affidavit dated February 16, 2015. Mr. Sandhu is the Senior Vice President and a former Vice President of merchandising at Best Buy Canada Ltd.

[82] The Defendants resisted the certification motion with evidence from the following witnesses:

- Robert Assal, who swore an affidavit dated December 10, 2014. Mr. Assal is the Chief Financial Officer and Vice President of Human Resources of the Defendant Toshiba of Canada Limited, where he has been employed in various roles since 2000.
- Michelle Burtis, who swore an affidavit dated December 16, 2014. Dr. Burtis has a Ph.D. in Economics from the University of Texas at Austin, and she is the Senior Advisor at Cornerstone Research, an economics and finance consulting firm. Dr. Burtis was cross-examined.
- Ron G. Cuthbertson, who swore an sworn dated November 28, 2014. Mr. Cutherbertson is an Executive Management Consultant. He is the former President and CEO of The Source (Bell) Electronics and before that he held executive positions with Circuit City, Best Buy (both in Canada and the United States) and Sears Canada. Mr. Cuthbertson was cross-examined.
- Yasuhir Kono, who swore an affidavit dated December 16, 2014. Mr. Kono is the General Manager of the Business Planning Department at Sony Energy Devices Corporation and General Manager of the Energy Control Department at the Defendant Sony Corporation, where he has been employed since 1999.
- Kevin Layden, who swore an affidavit dated December 4, 2014. Mr. Layden is the President and CEO of Wesbild Holdings Ltd. and former President and COO of Future Shop Ltd. and of Best Buy Canada Limited, where he was responsible for the intergration of Future Shop with Best Buy Inc. Mr. Layden was cross-examined.
- Dong Hyung Lee, who swore an affidavit dated December 12, 2014 and resworn February 27, 2015. Mr. Lee is the General Manager of the Mobile Battery Division, Planning Team at the Defendant LG Chem, Ltd. and has held various positions with LG Chem since 2008. Mr. Lee provided answers to written questions.
- William Moll, who swore an affidavit dated December 15, 2014. Mr. Moll is the President of GS Yuasa Lithium Power Inc., a wholly-owned subsidiary of the Defendant GS Yuasa Corporation. Mr. Moll has been the President since the corporation's formation in April 2006. Mr. Moll provided answers to written questions.
- Aylwin Shu, who swore an affidavit dated December 15, 2014. Mr. Shu is a Retail Manager with over 20 years' experience in the wireless retail industry.
- Steven Washio, who swore an affidavit dated November 25, 2014. Mr. Washio is the Vice President of Sales and Marketing for the Defendant Maxell Corporation of America, where he has been employed for over 27 years.

E. PROCEDURAL BACKGROUND

[83] On June 26, 2013, the Plaintiffs Khurram Shah and Alpina Holdings Inc. commenced a proposed class action under the *Class Proceedings Act, 1992*.

[84] The Plaintiffs claim, among other things, general and special damages for conspiracy and for conduct that is contrary to Part IV of the *Competition Act,* in the amount of $75 million. Having abandoned their claim under s. 46, the Plaintiffs rely on sections 36 and 45 of the *Competition Act*, which are set out above.

[85] Similar litigation has been commenced in British Columbia. Counsel in the British Columbia and Ontario actions are working together to pursue the litigation on a national basis in Ontario. There is also a similar action in Québec being pursued by other counsel.

[86] There is a parallel class proceeding in the United States on behalf of purchasers residing there. In the United States action, certification has not yet been argued.

[87] On February 21, 2014, the Plaintiffs served their Certification Record.

F. FACTUAL BACKGROUND

1. The Parties

[88] Mr. Shah and Alpina Holdings Inc. are resident in Ontario. Alpina Holdings Inc. is a former mobile phone retailer, and Mr. Shah, is a consumer. Mr. Zain Ul Islam Sayed is Mr. Shah's father, and Alpina Holdings is controlled by Mr. Shah's family.

[89] Between January 1, 2000 and December 31, 2011, Mr. Shah purchased five mobile phones from Alpina Holdings that contained LIBs. He also purchased a laptop computer with a LIB from a retailer.

[90] Mr. Sayed is now an employee of Hewlett Packard. He is an experienced businessman. Alpina Holdings was a distributor of cell phones under a dealership agreement with Mobilicity before shutting down in September, 2010. Alpina Holdings purchased various LIBs and LIB Products. It purchased and sold cell phones independent of any plan or cellular service contract, and it also sold service contracts. The prices of the phones sold by Alpina Holdings were the same regardless of whether or not the customer purchased a service plan.

[91] Although in my view nothing turns on this for the purposes of the immediate certification motion, both Mr. Shah and Alpina Holdings were scrutinized on a carriage motion and found to be appropriate for the purposes of awarding carriage to them rather than to a different proposed representative plaintiff in a rival proposed class action. See *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875.

[92] The Defendants are manufacturers of LIBs that are component parts of eight electronic products: notebook computers; cell phones, including smartphones; tablet computers; e-book readers; MP3 players; personal digital assistants; handheld GPS; and handheld video players, that are sold in Canada.

[93] The proposed hybrid class is composed of class members that are the manufacturers, wholesalers, and retailers of the eight electronic products and the pre-teenager, teenager, and adult population of Canada that use those products. It is a very large class.

2. The Production and Marketing of Lithium Ion Batteries

[94] LIBs are a component of rechargeable batteries. The cells are packed together, encased in a shell, and outfitted with a computer chip, circuitry, cabling, or other materials to deliver power to an electronic device. The Plaintiffs submit that there are no economic substitutes for LIBs because they have physical and performance characteristics that distinguish them from other rechargeable batteries such as NiMH batteries.

[95] There are a limited number of LIB manufacturers because of barriers to entry into the industry, including patents, the need for specialized equipment, and an expensive research and development process.

[96] The packaged cells ("LIB Packs") come in three distinct types with different uses. The three types are: (1) cylindrical, (2) prismatic, and (3) pouch, and they have different characteristics, designs, and engineering and manufacturing specifications.

[97] Cylindrical LIBs are produced in a few standard sizes and electrical charges. The cells are encased in a metal canister with protective electronic circuitry and then encased in a hard plastic shell. They are used almost exclusively in notebook computers and are generally standardized for the product. The Plaintiffs submit that cylindrical LIBs are commodity like. In 2011, Canadian imports of cylindrical LIBs were over $4.4 billion. The Defendants held approximately 91-97% of the market share for cylindrical LIBs during the Class Period.

[98] Prismatic LIBs are manufactured in the shape of a small rectangular box. They are commonly enclosed in a hardened plastic or metal cover with protective electronic circuitry. Prismatic LIBs are used primarily in cell phones and other handheld electriconic devices. The shape of prismatic LIBs must be customized to fit the battery cavity of the product, but major mobile phone makers use certain standard shapes to power several different phone models. The Plaintiffs submit that prismatic LIBs are commodity like.

[99] The Defendants held between 75% and 100% of the market share for the supply of prismatic LIBs to the major cell phone manufacturers. During the Class Period the Defendants held 63% of the entire prismatic LIB market.

[100] Pouch LIBs are constructed using a flexible polymer electrolyte and are packaged with protective electronic circuitry, without a rigid outer case. Pouch LIBs are used in cell phones, MP3 players, e-book readers, and tablet computers. The Plaintiffs submit that there was supply-side substitutability, i.e. one Defendant's pouch LIBs could be substituted for their rival's LIBs and that pouch LIBs are commodity like. During the Class Period, the Defendants held approximately 56-77% of the market share for pouch LIBs.

[101] The LIB Packs are used in many small consumer electronic products, including notebook computers, cell phones, smart phones, tablet computers, e-book readers, MP3 players, personal digital assistants, handheld GPS, and handheld video game players.

[102] The companies that manufacture and sell LIBs may be different from the companies that manufacture and sell LIB Packs, but some Defendants both manufacture and pack LIBs.

[103] Original equipment manufacturers ("OEMs") buy LIB Packs for use in their products from various sources, which include cell manufacturers; i.e. the Defendants and LIB packers.

[104] The Defendants submit that the LIBs and LIB Packs are often customized to the

specifications of individual customers for the specific type and model of product into which the battery pack is to be inserted; i.e., the Defendants deny that LIBs and LIB Packs are commodity like. The Plaintiffs, however, submit that the Defendants produced LIBs in a variety of shapes and sizes meaning that OEMs would have been able to substitute one Defendant's LIB for another's LIB at the design stage.

[105] The Plaintiffs submit that but for the conspiracy to fix prices, the price for LIBs would have been competitive between the Defendants.

[106] The Defendants submit that there is not a single market for LIBs but at least three markets; i.e., a market for cylindrical, prismatic, and pouch LIB Packs that are used for different LIB Products. They say that they variously participated in the various markets; i.e., they did not compete with each other in a single LIBs market and that non-Defendants had very substantial sales of certain types of LIBs during significant portions of the Class Period. The Defendants say that for each year from 2003 to 2011, non-Defendants accounted for between 34% and 41% of worldwide sales of prismatic-type LIBs and between 31% and 41% of worldwide sales of pouch-type LIBs for each year from 2004 to 2012. The Defendants submit that there are multiple markets for multiple products, with multiple market participants buying and selling, with different market power and different competitive conditions in each market, all of which vary over time. The Defendants submit that with multiple markets and class members purchasing from Defendants and non-Defendants, there is no common issue whose proof could be extrapolated across the class.

[107] The Defendants submit as an example of the variance in market participation, the situations of the Defendant Maxell Corporation of America, which did not make or sell any LIB pouches during the class period, and the Toshiba Defendants, none of which made any LIBs after 2004.

3. The Allegation of Price-Fixing

[108] The Plaintiffs allege that the Defendants conspired to raise the price of rechargeable LIBs for a period of 11 years and that the conspiracy succeeded in raising the prices of all LIBs including LIBs purchased from manufacturers who were not co-conspirators. In other words, it is the submission of the Plaintiffs that the price-fixing conspiracy of the Defendants affected the prices of all LIBs sold in the marketplace by the Defendants, who had approximately a 70% market share, and by non-Defendants, who had the balance of the market share.

[109] The Plaintiffs allege that both indirect purchasers from the Defendants and also indirect purchasers from non-Defendants, were adversely affected by the conspiracy.

[110] The Plaintiffs allege that the price increases were experienced in part and passed on in part such that each member of the proposed hybrid class of direct and indirect purchasers suffered harm. The Defendants submit that the evidence of their economist, Dr. Reutter, shows some basis in fact for concluding that each and every Class Member suffered a loss.

[111] The Defendants deny any price fixing, and they submit that LIBs and LIBs product prices are determined by a variety of market conditions, which can be different for different purchasers and depend on the characteristics of the particular LIBs or LIBs Product, the competitive alternatives available to the buyer, the relative market power of various buyers and sellers, and the result of individualized negotiations. The Defendants submit that pricing can also be

influenced by the varied pricing strategies available to and adopted by a given seller, for a given product, at a given point in time.

4. The Plaintiffs' Economics Evidence

[112] Dr. Reutter, the Plaintiffs' expert Economist, was asked to consider two questions: (1) Could all members of the proposed class have been impacted by the alleged conspiracy?; (2) Are there acceptable methods available to estimate any class-wide damages that may have resulted from the conspiracy? He answered both questions in the affirmative.

[113] In forming his opinion, he relied on public sources of information, including the websites of the Defendants and others in the industry. He relied on data collected by Statistics Canada and on data found on U.S. government websites. He relied on court filings in the United States proceedings that involved the Defendants Panasonic, Sanyo, and LG Chem.

[114] I pause here to say that the Defendants pound-pound on the drum that Dr. Reutter's opinion is purely theoretical and not grounded on the facts of the case. I find this criticism both inaccurate and unfair. The Defendants' criticism of Dr. Reutter ignores that he familiarized himself with and studied the nature of the LIB manufacturing industry and the market within which the Defendants operate and he examined the Defendants. Their criticism ignores that pre-certification much of the information upon which the Plaintiffs' theory would be proved or disproved has not been disclosed to the Plaintiffs and that the Defendants' economic evidence appears to be just as theoretical.

[115] Further, the Defendants' criticism ignores the law that holds that a plaintiff is not obliged at the certification stage to prove that his or her allegations of wrongdoing are true. At certification time, a plaintiff is only obliged to show that there is some basis in fact to the class identification, the commonality of the proposed questions, the preferability of the class action as the procedural mechanism to prove the issues in the case, and the qualifications of the representative plaintiff; certification is not a merits based analysis of the strengths and weaknesses of the plaintiff's case.

[116] Moving on in the description of the Plaintiffs' economic evidence, it was Dr. Reutter's analysis that the Defendants had 70% of global LIB sales – an alleged fact grounded in the circumstances of this case. It was his opinion that the balance of the market was filled by Chinese manufacturers who made lower quality LIBs for markets in developing countries – an alleged fact grounded in the circumstances of this case. From this market share allocation, Dr. Reutter inferred that if the Defendants acted together they could increase the price of LIBs. It was his view based on the stable market shares of non-Defendants that they were not reducing prices to gain market share and the non-Defendant manufacturers of LIBs may have taken advantage of the increased prices set by the Defendants.

[117] Dr. Reutter examined the market in which the Defendants carried on business and based on economic theory and his analysis of it, he formed the opinion that it was the type of market with the potential for overcharging by conspirators. In paragraph 30 of his report, he stated:

> 30. It [is] accepted in the field of economics that a limited number of market conditions enable firms, if acting together, to have an impact on the price of products in a given industry. These market conditions include: (1) the lack of economic substitutes, (2) a standardized, commodity-like, product; (3) a relatively concentrated market, where a small number of firms account for a large share of industry output; and (4) barriers to entry that limit the ability of firms outside an

> industry to quickly enter and erode supra-competitive prices. An analysis of the LIB market indicates that each of these economic conditions was present during the proposed Class Period. Assuming the alleged collusive activity did in fact occur, I expect that the combined effect of the above economic conditions would have resulted in higher prices for LIBs, and hence Lithium Battery Products, during the proposed Class Period than otherwise would have been the case.

[118] In coming to his opinion, Dr. Reutter examines each of the major market conditions that would provide an opportunity for manufacturers of LIBs to impact the prices of LIBs; namely: (1) the lack of economic substitutes; (2) a standardized, commodity-like, product; (3) a relatively concentrated market; and (4) barriers to entry.

[119] Moving on to Dr. Reutter's opinion with respect to damages assessment, it was his opinion that given that the alleged conspiracy affected three LIB types, a regression analysis model for each of cylindrical, prismatic, and pouch LIBs would quantify the aggregate damages suffered by the Class Members. A regression analysis involves developing an economic model of supply and demand for each type of LIB. Then supply and demand data is gathered and a regression program uses statistical techniques to isolate the impact of the alleged conspiracy by comparing prices before and during and/or during and after the alleged wrongdoing.

[120] It was Dr. Reutter's view that the demand for cylindrical LIBs is largely derived from the demand for notebook computers and that the demand for prismatic LIBs is largely derived from the demand of mobile phones. Since pouch LIBs are used in smartphones, MP3 players, tablet computers and e-book readers, he opined that the regression model would have to take that into account.

[121] It was Dr. Reutter's opinion that the requisite data for his methodology was available from the Defendants, from major retailers like The Source and Best Buy, and from third party sources such as the U.S. Geological Survey (price of raw materials used in LIBs), the London Metals Exchange (price of raw materials used in LIBs), the Bank of Japan and the Bank of Korea (price of labour and energy costs), and the U.S. Bureau of Labor Statistics (price of labour and energy costs) and the Institute of Information Technology (transaction data).

[122] As an alternative to a regression analysis, Dr. Reutter opined that an analysis of the Defendants' costs and price data could reveal the overcharge at the direct purchaser level of the distribution channel. The analysis would use the price-to-cost, or profit ratio method. It was his opinion that the conspiracy would have increased the prices charged for each LIB type to supra-competitive levels, which would result in the Defendants' profits being higher than they would have been, but for the alleged wrongdoing. Thus, an analysis of the Defendants' cost and price data for each LIB type could be used to estimate any direct purchaser overcharges.

[123] Once the overcharge at the direct purchaser point of the distribution channel had been determined, Dr. Reutter said there was a methodology to determine pass through rates, which would apportion the aggregate damages between direct and indirect purchasers of LIBs and LIB Products. It was his view that the determination of pass through rates is a straightforward analysis that can be derived from the elasticity of supply and demand at each level of commerce in the distribution chain. He said competition in electronics sales is strong, resulting in thin margins, which suggests that any overcharge would have been substantially passed through to consumers.

5. The Price-Fixing Investigation by the U.S. Department of Justice

[124] In her affidavits sworn on February 20, 2014 and February 6, 2015, Jennifer Bald, a law clerk at Siskinds LLP, counsel for the Plaintiffs, filed materials that she had retrieved from electronic databases about criminal proceedings in the United States against Sanyo Electric Co. Ltd. and LG Chem Ltd. In those proceedings those Defendants pleaded guilty to price-fixing cylindrical LIBs for use in notebook computer battery packs.

[125] In the U.S. proceedings, Panasonic's subsidiary Sanyo Electric agreed to pay a $10.731 million fine and LG Chem agreed to pay a $1.056 million fine for their respective roles in a LIB conspiracy concerning LIB Packs used in notebook computers from about April 2007 until about September 2008.

[126] In their joint factum at para. 29, the Defendants argue that the Plaintiffs' evidence about the U.S. proceedings is not helpful to the Plaintiffs. The Defendants state:

> In their factum, the plaintiffs attempt to rely on the guilty pleas in the United States following the U.S. Department of Justice ("DOJ") investigation into LIB Cell sales. Those guilty pleas do not assist the plaintiffs. On the contrary, the limited scope of those pleas highlights the lack of commonality which arises from the plaintiffs' broad-brush conspiracy allegations in this proceeding. The U.S. guilty pleas were: a) made by two companies only; b) in respect of only one type of LIB Cell used in one type of LIB product (i.e. cylindrical lithium-ion battery cells used in notebook computer battery pack forms); and c) in respect of a time period significantly narrower than the Class Period (i.e., from about April 2007 until about September 2008). The DOJ closed its investigation without laying any other charges or obtaining any guilty pleas by other defendants, even though the DOJ investigated LIB Cell producers in general (and was not restricted to these two companies nor to cylindrical Cells). The Canadian Competition Bureau has not investigated the conduct of LIB Cell manufacturers.

[127] Without necessarily agreeing with everything the Defendants state, I do agree that for the purposes of this certification motion, there is nothing in the United States proceedings that assists the Plaintiffs in obtaining certification. In the discussion that follows, all of my decisions are made without regard to the proceedings in the United States.

G. DISCUSSION AND ANALYSIS

1. Introduction – Certification as a Class Proceeding

[128] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[129] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[130] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[131] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26 to 29; *Hollick v. Toronto (City)*, *supra* at paras. 15 and 16.

2. The Quintessential Class Action or Class Action Genre Argument

[132] Relying on Justice Cumming's observation in *Ford v. F. Hoffman-La Roche Ltd.* (2005), 75 O.R. (3d) 758 (S.C.J.), the Plaintiffs argue that competition law cases are particularly well-suited for class certification. In the *Ford* case, Justice Cumming stated at para. 34:

> 34. Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade.

[133] Then, the Plaintiffs trot out a list of cases where certification of competition law actions has been granted: visualize: *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2008 BCSC 575, rev'd 2009 BCCA 503 leave to appeal refused, [2010] SCCA No. 32; *Pro-Sys Consultants Ltd. v. Microsoft*, *supra; Option Consommateurs v. Infineon Technologies AG*, 2008 QCCS 2781, rev'd 2011 QCCA 2116, rev'd 2013 SCC 59; *Fanshawe College of Applied Arts & Technology v. LG Philips LCD Co.*, 2011 ONSC 2484, leave to appeal granted on other grounds 2011 ONSC 6645; *Crosslink Technology Inc. v. BASF Canada*, 2014 ONSC 1682, leave to appeal refused 2014 ONSC 4529 (Div. Ct.); *Irving Paper Ltd v. Atofina Chemicals Inc.*, [2009] O.J. No 4021 (S.C.J.), leave to appeal denied 2010 ONSC 2705; *Fairhurst v. Anglo American PLC,* 2014 BCSC 2270 and very recently *Airia Brands Inc. v. Air Canada*, 2015 ONSC 5352.

[134] I accept that a particular class action may be quintessential in that - after an analysis of the evidence - it is found to be a paradigm of a certifiable class action, but I do not accept that this happens *a priori* based on the genre of the class action.

[135] It might be nice if class action judges could merrily accept the "this-is-a-quintessential class-action argument." Then, we could write one sentence certification decisions along the lines of: "Class Counsel has found a suitable representative plaintiff for another class action of the competition law genre and, therefore, the motion for certification is granted." However, because of s. 5 of the *Class Proceedings Act, 1992,* class action judges are actually obliged to do the laborious work of scrutinizing each class action to ascertain whether all the certification criterion have been satisfied for that particular class action.

[136] As I stated recently in *O'Brien v. Bard Canada,* 2015 ONSC 2470 at para. 190, "no class action is quintessentially certifiable" and "each class action of whatever genre must be individually assessed." In *Pro-Sys Consultants Ltd. v. Microsoft*, *supra at* para. 526, one of the cases the Plaintiffs rely on in support of the "this-is-a-quintessential class-action" argument, Justice Rothstein stated that the analysis of the evidence must not involve such a superficial analysis as to amount to nothing more than symbolic scrutiny.

[137] In the case at bar, I shall have regard to the various competition law cases for the legal wisdom they contain, but I do not feel bound to certify this competition law action because a particular genre of cases has been certified in the past or that the trend of the case law of competition law cases is toward certification.

3. The Some-Basis-in-Fact Test

[138] The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification: *Hollick v. Toronto (City)*, *supra* at para. 22.

[139] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, *supra* at paras. 28 and 29. However, the plaintiff must show "some-basis-in-fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action: *Hollick v. Toronto (City)*, *supra* at paras. 16-26.

[140] In particular, there must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140. In order to establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members: *Pro-Sys Consultants v. Microsoft*, *supra* at para. 110.

[141] Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend: *Williams v. Canon Canada Inc.*, 2011 ONSC 6571; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Ernewein v. General Motors of Canada Ltd.*, [2005] B.C.J. No. 2370 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).

[142] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification, but, in such cases, the issues are not decided on the basis of a balance of probabilities but rather on that of the much less stringent test of "some-basis-in-fact": *Hollick v. Toronto (City)*, *supra* at paras. 16-26; *Cloud v. Canada*, [2004] O.J. No. 4924 (C.A.), at para. 50.

[143] The some-basis-in-fact test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case; the focus at certification is whether the action can appropriately go forward as a class proceeding: *Pro-Sys Consultants v. Microsoft, supra*; *McCracken v. CNR Co.*, 2012 ONCA 445.

[144] The evidence on a motion for certification must meet the usual standards for admissibility: *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744, aff'd 2013 ONSC 1169 (Div. Ct.); *Williams v. Canon Canada Inc., supra*; *Ernewein v. General Motors of Canada Ltd.*, *supra*; *Schick v. Boehringer Ingelheim (Canada) Ltd.,* 2011 ONSC 63 at para. 13.

[145] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive and if the expert evidence

is admissible the scrutiny of it is modest: *Crosslink Technology Inc. v BASF Canada*, *supra* at para. 66; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76. In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge: *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260.

4. Cause of Action Criterion

(a) General Principles

[146] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992.*

[147] Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[148] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, *supra* at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 , rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469.

(b) Discussion and Analysis

(i) Introduction: Cause of Action Criterion

[149] The Plaintiffs assert four causes of action: (1) a statutory cause of action pursuant to sections 36 and 45 of the *Competition Act*; (2) unlawful means conspiracy; (3) predominant purpose conspiracy; and (4) unjust enrichment, which is a restitutionary claim.

[150] The Defendants submit that Plaintiffs' Statement of Claim does not disclose a reasonable cause of action with the exception of the claim for a statutory remedy for breach of s. 45 of the *Competition Act*, but in respect of only some Class Members; i.e., the Defendants submit that the Umbrella Purchasers do not have a cause of action and thus the Umbrella Purchasers should be excluded from the class for the statutory cause of action.

[151] As the discussion below will reveal, the Defendants' arguments about the Plaintiffs' four causes of action not satisfying the cause of action criterion are complex and difficult arguments, and it would, therefore, be easy for me to avoid analyzing the merits of them by taking refuge in the conclusion that it is not plain and obvious that the Plaintiffs' causes of action will ultimately fail. I am, however, not going to take that approach, because I very much agree with the

comments of Madam Justice Neilson in *Koubi v. Mazda Canada Inc.*, *supra,* which comments were approved and extended by Madam Justice Newbury in *Wakelam v. Wyeth Consumer Healthcare*, *supra* at para. 64, a case that was much debated by the parties in the case at bar, where Justice Newbury, referring to Justice Neilson's judgment in *Koubi*, stated:

> 64. In so ruling, [Justice Neilson] acknowledged that it is "admittedly difficult" to strike a claim as having no prospect of success in the context of recent class action decisions. The issue was, however, a matter of law alone which did not require a factual record for determination. (para. 80.) As she explained: ...
>
> > I have considered whether this result unreasonably interferes with the objectives of class proceedings described by Chief Justice McLachlin in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at 27-29, [2001] 2 SCR 534. I appreciate that while striking Ms. Koubi's claim at this early stage may serve judicial economy, it may thwart access to justice for the class and may not serve the objective of deterring the appellants and other manufacturers and sellers from similar actions. Nevertheless, while one might admire the strategic and creative use of a novel doctrine to transform individual loss to a common issue in a class proceeding, I am satisfied it does not benefit the parties or the court to permit such a claim to proceed when it has no hope of success. ...
>
> I fully agree with these observations (by which I am bound in any event) and would add that scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context. Certainly the *Hunt v. T & N plc* test is an easy one to meet, but it is not surmounted in *all* cases. As recent decisions of the Supreme Court of Canada discussed below illustrate, it is likely to be beneficial to all concerned, including the justice system, if such questions are directly addressed when raised at an early stage, rather than left for a trial that may never take place, or for another court in another case.

[152] I also agree and I am bound by the comments of Chief Justice McLachlin about the cautious but proactive use of the court's power to scrutinize causes of action. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, which I discuss below, she stated at paras. 19-20:

> 19. The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> 20. This promotes two goods - efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

(ii) Sections 36 and 45 of the *Competition Act*

[153] Section 36 of the *Competition Act* (set out above) grants persons a statutory cause of action. More precisely, pursuant to s. 36, persons who have suffered loss as a result of conduct that is contrary to Part VI of the *Act* (which includes s. 45, set out above) may sue to recover from the wrongdoers an amount equal to the loss suffered.

[154] Before its amendment, effective March 12, 2010, s. 45 of the *Competition Act* made it an

offence to conspire, combine, agree or arrange with another person to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof, or to otherwise restrain or injure competition unduly.

[155] The current, post-March 12, 2010, version of s. 45, makes it an offence to conspire, agree or arrange with another person to: (a) fix, maintain, increase or control the price for the supply of a product; (b) allocate sales, territories, customers or markets for the production or supply of a product; or (c) fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

[156] Although the Defendants would exclude the Umbrella Purchasers, the Defendants concede that the Plaintiffs have shown a cause of action under sections 36 and 45 of the *Competition Act*.

[157] Accordingly, the Plaintiffs have satisfied the first criterion for certification for at least one claim, the statutory cause of action.

(iii) The Cause of Action for the "Umbrella Purchasers"

[158] The Plaintiffs propose a class definition that would include all persons in Canada who purchased LIBs and LIBs Products during the proposed Class Period, regardless of who made the product being purchased. Thus, the proposed class includes what the Defendants have labelled "Unconnected Purchasers" or "Umbrella Purchasers"; i.e., purchasers who did not purchase indirectly from the Defendants but rather who purchased indirectly from upstream non-Defendants, which manufactured LIBs and LIB Packs.

[159] The theory of umbrella liability is that cartel activity could create an "umbrella" of supra-competitive prices that enable non-cartel members to set their prices higher than they otherwise would have under normal conditions of competition, thus affecting Umbrella Purchasers.

[160] In the case at bar, the Plaintiffs submit that they will prove that the Defendants had market power and were able to impact the entire LIB market, and, therefore, all Class Members suffered loss or damage. The Plaintiffs say that difficulties in proving the losses of those making purchases from a non-Defendant is not a reason to preclude the Plaintiffs from attempting to establish umbrella claims.

[161] Umbrella claims have been certified; see: *Irving Paper Ltd. v. Atofina Chemicals Inc.*, *supra*; *Fanshawe College of Applied Arts & Technology v. LG Phillips LCD Co.*, *supra*; *Crosslink Technology Inc. v. BASF Canada*, *supra*.

[162] However, none of these decisions have specifically addressed the issue of whether "Umbrella Purchasers" have a cause of action, which, as I shall explain below, ultimately is an issue of interpreting the *Competition Act*.

[163] From the perspective of Canadian law, adding indirect purchasers from non-defendants as class members is a novel claim, and the Defendants submit that on reasoned analysis informed by legal principles and policy, it is plain and obvious, there is no such claim. The Plaintiffs, not surprisingly, submit that it is not plain and obvious that Umbrella Purchasers do not have a cause of action for the harm caused by the Defendants.

[164] The Defendants offer five reasons why the claim of the Umbrella Purchasers does not disclose a cause of action. First, the Defendants submit that s. 36, upon which the Plaintiffs rely,

is not a substantive law provision, and, therefore, s. 36 cannot introduce a cause of action. Second, the Defendants submit assuming s. 36 can introduce a substantive cause of action, then as a matter of interpreting the scope of that cause of action, allowing a claim by Umbrella Purchasers would be inconsistent with restitutionary law. Third, the Defendants submit that assuming s. 36 can introduce a substantive cause of action, then as a matter of interpreting the scope of that cause of action, the Defendants' liability would be indeterminate and uncircumscribed and this is contrary to legal policy about economic loss torts. Fourth, the Defendants submit that the proposed new cause of action is unjust because the Defendants would be liable for the independent pricing decisions of non-Defendants, which they submit are intervening acts that break any purported causative link between Umbrella Purchasers and the Defendants. Fifth, the Defendants submit that to the extent that tort law has a role to play in behaviour modification and deterrence of wrongdoing, there is no need to extend liability to include compensation for Umbrella Purchasers.

[165] I do not agree with the Defendants' first reason for concluding that there is no cause of action by Umbrella Purchasers but, generally speaking, I do agree with their other four reasons for concluding that it is plain and obvious that the Umbrella Purchasers do not have a cause of action against the Defendants.

[166] With respect to the Defendants' first submitted reason (the one that I do not rely on), it is true that in *General Motors of Canada Ltd. v. City National Leasing, supra,* at p. 673, Chief Justice Dickson for the Supreme Court held that what is now s. 36 of the *Competition Act* is only a remedial provision, not a substantive part of the *Act,* and not the source of a general cause of action, but that description of s. 36 only begs the question whether the harm caused to the Umbrella Purchasers arises from conduct contrary to Part VI of the *Act*, which is a substantive provision. In other words, the genuine issue to be determined is not the scope of s. 36, which is procedural, but the issue is what is the scope of the Defendants' liability under s. 45 of the *Act*, which is the substantive provision that infuses the procedural one. As I shall now explain, the scope of s. 45 does not reach Umbrella Purchasers.

[167] I agree with the Defendants' submission that the Umbrella Purchasers' claim is inconsistent with restitutionary law. Restitution is concerned with the recovery of ill-gotten gains, but the indirect purchases by the Umbrella Purchasers did not yield any gain to the Defendants and rather it is non-Defendants who are enriched by advertently or inadvertently joining the bandwagon of price-fixing. Extending the scope of s. 45 to include Umbrella Purchasers is not supported by restitutionary law.

[168] In reaching this conclusion, I acknowledge that in *Pro-Sys Consultants v. Microsoft*, *supra* and in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company, supra*, the Supreme Court accepted the argument that there might be a restitutionary claim by indirect purchasers, and I recognize that in *Pro-Sys Consultants,* the Supreme Court allowed the indirect purchasers' restitutionary claims to be certified. In those cases, the defendants unsuccessfully argued that there could be no restitutionary claim because the transfer of wealth from the indirect purchases was indirect and did not involve a direct transfer of wealth to the upstream wrongdoer. In advancing their unsuccessful arguments, the defendants in both cases relied on *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, where Justice McLachlin, as she then was, held at p. 797, that the defendant must be enriched and that the claim in unjust enrichment must be based on "more than an incidental blow-by" and that "a secondary collateral benefit would not suffice." Justice Rothstein in the circumstances of *Pro-Sys Consultants*, however, did not think

that it was plain and obvious that the indirect purchasers, (who had just gained a cause of action for anti-competitive conduct) did not have a cause of action for unjust enrichment. Justice Rothstein stated at para. 87:

> 87. .... The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent that the benefit to Microsoft is an "incidental blow-by" or "collateral benefit". Second, Pro-Sys relies on *Alberta Elders*, which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.

See also *Sun-Rype Products Ltd. v. Archer Daniels Midland Company, supra*, at paras. 33-38.

[169] Thus, I acknowledge that indirect purchasers may have a restitutionary cause of action. However, it is to be noted and emphasized that in the immediate case the Defendants' objection to the restitutionary claim of the Umbrella Purchasers is different than the objection of the defendants in *Pro-Sys Consultants* and *Sun-Rype*. Unlike the situation of the indirect purchasers in those cases, there is not even an indirect transfer of wealth or collateral benefit to the Defendants.

[170] In the case at bar, the transfer of wealth is to competitor non-Defendants in a different channel of distribution. In the case at bar, there is no relationship, direct or indirect, between the Umbrella Purchasers and the Defendants, apart from the fact that they are trading in the same LIB market. To be clear, in those other cases, the defendant Microsoft's and Archer Daniels Midland's objection was that it was not the direct beneficiary of any enrichment, which rather went to a lower participant in the channel of distribution; in contrast, in the immediate case, the Defendants are not a participant in the channel of distribution involving the transfer of wealth from the Umbrella Purchasers.

[171] While it is at least arguable that the Defendants in the immediate case caused harm to the Umbrella Purchasers, for which there is the statutory cause of action, it is not arguable that the Defendants enjoyed any indirect benefit from the harm they inflicted on the Umbrella Purchasers. Thus, there is merit to the Defendants' argument that the Umbrella Purchasers' claim is inconsistent with restitutionary principles.

[172] I also agree with the Defendants' argument (which emerged more at the hearing of the motion, than it did in their joint factum), that allowing the Umbrella Purchasers' claim would result in indeterminate liability and must, therefore, be rejected. The Defendants' argument is similar to the successful argument made in *R. v. Imperial Tobacco Canada Ltd., supra*.

[173] In *R. v. Imperial Tobacco Canada Ltd.*, Mr. Knight brought a class action against Imperial Tobacco seeking refunds and punitive damages with respect to the sale of "mild" cigarettes. In a companion action, the government of British Columbia sued Imperial Tobacco seeking to recover the cost of paying for the medical treatment of individuals who suffered from tobacco related illnesses. Imperial Tobacco defended the claims, and it also brought a third party claim against Canada for, among other things, negligent misrepresentation, negligent design, and failure to warn. Canada moved to have the third party claim dismissed for failure to show a reasonable cause of action. Canada's argument was that allowing the third party claim would result in indeterminate liability and, therefore, the claim must be rejected as inconsistent with legal principle. This argument was successful.

[174] In my opinion, Chief Justice McLachlin's reasons in *R. v. Imperial Tobacco Canada Ltd.* about indeterminate liability at paragraphs 97-101 apply equally to the circumstances of the Defendants and the Umbrella Purchasers in the case at bar. In *R. v. Imperial Tobacco Canada Ltd.,* the Chief Justice stated:

> *Indeterminate Liability*
>
> 97. Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.
>
> 98. The tobacco companies respond that Canada faces extensive, but not indeterminate liability. They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.
>
> 99. I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.
>
> 100. The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, per Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.
>
> 101. Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.
>
> [Emphasis added]

[175] In my opinion, the Umbrella Purchasers' claim would impose indeterminate liability on the Defendants and the claim would be unfair because the law, generally speaking, does not impose liability on one person for the conduct of others, and in the instance of the Umbrella Purchasers, the Plaintiffs' seek to make the Defendants liable for the advertent, inadvertent, voluntary, or involuntary conduct of the non-Defendants in taking advantage of the price-fixing.

[176] Thus, I conclude that it is plain and obvious that the Umbrella Purchasers do not have a reasonable cause of action and they should be excluded from class membership.

[177] Finally, before moving on to consider the Plaintiffs' other causes of action, I should note that had I concluded that the Umbrella Purchasers had a cause of action against the Defendants, I

would not have found this class action the preferable procedure for the resolution of that unjust enrichment cause of action. Here, I note that during oral argument, the Plaintiffs conceded that including the Umbrella Purchasers would require a subclass for them, but, in my opinion, their inclusion goes beyond constituting a subclass and their inclusion would raise difficult issues about the commonality of the proposed common issues and would make the class proceeding unmanageable including the complicating prospect of third party claims against the non-Defendants and heightened conflicts between the Class Members if the action ever got so far as the distribution of a judgment or settlement.

(iv) Conspiracy

[178] Although the *Competition Act* statutory cause of action satisfies the first criterion for certification, the Plaintiffs also seek to certify their common law conspiracy actions and the restitutionary unjust enrichment claim (which has its judicial roots in the common law action for moneys had and received). The Defendants, however, submit that the conspiracy and the unjust enrichment claims are not certifiable and, along with their associated common issues, should not be certified.

[179] I foreshadow to say that although I conclude that the Plaintiffs have adequately pleaded a conspiracy claim, in the end result, I will not be certifying the conspiracy claims because I agree with the Defendants' argument that the unlawful means conspiracy claim (and the unjust enrichment claim) are precluded by the statutory cause of action under the *Competition Act,* and in my opinion, while not precluded by the statutory cause of action, the predominant purpose conspiracy claim, which barely satisfied the standard for pleading a conspiracy claim, fails to satisfy the common issue and the preferable procedure criterion.

[180] The elements of a claim of civil conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants: (a) use some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff, or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and, (4) the plaintiff suffers damages as a result of the defendants' conduct: *Hunt v. T & N plc*, *supra*; *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, *supra*; *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.); *Knoch Estate v. John Picken Ltd.* (1991), 4 O.R. (3d) 385 (C.A.); *Pro-Sys Consultants v. Microsoft*, *supra*.

[181] It should be noted that there are, doctrinally speaking, two types of civil conspiracy; namely: (1) unlawful means conspiracy; and (2) predominant purpose conspiracy (intention to injure conspiracy).

[182] The second type of conspiracy has the potential of making group activity unlawful notwithstanding that the alleged misconduct would be lawful for an individual. It should also be noted that the unlawful conduct for the tort of civil conspiracy is different than the unlawful conduct that is a constituent element of the tort of intentional interference with economic relations: *Agribrand Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460. In *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.,* 2014 SCC 12, the Supreme Court held that a statutory breach could not provide the basis for the tort of unlawful interference with economic relations.

[183] In *Pro-Sys Consultants v. Microsoft*, *supra* at paras. 74-75, Justice Rothstein described predominant purpose conspiracy as follows:

> 74. Predominant purpose conspiracy is made out where the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and the plaintiff does in fact suffer loss caused by the defendant's conduct. Where lawful means are used, if their object is to injure the plaintiff, the lawful acts become unlawful (*Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-72).
>
> 75. It is worth noting that in *Cement LaFarge*, Estey J. wrote that predominant purpose conspiracy is a "commercial anachronism" and that the approach to this tort should be to restrict its application:
>
> > The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *Lonrho, supra*, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

[184] In my opinion, in the case at bar, the Plaintiffs have adequately pleaded a claim for unlawful means conspiracy, and they, just barely, have adequately pleaded a claim for predominant purpose conspiracy. In this last regard, I am bound by what Justice Rothstein said at para. 78 of his judgment in *Pro-Sys Consultants v. Microsoft*, *supra*:

> 78. .... Pro-Sys argues that its pleadings state that Microsoft acted with the predominant purpose of injuring the class members which resulted in, among other things, increased profits. While the pleadings could have been drafted with a more precise focus, I would hesitate on a pleadings application to rule definitively that the predominant purpose conspiracy pleading is so flawed that no cause of action is disclosed. At this stage, I cannot rule out Pro-Sys's explanation that Microsoft's primary intent was to injure the plaintiffs and that unlawfully increasing its profits was a result of that intention. For this reason, I cannot say it is plain and obvious that Pro-Sys's claim in predominant purpose conspiracy cannot succeed.

[185] I turn then to the Defendants' argument based on the decision of the British Columbia Court of Appeal in *Wakelam v. Wyeth Consumer Healthcare*, *supra* and several other cases. Here, the Defendants submit that the effect of the *Wakelam* decision is to preclude the certification of the unlawful means conspiracy claim and also the unjust enrichment claim, both of which are based on an alleged breach of s. 45 of Part VI of the *Competition Act*.

[186] *Wakelam* was a proposed consumer class action based on alleged misleading and deceptive consumer practices in relation to the marketing of children's cough medicine contrary to s. 52 of the *Competition Act*. There was also a claim based on contravention of British Columbia's *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, but for the present purposes of an analysis of the Defendants' argument based on the *Wakelam* decision, I need not address that claim.

[187] In *Wakelam*, the theory of the plaintiff's, Ms. Wakelam's, action was that by their breach of s. 52 of the *Competition Act,* the defendant manufacturers had been enriched and there should be an award in restitution to the class members, none of whose children had suffered any

physical harm from the purchases of children's cough medicine. The motions judge certified Ms. Wakelam's action as a class action. For reasons that will shortly become apparent (when I discuss the British Columbia Court of Appeal's recent retreat from *Wakelam* in *Watson v. Bank of America Corporation, supra*), it is important to note that it was not a part of Ms. Wakelam's case to advance a tort claim. She was advancing only restitutionary claims.

[188] In *Wakelam,* on appeal from Justice Grauer's certification of the action, the British Columbia Court of Appeal decertified the action, and Justice Newbury stated that Parliament did not intend that the statutory right of action of the *Competition Act* should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI of the *Competition Act*. Thus, Justice Newbury stated at paras. 89-90:

> 89. Parliament has not seen fit to amend s. 36 since its predecessor was enacted, nor to provide additional private law remedies for contraventions of Part VI of the Act. We were not referred to anything that suggests the statutory remedies provided by that Part are "inadequate" (to use the term employed in *Macaraeg, supra.*) The statutory right of action remains "hedged about by restrictions" (to use the phrase of Glanville Williams in "The Effects of Penal Legislation on the Law of Tort" (1960) 23 *M.L.R.* 233, at 244), including the two-year limitation imposed by s. 36(4). The Court in *General Motors* was careful to emphasize that this right of action was part of the "well-integrated scheme" of the whole Act, and that it did not create a right of action "at large". Had it done so, it appears the constitutional verdict in *General Motors* might have been different.
>
> 90. Section 36 clearly limits recovery for pecuniary loss to "the loss or damage proved to have been suffered" by the plaintiff, together with possible investigatory costs incurred by the plaintiff. I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI. It follows in my view that the certification judge did err in finding that the pleading disclosed a cause of action under the *Competition Act* for which a court might grant restitutionary relief; and that accordingly, paras. 34-38 of Ms. Wakelam's statement of claim do not disclose a cause of action.

[189] Relying on the literal language of the *Wakelam* judgment, the Defendants in the case at bar submit that both the tort claim for conspiracy and also the restitutionary claim for unjust enrichment are precluded by the statutory cause of action under the *Competition Act*.

[190] Recently, however, in *Watson v. Bank of America Corporation, supra,* a decision released on August 18, 2015, after the delivery of the Defendants' joint factum in the immediate case and less than two weeks before the commencement of oral argument, the British Columbia Court of Appeal disavowed that *Wakelam* had anything binding to say about the *Competition Act* precluding tort claims, including tort claims for unlawful means conspiracy. Thus, as a matter of relying on precedent, the effect of the recent *Watson* decision was to kick the legs out of the Defendants' argument relying on *Wakelam* insofar as it precluded the unlawful means conspiracy tort cause of action.

[191] I should also note that even before the British Columbia Court of Appeal's decision in *Watson,* the lower courts in that province were rejecting the argument that the *Competition Act* had the effect of precluding tort claims for conspiracy to contravene the *Competition Act*. See: *Pro-Sys Consultants Ltd v. Microsoft Corp*, 2014 BCSC 1280 at paras. 36, 38, 42-43; *Fairhurst v. Anglo American PLC, supra*. I should also note that there was existing case law recognizing that a breach of the *Competition Act* was an unlawful act for the purposes of satisfying this constituent element of the tort of conspiracy. See *Apotex Inc. v. Hoffman LaRoche Ltd.*, [2000] O.J. No. 4732 (C.A.); *Dale v. Toronto Real Estate Board*, 2012 ONSC 512, leave to appeal

refused 2012 ONSC 1540 (Div. Ct.). And I note that in *Wellman v. Telus Communications Co.*, 2014 ONSC 3318, Justice Conway declined to follow the motions judgment in *Watson* that followed *Wakelam,* and I note that on August 26, 2015, five days before the commencement of oral argument in the immediate case, in *Airia Brands Inc. v. Air Canada*, *supra*, Justice Leitch certified a conspiracy claim in a competition law class action.

[192] With this *Vesuvius* like explosion of case law raining on the Defendants shortly before the argument of the motion, at the certification motion, they argued that the British Columbia Court of Appeal got in right in *Wakelam* and wrong in *Watson* and that the Ontario courts and other courts across the country in certifying unlawful means conspiracy claims in competition law claims had not considered or understood the preclusion argument advanced in *Wakelam* and thus were neutral authorities or the courts were wrong in certifying the unlawful means conspiracy claims.

[193] For my part, I do not propose to approach the Defendants' argument initially as a matter of what other courts may have decided, and rather I shall approach the matter as a matter of first principles and then analyze what the case law says. I think this approach is preferable to beginning with what was or was not decided by the British Columbia Court of Appeal and other courts, because upon reading the case law, it strikes me that the defendants and plaintiffs in those cases, some of whom were represented by the same lawyers that appeared in front of me, did not make the same arguments that were made before me.

[194] The principle that the Defendants rely on in precluding the claims that are tethered in an alleged breach of s. 45 of the *Competition Act* is a matter of statutory interpretation about the effect of a statute on common law causes of action. The precise principle that the Defendants rely on is taken from *Orpen v. Roberts*, [1925] S.C.R. 364 at pp. 369-70, where Justice Duff, as he then was, stated:

> Where the offence consists in the non-performance of a duty imposed by statute or the non-observance of a prohibition created by statute, then the rule, based upon the *Statute of Westminster*, 13 Edw. V, c. 50, is, as stated in *Comyn's Digest* ("Action upon Statute" (F)):
>
> > "In every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law."
>
> Obviously, this leaves it to be determined in each case whether the enactment relied upon was passed for the benefit of the person asserting the right to reparation or other relief; and, assuming that question to be answered in the affirmative, there may still be the general principle to be considered that, to quote Lord Selborne in *Brain v. Thomas*, 50 L.J.Q.B. 662:
>
> > "Where a statute creates an offence, and defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined, and no other."
>
> But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty: *Atkinson v. Newcastle Waterworks Company*, 2 Ex. D. 441, at pages 446 and 447.

[195] *Orpen v. Roberts* was considered by the Ontario Court of Appeal in *Stewart v. Park Manor Motors Ltd.,* [1968] 1 O.R. 234 (C.A.), where Justice Schroeder, after quoting from the *Orpen* decision, stated at para. 9:

> It was observed by Romer, L.J., in *Solomons v. R. Gertzenstein Ld.*, [1954] 2 Q.B. 243 at p. 266, that:
>
> > No universal rule can be formulated which will answer a question whether in any given case an individual can sue in respect of breach of statutory duty.
>
> An examination of the authorities makes it clear that in the determination of this question it ought to be considered whether the action is brought in respect of the kind of harm which the statute was intended to prevent, if the person bring the action is one of the class which the statute was designed to protect, and if the special remedy provided by the statute is adequate for the protection of the person injured.

[196] Earlier in his judgment in *Stewart v. Park Manor Motors Ltd.*, at para. 8, Justice Schroeder stated:

> 8. Where a statute creates a liability not existing at common law and provides a particular remedy for enforcing it, the question is raised as to whether the particular remedy provided is the only remedy or whether there is, in addition, a right of action for damages or other relief based on the breach of the statutory duty. As statutory duties deal with a great variety of matters of varying degrees of importance and are directed to a number of different objects it is impossible to give a simple, affirmative or negative answer to this question. Everything depends upon the object or intention of the statute. Liability "must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed": per Lord Cairns, L.C., in *Atkinson v. Newcastle Waterworks Co.* (1877) 2 Ex. D. 441 at p. 448. The general principle stated by Lord Halsbury, L.C. in *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387 at p. 394, upon which the appellant relies, is a familiar one, but as was stated by Lord Macnaghten, at p. 397:
>
> > Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience.
>
> The test was applied by Bankes, L.J., in *Waghorn v. Collison* (1922), 91 L.J.K.B. 735, where he stated at p. 736:
>
> > ... I think that, looking at the language of the section, and regarding the scope of the Act, the Legislature did not intend the remedy to be exclusive -- namely, procedure before Justices.
>
> That decision involved an interpretation of s. 4 of the *Corn Production Act, 1917* (U.K), c. 46, which provided that an employer who failed to pay a workman in agriculture the minimum wage fixed by the Act should be liable on summary conviction to a pecuniary penalty and it was held that it did not exclude the jurisdiction of the High Court to entertain a claim for arrears of wages based on the difference between the amount paid and the minimum rate fixed by the Act.

[197] The British Columbia Court of Appeal considered the principle from *Orpen v. Roberts* in *Macaraeg v. E. Care Contact Centers Ltd., supra*, where Justice Chiasson stated at paras. 73-74:

> 73. The law is clear: the general rule is there is no cause of action at common law to enforce statutorily-conferred rights. The exception arises when, on a construction of the legislation as a whole, the court concludes the legislators intended that statutorily-conferred rights can be enforced by civil action. An examination of the cases suggests that the rights are not enforced *per se*, that is, standing alone, but are enforced in a recognized cause of action: .... In *Saskatchewan Wheat Pool*

v. Canada, [1983] 1 S.C.R. 205 (S.C.C.) at 222-223, the court stated that breach of a statute is evidence of negligence:

> The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England.

> 74. In my view, in ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic. ...

[198] In *Koubi v. Mazda Canada Inc.*, *supra* the British Columbia Court of Appeal considered the interpretative issue of whether the Legislature intended the province's *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, (the "*BPCPA*") to be a comprehensive code that precluded resort to restitutionary relief. In this case, Madam Justice Neilson analyzed the *BPCPA* and concluded that resort to waiver of tort was precluded. She stated at paras. 63 and 64 of her judgment:

> 63. A close examination of the statute's legislative objectives and provisions reveals a clear intent to provide an exhaustive code regulating consumer transactions, directed to both protection of consumers and fairness and consistency for all parties in the consumer marketplace. The *Act* has over 200 provisions that comprehensively establish, administer, and enforce statutory rights and obligations directed to the regulation of consumer transactions in a multitude of circumstances. It provides extensive powers and remedies to a statutory director and investigative staff to ensure compliance with its requirements. ... It also enacts a panoply of statutory sanctions for suppliers and other offenders who breach the statutory rights of consumers, including administrative penalties of up to $50,000 for a corporation, and offences with penal consequences that include fines of up to $100,000 for a corporate offender.

> 64. I discern nothing in the BPCPA to support the view that the Legislature intended to augment its statutory remedies by permitting consumers to mount an action against a supplier for restitutionary relief based on the novel doctrine of waiver of tort. Such a conclusion is inconsistent with the express language of s. 171, 172(3) (a) and s. 192 which clearly limit recovery for pecuniary loss to restoration of the consumer's own damages or loss arising from a deceptive act.

[199] In *Orpen v. Roberts, supra* and *Koubi v. Mazda Canada Inc.*, *supra,* the courts decided that the plaintiff did not have a cause of action. In *Stewart v. Park Manor Motors Ltd., supra* and *Macaraeg v. E. Care Contact Centers Ltd. supra,* the courts decided that a common law action was not precluded by the statutory provisions.

[200] Pausing here, it is necessary to make clear that in the case at bar the Defendants do not suggest that the principle from *Orpen v. Roberts* would preclude all torts in a competition law case. Their argument accepts that other civil wrongs that do not rely on misconduct involving the very long list of civil or criminal anti-competitive conduct found in the *Competition Act*, are not precluded. For example, if the LIBs in the case at bar were to explode and cause harm to persons or to property, a negligence claim could be joined to the statutory cause of action for breaching s. 45 of the *Competition Act*. The thrust of the Defendants' argument is that Parliament meant to govern and control both criminal and civil competition law not tort law generally. Tort claims not connected to wrongdoing defined by the *Competition Act* are not precluded.

[201] Approaching the matter of whether the statutory cause of action under the *Competition*

Act precludes common law claims based on a breach of the *Competition Act*, which is the Defendant's argument based on the principle from *Orpen v. Roberts*, the analysis may begin by describing the legislative history of the statutory cause of action now found in s. 36 of the *Act* and its initial reception by the courts. Recalling Justice Howland's comment above from *Stephens v. Gulf Oil Canada Ltd., supra* that competition law is an amalgam of statutory provisions and the common law, it is part of the Defendants' argument that the amalgam was reconfigured when statute law changed, as Justice Howland predicted might happen.

[202] As noted above, what is now s. 36 of the *Competition Act* was introduced by s. 31.1 of the *Combines Investigation Act* in 1975 and became s. 36 of the *Act* by virtue of S.C. 1985, c. C-34. The *Combines Investigation Act* was renamed the *Competition Act* a year later by S.C. 1986, c. 26.

[203] *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., supra* is an example of the state of the law before s. 36 came into force. At the time when the writ of summons was issued in that case, the then *Combines Investigation Act* did not have a statutory civil cause of action but did have an anti-competition conspiracy criminal offence. In *Canada Cement LaFarge*, the plaintiff successfully sued for unlawful means conspiracy based on a breach of the criminal offence provisions of the *Combines Investigation Act,* and the Supreme Court of Canada declined to make any comment about the constitutionality of the new statutory cause of action or about what effect, if any, the statutory cause of action might have on the plaintiff's common law conspiracy action for breach of the *Act*.

[204] The constitutionality of the *Combines Investigation Act* was addressed in *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641. As already noted earlier in these Reasons for Decision, in that case, in the course of deciding that the statutory cause of action introduced by s. 31.1 of the *Act* (now s. 36 of the *Competition Act*) was within the legislative competence of Parliament, Chief Justice Dickson noted that s. 31.1 (now s. 36) was only a remedial provision and did not create a general cause of action but was carefully limited by the provisions of the *Act*. The Chief Justice stated that the *Act* as a whole embodied a well-orchestrated and complex scheme of economic regulation. At p. 676, the Chief Justice stated:

> ... I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibitive conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy.

[205] Relying on this statutory history and as a matter of first principles, it is the Defendants' argument that as a matter of statutory interpretation, under the rulebook of the principle from *Orpen v. Roberts,* the introduction of the statutory cause of action was part of a comprehensive statutory scheme and Parliament signalled its intent that the statutory duties should be enforced exclusively by the statutory cause of action.

[206] During the oral argument, I asked the Defendants' counsel whether apart from the mechanical application of the principle from *Orpen v. Roberts*, there were sound legal policy

reasons why Parliament would have intended to make the statutory claim exhaustive. Mr. Kwinter suggested that there were several reasons. As I understood his argument, it was that Parliament intended to keep control of its well-integrated scheme and did not wish it to be disturbed by alternative remedies, penalties, and limitation periods.

[207] In my opinion, the Defendants make a sound legal policy argument, perhaps best exemplified by Mr. Kwinter's reference to limitation periods. In s. 36(4)(a) of the *Competition Act*, in the case of an action based on conduct that is contrary to any provision of Part VI, the limitation period is two years from a day on which the conduct was engaged in or the day on which any criminal proceedings relating thereto were finally disposed of. At the time of the enactment of s. 31, the Ontario limitation period under the *Limitations Act,* R.S.O. 1970, c.246, s. 45 (1)(g) for actions upon the case (other than for slander) was within six years after the cause of action arose. Tort actions for conspiracy would be actions upon the case and thus subject to a six year limitation period. From a policy perspective, in my opinion, it does makes sense that Parliament would not have intended to allow the shorter limitation period for its statutory cause of action to be circumvented by a common law cause of action for the same wrongdoing. A similar argument may be made about possible different calculations of damages under the statute and under the common law.

[208] In my opinion, there are other sound policy reasons for applying the principle from *Orpen v. Roberts*. Another reason is that the statutory claim makes the common law claims redundant and inefficient by comparison. Visualize, for the unlawful means conspiracy, the plaintiff must prove not only a breach of Part IV of the *Competition Act* and damages, which are the constituent elements of the statutory cause of action, but the plaintiff must also prove: (1) an agreement amongst the defendants to injure the plaintiff; (2) that the defendants knew that their wrongful acts were aimed at the plaintiff and or that they constructively knew that their acts would result in injury to the plaintiff; and (3) acts in furtherance of their agreement to injure.

[209] By way of counterargument, as a matter of statutory interpretation, the Plaintiffs argue that s. 62 of the *Competition Act* expressly negates the principle from *Orpen v. Roberts* by providing that "Except as otherwise provided in this Part, nothing in the Part shall be construed as depriving any person or any civil right of action." However, as the Defendants point out, the Plaintiffs' argument about s. 62 rather tends to prove the opposite of what they submitted, because the operation of s. 62 is expressly confined to Part VI of the *Act* and s. 36 (the statutory cause of action that would preclude common law actions) is not found in Part VI of the *Act* but rather in Part IV of the *Act.* In other words, for the Plaintiffs' argument to succeed s. 62 would have to have stated: "Except as otherwise provided in this *Act*, nothing in the *Act* shall be construed as depriving any person or any civil right of action." Thus, in my opinion, the Plaintiffs' counterargument relying on s. 62 of the *Act* fails.

[210] Further as a matter of counterargument, the Plaintiffs submit that as a matter of statutory interpretation there are indications that Parliament did not intend the principle from *Orpen v. Roberts* to apply to preclude common law tort claims for conspiracy and they also rely on another principle of statutory interpretation to negate the operation of *Orpen v. Roberts*; namely, the principle that legislatures are presumed not to interfere with common law rights and that there must be clear language to change the common law: *Bryan's Transfer Ltd. v. Trail (City),* 2010 BCCA 531 at para. 45; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co. Ltd.*, [1956] S.C.R. 610.

[211] The Plaintiffs' counterargument, which relies on the principle that clear language is required to change the common law, appears to have succeeded in *Watson v. Bank of America Corporation*, *supra*. In my opinion, however, the Plaintiffs' counterargument fails on its merits.

[212] The counterargument fails for three reasons. First, in the context of the comprehensive scheme of civil and administrative law regulation introduced by the 1975 amendments to what was then the *Combines Investigation Act*, in my opinion, Parliament did indicate its intention that the statutory cause of action along with the administrative law remedies available under the *Act* were to be comprehensive, and in my opinion, Parliament intended to preclude a redundant and inefficient common law cause of action for conspiracy.

[213] Second, the Plaintiffs' counterargument connotes that Parliament was depriving a person of a civil cause of action, which seems to me to mischaracterize what Parliament was doing. Remembering that it was Parliament that provided the predicate wrongdoing for a price-fixing conspiracy tort in the first place and that the principle of *Orpen v. Roberts* would not preclude tort claims unconnected to wrongdoing under the *Competition Act*, including not precluding the tort claim for a predominant purpose conspiracy, but for the shorter limitation period, Parliament was introducing a statutory cause of action and not taking away very much from plaintiffs.

[214] Third, given the introduction of a statutory cause of action as part of an elaborate statutory scheme, there is no lacuna to be filled by the common law in the amalgam that is competition law; the statutory cause of action is adequate for Parliament's regulation of competition law.

[215] I, therefore, conclude based on first principles that the Defendants were right to concede that the Plaintiffs have a statutory cause of action and were correct in their argument that the statutory claim precludes the common law unlawful means conspiracy but not the predominant purpose conspiracy, which I foreshadow again to say, I shall not certify because I find it does not satisfy the common issues and preferable procedure criteria.

[216] Before moving away from first principles of statutory interpretation to address the case law about the issue of whether plaintiffs have both a statutory cause of action and also a common law unlawful means conspiracy claim, I can add that during the argument, I asked the parties to review the legislative debates and discussions in Parliament to determine whether the record of the debates and discussions shed any light on the intention of Parliament. I subsequently received briefs from both parties, and I was advised that there were thousands of pages of debates, Committee hearings and submissions made on the proposed amendments to the *Combines Investigation Act* made by dozens of different groups, companies and law firms.

[217] In the case at bar, both sides indicated that they were not able to review all of the material and focused as best they could on discussions about the introduction of a statutory cause of action. From their review of the voluminous materials, not surprisingly, the Defendants submitted that there was evidence from which the inference could be drawn that Parliament intended an exclusive remedy, and, not surprisingly, the Plaintiffs submitted that there was evidence from which the inference could be drawn that the legislators were content for civil remedies to co-exist with the statutory damages right. Put shortly, the debates are interesting but not informative or determinative one way or the other.

[218] Turning then to the case law, for their part, the Plaintiffs rely on cases after the introduction of the statutory cause of action that have recognized a common law unlawful means

conspiracy based on a contravention of the *Competition Act,* including such high profile cases as *Pro-Sys Consultants v. Microsoft*, *supra* and *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.* The Plaintiffs, of course, also rely on *Watson v. Bank of America Corporation,* where the British Columbia explained what was decided by *Wakelam v. Wyeth Consumer Healthcare.*

[219] However, in my opinion, the case law that accepts a cause of action for unlawful means conspiracy based on a contravention of the *Competition Act* is not that helpful to the Plaintiffs because: (a) the courts in those cases did not address the argument made in the case at bar; or (b) the courts in those cases addressed a weaker version of the argument made in this case.

[220] For their part, the Defendants rely on the few cases, like *Wakelam v. Wyeth Consumer Healthcare, supra* (before it was explained away by the British Columbia Court of Appeal in *Watson v. Bank of America Corporation, supra*), that invoked the principle of *Orpen v. Roberts.*

[221] My own opinion is that in *Wakelam v. Wyeth Consumer Healthcare,* Justice Newbury (Justices Frankel and Garson concurring) was correct in concluding at para. 90 of her judgment, set out above, that Parliament did not intend the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI of the *Competition Act.* From that conclusion, she struck Ms. Wakelam's claim for restitutionary relief, which was the only cause of action apart from the statutory cause of action that she was advancing.

[222] As I understand, the British Columbia Court of Appeal's subsequent decision in *Watson v. Bank of America Corporation,* which also addressed a competition law class action, the Court there accepted *Wakelam* to the extent that it agreed that a restitutionary claim based on a breach of the *Competition Act* should be struck, but the Court held that the unlawful means conspiracy cause of action should not be struck.

[223] In *Watson,* as I understand the intricately reasoned judgment of Justice Saunders (Justices Donald and Neilson concurring), she reasoned that *Wakelam* was not binding on the issue of whether an unlawful means conspiracy tethered in a breach of Part VI of the *Competition Act* was precluded by the statutory cause of action because no conspiracy claim was actually advanced in *Wakelam,* and more to the point, on the merits, she disagreed with the Defendants' argument that the statutory cause of action precluded the common law conspiracy claim. At para. 24 of her judgment, Justice Saunders stated:

> 24. I conclude that *Wakelam* does not govern the issue before us on the tort of unlawful means conspiracy or restitution and waiver of tort based upon that claim. However, it does bar, in my view, claims in restitution for simple breach of the *Competition Act,* that is, it bars restitution in lieu of a s. 36 remedy, and on that application of *Wakelam*, I would not refer the issue to a five judge division. In the circumstances, it is inconsistent with the orderly development of our jurisprudence to consider changing direction on this issue so soon after the litigants in *Wakelam* received their final answer on the issue. I take *Wakelam* as correctly decided on the issue.

[224] I am, however, not persuaded by the British Columbia Court's judgment in *Watson v. Bank of America Corporation.* While it is true that in *Wakelam* Justice Newbury's comment about the tort claim may be *obiter dicta* on the point of the unlawful means conspiracy, hers was a meticulously reasoned decision based on fulsome argument from the parties. As a matter of implementing *stare decisis,* one determines the *ratio* and then what is left over is the *obiter*, which is not binding; however, the *obiter dicta* of appellate courts is given considerable respect in subsequent cases. In *R. v. Henry,* [2005] 3 S.C.R. 609 at para. 57 Justice Binnie stated:

> 57. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" . . . .

For my part, I would have regarded Justice Newbury's *obiter* in *Wakelam* as of the binding sort of *obiter*.

[225] More to the point, however, on the merits of whether the statutory cause of action precludes an unlawful means conspiracy based on a breach of Part VI of the *Competition Act*, with respect, in my opinion, the Court in *Watson v. Bank of America Corporation* was mistaken on this particular point. I believe that the crux of the Court's judgment in *Watson* is found in paras. 42, 48-49, and 53-58, which state:

> 42. The second question is whether breach of this statute, the *Competition Act*, permits the tort to be advanced. This is a different question than was presented in *LaFarge,* and its answer depends largely upon the effect of the civil remedy provisions of the *Act* added in the 1975 revamping.
>
> ...
>
> 48. How, then, is the redesign of the combines legislation to a modern regulatory scheme complete with provision for civil redress to be considered -- on the standard set out in *Macaraeg* and *Koubi*, or, as the plaintiff would have it, on the standard for negating an existing common law remedy.
>
> 49. *Wakelam* does not advert to this question; it does not address the potential effect of the augmentation of the *Act* to include a process for civil redress, previously available only at common law under a *LaFarge* approach. Rather, it addresses directly the question posed most plainly in *Koubi*: is the statute a complete code evincing an intention that civil remedies for its breach are limited to those provided in the *Act*? This is likely because by the time *Wakelam* reached this Court, the only claim advanced under the *Competition Act* was a claim for compensation for breach of the statute. That is, of course, exactly what s. 36 addresses. As the case was framed in *Wakelam*, there was no claim in tort, and certainly not the claim of unlawful means conspiracy entertained in *LaFarge*.
>
> ...
>
> 53. The dividing point in this appeal on the tort issue turns on the lines of jurisprudence that govern. Does it call for a *Koubi/Macaraeg/Wakelam* approach, or does it engage the principle discussed in *Rawluk* and *Bryan's Transfer*?
>
> 54. This answer is provided, in my view, by *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298. In *Gendron* the Court grappled with the availability of an action based on the common law duty of fair representation by a trade union, in the presence of labour legislation that codifies the common law. Justice L'Heureux-Dubé for the Court, observed at 1319:
>
> > In view of the legislation we must consider here, the words of McLachlin J. in dissent in *Rawluk, supra,* are appropriate. To use her words in the context of this case, the common law duty of fair representation is neither "necessary or appropriate" in circumstances where the statutory duty applies. Parliament has codified the common law duty and provided a new and superior method of remedying a breach. It is therefore reasonable to conclude that while the legislation does not expressly oust the common law duty of fair representation, it does however effect this end by necessary implication or, to once again use the language in *Goodyear Tire, supra,* Parliament has, by the enactment of this

> particular legislative scheme, expressed its intentions with "irresistible clearness".[Emphasis in original.]
>
> 55. The question may be framed as whether the *Competition Act* provides "a new and superior" method of remedying a breach of the statute. By looking at the question in this fashion, I find it easier to see whether the 1975 (and after) amendments to the combines legislation filled the role that the tort of unlawful means conspiracy, contemplated by *LaFarge*, occupied.
>
> 56. The elements of unlawful means conspiracy are explained in *LaFarge* and in *Pro-Sys*: the conduct of the defendants is unlawful; the conduct is directed towards the plaintiff (alone or with others); the defendants should know that injury to the plaintiff is likely to result; and injury to the plaintiff does occur.
>
> 57. This tort is not identical to the claim under s. 36. Indeed, by requiring proof of elements directed towards the plaintiff it is narrower than a claim under s. 36. Once proved, however, the range of damages and remedies is different and broader than is available under s. 36. The claim for unlawful means conspiracy admits of punitive damages: *Claiborne Industries Ltd. v. National Bank of Canada*, [1989] O.J. No. 1048, 59 D.L.R. (4th) 533 (Ont. C.A.); *ICBC v. Atwal*, 2010 BCSC 338, aff'd 2012 BCCA 12. Nor is the limitation period for a claim in tort as brief as that in s. 36.
>
> 58. In my view, it cannot be said that the scheme for civil redress in s. 36 of the *Act* is a replacement for an action in common law for unlawful means conspiracy. This is the same conclusion as was reached by Madam Justice Helper in *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335, [1990] 2 W.W.R. 42 (Man. C.A.), although for somewhat different reasons. In particular I do not rely, as she did, upon *Stephens v. Gulf Oil Can. Ltd.* (1975), 11 O.R. (2d) 129, 65 D.L.R. (3d) 193 (C.A.). As in *Westfair*, I consider a claim for unlawful means conspiracy relying upon breach of the *Competition Act*, is a viable pleading. My conclusion extends to a claim in restitution and waiver of tort to the extent those claims derive from the tort of unlawful means conspiracy.

[226] In my opinion, the error in this analysis of the statutory interpretation issue of whether Parliament intended to preclude an unlawful means conspiracy based on a breach of Part VI of the *Competition Act* appears at para. 55 of the Court's judgment in *Watson*, where Justice Saunders reframes the question to be asked as whether the *Competition Act* provides "a new and superior" method of remedying a breach of the statute. With respect, the superiority of the new statute in providing a remedy for a breach of the statute is not the right interpretative question. The proper question is: Based on a reading of the whole statute what was Parliament's intent in introducing the statutory cause of action? I repeat what Justice Duff stated in *Orpen v. Roberts*, *supra* at pp. 369-70:

> Obviously, this leaves it to be determined in each case whether the enactment relied upon was passed for the benefit of the person asserting the right to reparation or other relief; and, assuming that question to be answered in the affirmative, there may still be the general principle to be considered that, to quote Lord Selborne in *Brain v. Thomas*, 50 L.J.Q.B. 662:
>
> > "Where a statute creates an offence, and defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined, and no other." [Emphasis added]
>
> But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the

non-performance of that duty: *Atkinson v. Newcastle Waterworks Company*, 2 Ex. D. 441, at pages 446 and 447. [Emphasis added]

[227] For the reasons expressed above, Parliament's intent was not constrained to replacing the existing common law means of enforcing competition law with a new and superior method. Parliament does not have to justify making its statutory cause of action the exclusive cause of action by making it broader and more generous or superior in some way to the common law cause of action. Given the policy pulls of competition law, Parliament was not constrained to only introduce pro-plaintiff amendments to the *Competition Act,* and, in my opinion, Parliament intended to introduce a statutory cause of action that had a briefer limitation period and that did not admit of punitive damages but did offer plaintiffs a more efficient claim against price-fixers. As Justice Howland, noted in *Stephens v. Gulf Oil Canada Ltd., supra*, the scope of the common law may be changed to the extent that Parliament determines that regulation is desirable in the public interest.

[228] Finally, to end this discussion of the case law, turning to a recent case relied on by the Plaintiffs, where the issue of the effect of the introduction of the statutory cause of action was actually argued, that case is *Airia Brands Inc. v. Air Canada*, 2015 ONSC 5352. However, I will not follow *Aria Brands Inc.* on the matter of the effect of the statutory cause of action on the unlawful means conspiracy cause of action. In that case, Justice Leitch did not say that the Defendants' argument was wrong, and rather she said that she could not conclude that it was plain and obvious and beyond doubt that the plaintiffs' common law claim for unlawful means conspiracy was certain to fail. My conclusion is to the contrary, because it is plain and obvious to me as a matter of statutory interpretation that the common law claim is precluded by the statutory cause of action.

(v) Unjust Enrichment

[229] Recalling that I have already removed the Umbrella Purchasers from the class, I turn now to the Plaintiffs' unjust enrichment cause of action for the remaining Class Members.

[230] The elements of a claim of unjust enrichment are: (1) the defendant being enriched; (2) a corresponding deprivation of the plaintiff; and, (3) no juristic reason for the defendant's enrichment at the expense of the plaintiff: *Alberta Elder Advocates of Alberta Society*, 2011 SCC 24; *Garland v. Consumers' Gas Co.*, 2004 SCC 25; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peel (Regional Municipality) v. Canada, supra.*

[231] I am satisfied that Plaintiffs have adequately pleaded a cause of action for unjust enrichment. However, for the above reasons, it is my opinion, that an unjust enrichment claim based on a breach of the Part VI of the *Competition Act* is as a matter of statutory interpretation precluded by the statutory cause of action.

[232] I, therefore, conclude that the unjust enrichment claim does not satisfy the cause of action criterion for certification.

[233] I add that I also would not certify this cause of action on the grounds that it does not satisfy the preferable procedure criterion.

[234] A joined unjust enrichment claim would unnecessarily complicate the class proceeding and likely make it unmanageable. I say unnecessarily complicate because its contribution to access to justice, behaviour modification, and judicial economy is negligible or

counterproductive in the circumstances of the case at bar. The predicate wrongdoing to be sanctioned is already addressed by the statutory cause of action and the calculation of the Class Members' damages will be based on economic evidence to compensate the Class Members for their actual losses. In contrast, a calculation of the Defendants' unjust enrichment is based on financial evidence of their business's sales performance. The calculation of the enrichment would likely take the action into largely unexplored legal territory about the calculation of a disgorgement remedy. This is not a case like *Serhan v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.), leave to appeal granted [2004] O.J. No. 4580 (S.C.J.), aff'd (2006), 85 O.R. (3d) 665 (Div. Ct.), leave to appeal to C.A. ref'd Oct. 16, 2006, leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 494, where the restitutionary claim would inevitably exceed the damages assessment; it is a case where the prospect of an aggregate assessment of damages is feasible making disgorgement redundant. The unjust enrichment claim complicates the prosecution of the certified claims in this class proceeding; it is disproportionate in the circumstances, and it adds little to access to justice.

(c) Conclusion – Cause of Action Criterion

[235] For the above reasons, I conclude that the Plaintiffs have satisfied the cause of action criterion but just for the statutory cause of action under the *Competition Act* and without a cause of action for the Umbrella Purchasers.

5. Identifiable Class Criterion

(a) General Principles

[236] I turn now to the second criterion for certification of a class action, the identifiable class criterion.

[237] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[238] In defining Class Membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

(b) Discussion and Analysis – Identifiable Class Criterion

[239] The Plaintiffs propose the following class definition:

> All persons in Canada who, between January 1, 2000 and December 31, 2011 (the "Class Period"), purchased a Lithium Battery* and/or any of the following products containing a Lithium Battery: (1) notebook computer**; (2) cell phones, including smartphones***; (3) tablet computers; (4) e-book readers; (5) MP3 players; (6) personal digital assistants; (7) handheld GPS; (8) handheld video players; and/or (9) lithium ion battery packs (collectively "LIB Products"). Excluded from the class are the Defendants and the Defendants' present and former parents, predecessors, subsidiaries and affiliates, and any person who timely and validly opts out of the proceeding.

> *a Lithium Battery is a rechargeable battery cell which uses lithium-ion technology.
>
> **for greater certainty, a notebook computer includes a laptop computer
>
> ***excluding cell phones acquired as part of a cellular phone service contract.

[240] With the exclusion of the Umbrella Purchasers, the above definition satisfies the identifiable class criterion. The result of the exclusion is that the class definition becomes as follows, with the change bolded and underlined:

> All persons in Canada who, between January 1, 2000 and December 31, 2011 (the "Class Period"), purchased a Lithium Battery **manufactured by the Defendants*** and/or any of the following products containing a Lithium Battery **manufactured by the Defendants**: (1) notebook computer**; (2) cell phones, including smartphones***; (3) tablet computers; (4) e-book readers; (5) MP3 players; (6) personal digital assistants; (7) handheld GPS; (8) handheld video players; and/or (9) lithium ion battery packs (collectively "LIB Products"). Excluded from the class are the Defendants and the Defendants' present and former parents, predecessors, subsidiaries and affiliates, and any person who timely and validly opts out of the proceeding.
>
> *a Lithium Battery is a rechargeable battery cell which uses lithium-ion technology.
>
> **for greater certainty, a notebook computer includes a laptop computer
>
> ***excluding cell phones acquired as part of a cellular phone service contract.

(c) Conclusion – Identifiable Class Criterion

[241] For the above reasons and with the above revision of the class definition, I am satisfied that the Plaintiffs have satisfied the second criterion for certification.

6. Common Issues Criterion

(a) General Principles

[242] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City), supra* at para. 18.

[243] With regard to the common issues, "success for one 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." The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Shopping Centres Inc. v. Dutton*, *supra* at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160; *McCracken v. Canadian National Railway Co.*, *supra,* at para. 183.

[244] Whether an issue is common to a class does not depend on whether it falls on the plaintiffs' or the defendants' "side of the forensic ledger", but rather on whether it would involve findings of fact (or law) that can be generalized across the class or extrapolated from one class member to the others: *O'Brien v. Bard Canada,* 2015 ONSC 2470 at para. 131.

[245] In *Pro-Sys Consultants v. Microsoft*, *supra* at para. 106, the Supreme Court of Canada

describes the commonality requirement as the central notion of a class proceeding, which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[246] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries: *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, varied on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).

[247] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General) supra* at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348.

[248] An issue can be a common issue, even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General) supra.* A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, (S.C.B.C.), aff'd 2000 BCCA 605, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

(b) The Proposed Common Issues

[249] After removing the questions that the Plaintiffs listed in their Notice of Motion but did not propose to pursue to certification, the Plaintiffs propose the following common issues, which I have modified for clarity.

Breach of the Competition Act

1. 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*?

(a) [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:

(i) prevent, limit or lessen, unduly, the manufacture or production of Lithium Batteries; and/or

(ii) enhance unreasonably the price of Lithium Batteries?

(b) [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:

(i) fix, maintain, increase or control the price of Lithium Batteries;

(ii) allocate sales, territories, customers or markets for the production or supply of Lithium Batteries; and/or

(iii) fix, maintain, control, prevent, lessen or eliminate the production or supply of Lithium Batteries.

(c) Did Class Members suffer injury as a result?

Conspiracy

2. Are the Defendants, or any of them, liable in tort for conspiracy to fix prices for Lithium Batteries?

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

(b) Was the Defendants' unlawful conduct directed towards Class members?

(c) Did the Defendants know, or ought they to have known, in the circumstances that injury to Class Members was likely to result?

(d) Did Class Members suffer injury as a result?

(e) Was the predominant purpose of the Defendants' conduct to cause injury to the plaintiffs and other Class Members?

4. Over what period of time did the conspiracy take place?

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

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

Unjust Enrichment

7. As a result of the alleged conduct, were the Defendants enriched?

8. Did the Plaintiffs and other Class Members suffer a corresponding deprivation?

9. Was there a juristic reason for the Defendants' enrichment?

Aggregate Damages

10. Can damages for the Class be measured on an aggregate basis and, if so, what are the aggregate damages for the Class?

Punitive Damages

11. Are the Defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, in what amount and to whom?

Costs of Investigation

12. Should the full costs of investigation in connection with this matter, including the costs 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?

[250] From this list of questions, as foreshadowed above, I shall not certify any questions related to the causes of action that do not satisfy the cause of action criterion or the preferable procedure criterion.

[251] Therefore, for the reasons that follow, I shall certify the following questions:

Breach of the Competition Act

1. 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*?

(a) [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:

(i) prevent, limit or lessen, unduly, the manufacture or production of Lithium Batteries; and/or

(ii) enhance unreasonably the price of Lithium Batteries?

(b) [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:

(i) fix, maintain, increase or control the price of Lithium Batteries;

(ii) allocate sales, territories, customers or markets for the production or supply of Lithium Batteries; and/or

(iii) fix, maintain, control, prevent, lessen or eliminate the production or supply of Lithium Batteries.

(c) Did Class Members suffer injury as a result?

Aggregate Damages

2. Can damages for the Class be measured on an aggregate basis and, if so, what are the aggregate damages for the Class?

Costs of Investigation

3. Should the full costs of investigation in connection with this matter, including the costs 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?

(c) Analysis: The Defendants' Argument that the Action Wants for Commonality

[252] The Defendants argue that the Plaintiffs' proposed common issues want for commonality.

[253] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation, supra* at paras. 114 – 126, Justice Rothstein discusses commonality in the context of a price-fixing class action. His discussion is nicely summarized in the headnote of the case, which states:

> In order to establish commonality, evidence that the acts alleged actually occurred is not required, rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members. With respect to the common issues that ask whether loss to the class members can be established on a class-wide basis, they require the use of expert evidence in order for commonality to be established. The expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement — it must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question, and there must be some evidence of the

> availability of the data to which the methodology is to be applied. Resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification.

[254] In the case at bar, the Defendants submit that the Plaintiffs' claim does not raise common issues in respect of: (1) the existence of the alleged conspiracy; (2) fact of harm; and (3) fact of unlawful gain (restitution).

[255] The Defendants submit that there is no basis in fact for a common issue to be proven of a conspiracy covering multiple relevant markets with different market participants and competitors selling and buying different products over the 11-year Class Period. They submit a common issue has not been demonstrated on a class-wide basis using common proof. The Defendants submit that the Plaintiffs do not demonstrate some basis in fact, grounded in the facts of this case, that the proposed common issues are capable of resolution on a class-wide basis using evidence common to the class. Relying on *Chadha v. Bayer Inc.*, *supra,* the Defendants submit that loss to all class members cannot be determined on the basis of common evidence and, therefore, the action will necessarily degenerate into a series of individual issues trials and become unmanageable. In *Chadha,* the Court of Appeal held that a class action was not the preferable procedure for resolving indirect purchasers' claims because of the plaintiff's failure to put forward a credible methodology for proving class-wide harm.

[256] The Defendants submit that the Plaintiffs do not put forward a methodology, grounded in the facts of this case, that is capable of demonstrating fact of harm to all direct and indirect purchasers on the basis of evidence common to the class. The Defendants submit that the alleged gains made at the expense of Class Members cannot be established on a common basis, and Class Members' claims would have to be individually assessed. The Defendants submit that Dr. Reutter's opinion is purely theoretical or hypothetical and there is no evidence of the availability of the data to which the methodology is to be applied. As noted above, the Defendants criticize Dr. Reutter for attempting to show commonality based on general economic theory and assumptions without regard to the facts. They argue that Dr. Reutter assumed rather than providing any basis in fact for the implementation of their alleged agreement to overprice the charge for LIBs. They submit that if there is no basis in fact for the implementation of the conspiracy the Class Members were not harmed.

[257] The Defendants outline their argument that the Plaintiffs' common issues want for commonality in paras. 78-81 of their factum, where they state:

> 78. Dr. Reutter opined that all members of the proposed class (i.e. all direct and all indirect purchasers) would have been impacted by the defendants' actions as alleged in the statement of claim.
>
> 79. To reach this conclusion in respect of direct purchasers, Dr. Reutter first assumed that the defendants in fact acted on the alleged agreements by imposing the agreed overcharges on their customers. However, implementation cannot be simply assumed. The plaintiffs will have to demonstrate at trial not only that the defendants reached an agreement to fix LIB Cell prices, but that they then acted on the agreement by imposing any agreed "overcharges" in their respective sales to direct purchasers. If the alleged conspiracy was not implemented, class members were not harmed.
>
> 80. Having assumed implementation (with no basis in fact), Dr. Reutter then examined four market conditions and concluded that their presence means that the defendants' conduct would have resulted in increased prices to all direct purchasers of LIB Cells. Dr. Reutter concluded that a) LIB Cells are a standardized, "commodity-like" product; b) no substitutes exist for LIB Cells;

> c) defendants account for nearly all sales of LIB Cells and thus control the price of LIB Cells; and
> d) there are barriers to entering the LIB Cell manufacturing business.
>
> 81. As described below, Dr. Reutter's conclusions with respect to these four market conditions are not grounded in the facts of the case and his analysis cannot be done without resort to individual inquiries. Dr. Reutter ignored the evidence tendered by the defendants, even where the evidence was directly relevant to the market conditions he was addressing.

[258] As noted above in the description of the Plaintiffs' economic evidence, the Defendants' criticism of Dr. Reutter is neither fair nor correct. Dr. Reutter's conclusions, the merits of which remain to be determined, were grounded in the facts of the case, and his analysis can be done without resort to individual inquiries. And he did not ignore the evidence tendered by the Defendants. The Defendants' criticism misses the point that disproof of Dr. Reutter's theories and disproof of the underlying factual premises is not the purpose of the certification motion. The Defendants – after certification – will have ample opportunity to prove that Dr. Reutter's conclusions are wrong.

[259] In their pound-pound-pound the drum of criticism, the Defendants point out weaknesses or errors with respect to Dr. Reutter's analysis of each of the market conditions upon which he relies for his opinion that there was a marketplace in which the Defendants could conspire and influence the price of LIBs. For example, the Defendants submit that Dr. Reutter's opinion that LIBs are commodity-like is fundamentally flawed in four principal respects: (1) it rests on unsupported inferences drawn from certain Defendants' sales of LIBs to computer OEMs; (2) it ignores uncontroverted evidence of LIBs customization; (3) it ignores uncontroverted evidence of individualized price negotiations between Defendants and their customers; and (4) it acknowledges the need for empirical analysis of the very facts it assumes but does not provide a methodology for doing so. Apart from the fact that these criticisms belie the Defendants' submission that Dr. Reutter did an entirely theoretical analysis without regard to the facts of the case, the criticism does not establish that the proposed common questions want for commonality and rather demonstrate that the Defendants may have a good defence to the common issue of whether they conspired together to harm the Class Members.

[260] As it happens, the Plaintiffs' counterarguments to the Defendants' "does not" arguments are largely of the "does to" variety, and demonstrate that, as is frequently the situation with respect to deciding the common issues criterion, the competing arguments have to be taken with a grain of salt, particularly the Defendants' argument.

[261] The extra scepticism for the Defendants' arguments about commonality follows from the Supreme Court's admonition that a certification motion is not the time for the plaintiff to have to prove the merits of his or her case, and it is not the time for a battle of the experts over methodology. I agree with Justice Rady's comments in *Crosslink Technology Inc. v. BASF Canada, supra* where she stated:

> 110. Turning then to the proposed methodology. I begin by reiterating that the court is ill equipped at this stage of the proceeding to engage in a finely calibrated assessment of evidentiary weight, to borrow from *Hague v. Liberty Mutual Insurance Co.*, [2004] O.J. No. 3057 (S.C.J.). The *Pro-Sys* decision underscores that it is not necessary for the motion judge to resolve conflicts between the experts. Indeed, it would be exceedingly difficult to do so unless the inadequacy of the expert's opinion were patently obvious. This is very complex evidence, which requires a considerable degree of sophistication in order to understand it. Part of an expert's role is to assist the court in understanding the underlying science, engineering, medicine – or as in this case, the statistical and economic foundation for the opinion. At this stage of the proceeding, it bears repeating that the

> motions judge does not have that assistance and is therefore ill-equipped to resolve conflicts, particularly on the basis of a paper record and without the benefit of the interaction that occurs during viva voce testimony. I think it would be incorrect to reject either expert's opinion and the case should be permitted to go forward because a plausible methodology is before court. The Concise Oxford English Dictionary defines plausible as "apparently reasonable or probable, without being necessarily so". Put another way, the expert evidence raises a triable issue.

[262] In evaluating arguments about commonality, it is important to keep in mind that defendants naturally enough will take the opportunity of the certification motion to obtain something that normally comes much later in litigation; i.e., the right to cross-examine the opponent's expert witness on his or her report and the opportunity to reveal its weakness and the weaknesses and problems of the plaintiff's case. But a certification motion is not some sort of summary judgment motion, and proving that the plaintiff has a weak claim or that the defendant has a strong defence is not the same thing as proving that the certification criteria, including the commonality criterion, have not been satisfied.

[263] In evaluating arguments about commonality, it is also important to note that Justice Rothstein in *Pro-Sys Consultants* did not say that the methodology cannot be theoretical or hypothetical; he said that the methodology cannot be "purely methodology." This qualification is subtle in competition law cases because the facts of the case may themselves be theoretical; after all, markets, prices, bargains, and the notions of competition and competitors are human constructs that do not exist in nature and are defined concepts not innate ones.

[264] The point is that it is easy enough to say or to deny that a methodology is purely theoretical but in the context of a commercial world built on economic theory it is difficult for either side to prove their "does not", "does to" arguments. To be clear, for the purposes of deciding this case, I am not departing from the standard set by the Supreme Court in *Pro-Sys Consultants* and other cases, I am simply saying that the court should be sceptical about the competing arguments about the adequacy of the methodology and be particularly sceptical of the defendant's argument.

[265] In the case at bar, the Plaintiffs' common issues are largely based on Dr. Reutter's economic evidence, and I am not persuaded by the Defendants' criticisms that there is no basis in fact for Plaintiffs' proposed common issues. In particular, I am not persuaded by the Defendants' argument that at the time of certification, the Plaintiffs must show some basis in fact that the conspiracy was actually implemented in order to have a common issue about the conspiracy.

[266] Although, the Defendants deny that they are insisting at the certification stage that the Plaintiffs show that the conspiracy was implemented, and they submit that they are only asking that the Plaintiffs show some basis in fact that implementation would be tried and proven on a class-wide basis without individual inquiries, this is just sophistry. The Defendants' denial that they are insisting that the Plaintiffs prove the merits of their allegation that there was an implemented conspiracy does not withstand analysis. In truth, the Defendants are simply submitting that there is no merit to the allegation of a conspiracy; however, that merits argument is for another day.

[267] That individual inquiries of the Defendants severally and that individual proof may be required to establish the participation and contribution of each individual Defendant to the conspiracy does not diminish the commonality of the question of whether or not there was a conspiracy. If the answer to that question is that there was no conspiracy, then the action will be dismissed and the judgment will bind all Class Members. If the answer is that there was a

conspiracy in which only some of the Defendants participated, then the action will be dismissed with respect to the Defendants who did not participate and granted against the Defendants who were co-conspirators assuming other elements of the conspiracy cause of action are satisfied. The commonality of all this is inherent.

[268] I am satisfied that the Plaintiffs have satisfied the common issues criterion for the questions arising from the certified statutory cause of action.

7. Preferable Procedure Criterion

(a) General Principles

[269] The fourth criterion is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the Class Members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

[270] Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different Class Members.
>
> 3. Different remedies are sought for different Class Members.
>
> 4. The number of Class Members or the identity of each Class Member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

[271] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General) supra* at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[272] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank, supra* at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

[273] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*;

and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc. supra.*

[274] The court must identify alternatives to the proposed class proceeding: *AIC Limited v. Fischer, supra* at para. 35; *Hollick v. Toronto (City), supra* at para. 28. The proposed representative plaintiff bears the onus of showing that there is some-basis-in-fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative: *AIC Limited v. Fischer, supra* at paras. 48-49.

[275] In *AIC Limited v. Fischer, supra* at paras. 24 to 38, the Supreme Court of Canada reiterated that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the Court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[276] In *AIC Limited v. Fischer,* Justice Cromwell pointed out that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?; (2) What is the potential of the class proceeding to address those barriers?; (3) What are the alternatives to class proceedings?; (4) To what extent do the alternatives address the relevant barriers?; and (5) How do the two proceedings compare?

[277] In considering the preferable procedure criterion, one should consider the type or genre of class action, because in terms of access to justice, the needs of plaintiffs suffering personal injuries are different than the needs of plaintiffs suffering a purely economic loss, and the needs of those suffering economic losses are different depending upon whether the loss is a deprivation or a missed expected financial gain.

[278] The type of remedy being sought be it declaratory, compensatory, or restitutionary may also make a difference to whether a class proceeding is the preferable procedure for the resolution of the class members' claims. Providing injured parties with access to justice cannot be divorced from ensuring that the ultimate remedy provides substantive justice where warranted: *AIC Limited v. Fischer, supra,* at para. 24; F. Iacobucci, "What Is Access to Justice in the Context of Class Actions?" in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17 at p. 20.

[279] And one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The importance of proportionality to access to justice was recently expressed by the Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 SCC 7 at paras. 1-2, 27, where the Court stated:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. ...

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

(b) Discussion and Analysis - Preferable Procedure Criterion

[280] Emerging from the above analysis of the facts and law, the discussion of the preferable procedure criterion can be narrowed to a preferable procedure analysis for two causes of action; namely: (1) the statutory cause of action; and (2) the predominant purpose conspiracy. As explained above, the other causes of action are precluded by the principle from *Orpen v. Roberts*.

[281] The Defendants submit that as a result of the lack of commonality on the essential issues, a class proceeding would not be a fair, efficient and manageable method of advancing these remaining causes of actions, as required by the preferability criterion. The Defendants' argument that this action fails the preferable procedure criterion is built upon the foundation that there are no meaningful common issues because of the Plaintiffs' submitted failure to provide a commonality in the proof of loss to the indirect purchasers' part of the class based on the evidence in this case.

[282] Dealing with the statutory cause of action, I disagree with the Defendants' arguments that the action fails the preferable procedure analysis. In the immediately preceding section of these Reasons, I concluded that the Plaintiffs' common issues satisfy the common issues criterion. For the reasons expressed above, the Defendants' arguments about the common issues fails, and with that failure, the underlying premise of their preferable procedure argument is swept away. The common issues associated with the statutory cause of action and the prospect of an aggregate assessment of damages makes this action the preferable procedure for obtaining access to justice in an efficient and manageable way.

[283] Turning to the Plaintiffs' predominant purpose conspiracy, although from a pleadings perspective, I cannot say that it is plain and obvious that the Plaintiffs' allegation that the 19 Defendants' primary intent was to injure the teenage and adult population in Canada that purchased LIB consumer goods and that increasing their respective profits was the result of that intention cannot succeed, it does seem to me that it is plain and obvious that the Plaintiffs' chance of success for a predominant purpose conspiracy based on purely lawful conduct in pricing LIBs is very remote. If the Plaintiffs succeed on the statutory cause of action, the predominant purpose conspiracy is redundant, and if the Plaintiffs fail on the statutory cause of action, it is unlikely that the Plaintiffs will snatch victory from the jaws of defeat.

[284] In my opinion, in the circumstances of this price-fixing case from a common issues and a preferable procedure prospective, the infusion of a common issue about an intention to injure the Class Members would threaten the manageability of the action. In my opinion, a class action to

determine whether the Defendants' predominant purpose was to cause harm to their respective purchasers would not satisfy the preferable procedure criterion. From an access to justice perspective, this additional claim of a predominant purpose conspiracy is redundant given that the statutory cause of action more efficiently covers the same liability territory. At the end of the day, this class action is about whether the Defendants breached the statutory cause of action under the *Competition Act* not about whether they banded together to intentionally harm their customers by lawful competitive law conduct.

(c) Conclusion – Preferable Procedure Criterion

[285] I conclude that the preferable procedure criterion is satisfied in the case at bar for the statutory cause of action.

8. Representative Plaintiff Criterion

(a) General Principles

[286] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[287] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[288] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.), at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[289] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 41. The representative plaintiff should be able to instruct counsel and exercise independent judgment concerning the important issues that will arise during the progress of the litigation: *Martin v. Astrazeneca Pharmaceuticals Plc.*, 2012 ONSC 2744 at para. 367, affirmed, 2013 ONSC 1169 (Div. Ct.); *Sullivan v. Golden Intercapital (GIC) Investments Corp*, 2014 ABQB 212 at paras. 54-55.

[290] Although the court must be satisfied that the proposed representative plaintiff is a

genuine plaintiff who will vigorously and capably prosecute the interests of the class, because the plaintiff will have advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff, and the court will be sceptical of the defendant's arguments based on the personality of the candidate: *Shah v. LG Chem Ltd.*, 2015 ONSC 3257 at paras. 26-27.

[291] The critical ingredients or factors for the determination of the representative plaintiff criterion are the competence of counsel and on the qualification of the plaintiff as reflected in the litigation plan, which in a sense is a synthesis of the other certification criteria: *Shah v. LG Chem Ltd.*, 2015 ONSC 3257 at para. 32.

(b) Discussion and Analysis – Representative Plaintiff Criterion

[292] The Defendants submit that the proposed Representative Plaintiffs would not fairly and adequately represent the interests of the class, nor have they put forward a plan which sets out a workable method for the advancement of the proceeding.

[293] Based on what the Defendants submit was a very poor performance during his cross-examination in answering questions about the role and responsibilities of a representative plaintiff, the Defendants submit that Mr. Shah lacks the requisite knowledge and information to be an adequate representative plaintiff in this class action.

[294] An example of the Defendants' efforts to disqualify Mr. Shah is found in para. 166 of the Defendants' factum, which states:

> 166. Regarding the role of a representative plaintiff:
>
> Q. What does it mean to be a representative plaintiff, Mr. Shah?
>
> A. To represent the millions of people who have been suffered or in a way, the same way due to price-fixing.
>
> Q. And how do you know its millions of people?
>
> A. Well, everybody uses cell phones, everybody has some laptops, anything using lithium ion batteries.
>
> Q. What do you understand your role to be as representative plaintiff?
>
> A. Yes.
>
> Q. What do you understand your role to be as representative plaintiff? What do you have to do as a representative plaintiff?
>
> A. Well, whatever it takes to get the conspirators pay for whatever they did wrong.
>
> Q. Okay. So that's fairly general. I understand you're going to do, quote unquote, whatever it takes. What do you actually have to do as a representative plaintiff? What are your duties?
>
> A. Well, whenever the court requires me to come and whatever the proceedings be, my presence, make sure everything -- the right decision is made -- well, the court is going to decide the right decision, but make sure the conspirators pay for whatever they have done wrong.

[295] There are further examples in paras. 167 to 170 of the factum, and the Defendants submit that a review of Mr. Shah's evidence demonstrates that: (a) Mr. Shah does not understand the

nature of this class action, his role as a Representative Plaintiff and the steps that must be taken; and (b) he is little more than a "passive figurehead" who lacks the requisite qualifications to be an adequate Representative Plaintiff in this class action.

[296] The Defendants submit that Alpina Holdings is not an appropriate Representative Plaintiff because it does not have a genuine claim. They submit that it does not have a genuine claim because it, as a matter of its contractual arrangements, always marked up the cost of the phones that it was supplied and, therefore, would not have suffered any damage from the alleged price-fixing conspiracy.

[297] The Defendants also take exception to the fact that Mr. Sayed, the representative of Alpina Holdings, is Mr. Shah's father, which close relationship, the Defendants submit, calls into question their ability to fairly and adequately represent the interests of the proposed class as co-Representative Plaintiffs. The proposed Representative Plaintiffs are at different points in the distribution chain and thus the Defendants submit would have divergent interests in respect of the apportionment of any recovery

[298] The Defendants also submit that the proposed Representative Plaintiffs have not produced a workable litigation plan. In particular, they submit that the plan fails to adequately address individual issues that will remain after the common issues trial.

[299] I am not persuaded by any of the Defendants' arguments about the fifth criterion for certification.

[300] Speaking colloquially, the proof of the fifth criterion is in the pudding.

[301] The Plaintiffs' abilities to serve as Representative Plaintiffs passed the rigorous legal road test of satisfying the first four criteria for certification. However, badly Mr. Sayed and Mr. Shah performed during their cross-examinations in answering the skill-testing questions of the Defendants, their performance was not as bad as the Defendants would have it to be as demonstrated by their pleading a viable cause of action and by their showing some-basis-in-fact that there is an identifiable class with common issues and a preferable procedure for the resolution of that cause of action. Any problems in the litigation plan can be resolved as the action proceeds.

[302] In my opinion, the Plaintiffs satisfy the fifth criterion for certification.

H. CONCLUSION ON THE CERTIFICATION CRITERIA

[303] For the above reasons and with the qualifications noted above, I certify this action as a class proceeding under the *Class Proceedings Act, 1992.*

[304] The parties agreed that there would be no costs for the certification motion.

Perell, J.

Released: October 5, 2015

CITATION: Shah v. LG Chem, Ltd., 2015 ONSC 6148
COURT FILE NO.: CV-13-483540
DATE: 20151005

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KHURRAM SHAH and ALPINA HOLDINGS INC.

Plaintiffs

– 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

REASONS FOR DECISION

PERELL J.

Released: October 5, 2015