IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pro-Sys v. Microsoft,*
2010 BCSC 285

Date: 20100305
Docket: L043175
Registry: Vancouver

Between:

Pro-Sys Consultants
Neil Godfrey

Plaintiffs

And

Microsoft Corporation
Microsoft Canada Co./Microsoft Canada Cie.

Defendants

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

Counsel for the Plaintiff:	J.J. Camp, Q.C. R. Mogerman
Counsel for the Defendants:	N. Finkelstein J. Sullivan C. Beagan Flood S. Knowles
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I. INTRODUCTION

[1] The plaintiffs apply for certification of this case as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[2] For the purposes of these reasons there is no need to distinguish between either of the two plaintiffs or either of the two defendants. I will therefore refer to both plaintiffs as Pro-Sys and both defendants as Microsoft.

[3] This case is an indirect purchaser competition class action. Pro-Sys alleges that Microsoft committed various anti-competitive wrongs enabling it to charge higher prices for a number of its products. The proposed class members are indirect purchasers who acquired their Microsoft software from re-sellers who, in turn, either purchased the software directly from Microsoft, or indirectly from other re-sellers. (Although Microsoft licenses its software, for ease of reference I will refer to the transactions as purchases of a product.)

[4] Pro-Sys pleads causes of action for the common law torts of intentional interference with economic interests and conspiracy. It claims damages pursuant to the civil remedies provision contained in s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34 for breaches of s. 45 (conspiracy) and s. 52 (false and misleading representations) of that act. Pro-Sys also claims unjust enrichment and waiver of tort. I will discuss the nature and scope of the action and the proposed class in greater detail below.

[5] The parties agree that, with the exception of waiver of tort, a constituent element of all the causes of action alleged by Pro-Sys is harm to the plaintiff class members. That harm is the payment of prices artificially inflated by the alleged anti-competitive behaviour. The parties disagree as to whether proof of harm is a requirement with respect to waiver of tort.

[6] Because the class members did not purchase their software directly from Microsoft, they will be required to show at trial that wrongful price overcharges were paid by the direct (i.e. first-level) customers to Microsoft and that these charges were

passed on through every level of the various distribution channels (referred to as "pass-through"), resulting in the class members paying more for the software than they would have paid in the absence of the wrongful conduct. In other words, the plaintiffs must show that the alleged increased charges to the direct customers were not absorbed by any subsequent level in the distribution channel.

[7] At trial, Pro-Sys proposes to demonstrate the initial overcharges and the pass-through with economic and econometric analyses.

[8] This leads to the major issue in this certification motion: whether Pro-Sys' proposed methodology will be able to show the initial overcharges and the pass-through to the proposed class members. The ability of Pro-Sys to demonstrate economic harm on a class-wide basis is germane to at least three of the requirements for certification: whether there is an identifiable class; whether there is a common issue; and whether a class proceeding is the preferable procedure for determining the claims.

[9] The parties agree that at the certification stage a plaintiff need not come with a completed harm or damage analysis. Beyond that they dispute the plaintiffs' onus in demonstrating a workable methodology to demonstrate harm to the class members. Further, they disagree as to whether Pro-Sys need and can show that its methodology will demonstrate harm to *every* member of the class and whether the aggregate damage provisions contained in s. 29 of the *Class Proceedings Act* can be used to establish harm to class members.

[10] As I mentioned above, Pro-Sys claims waiver of tort. It argues that waiver of tort is an independent cause of action which allows the class members to recover restitution of the benefit obtained by Microsoft from its wrongful acts, without the necessity of showing harm to the plaintiff class members. On that basis, the plaintiff class members would not have to demonstrate any harm or prove damages.

[11] This motion was heard in January 2009. Microsoft quite rightly placed great reliance on a decision involving the same plaintiff and very similar issues, in which

certification was denied: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, rev'd 2009 BCCA 503, 312 D.L.R. (4th) 419 [*Infineon*]. The appeal of that decision was to be argued two months after this motion was heard and I determined that I would await the Court of Appeal's decision and the parties' supplemental submissions based on that decision. The Court released its decision in November, 2009. Most recently - February 23 - the Court of Appeal issued reasons settling the terms of its order: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2010 BCCA 91.

[12] As will be seen, the Court of Appeal's decision to set aside the judgment of the chambers judge and certify the proceeding is determinative of a large number of issues in the present motion.

[13] A number of Pro-Sys' claims were the subject of a motion to strike brought by Microsoft under Rule 19(24), which was heard by Tysoe J. (as he then was): *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2006 BCSC 1047, 57 B.C.L.R. (4th) 323. Tysoe J. struck some causes of action leaving the ones that I described in para. 4. The parties agreed that the ruling on that motion would also stand as a determination of the first requirement for certification under the *Class Proceedings Act*, namely, that the pleadings disclose a cause of action. Therefore, that is something that I need not deal with.

II. THE NATURE AND SCOPE OF THE ACTION AND PROPOSED CLASS

[14] The computer programmes comprised in this claim are all of Microsoft's operating systems, and some of Microsoft's application software. These are defined in the statement of claim as:

> "Microsoft Operating Systems" means any full or upgrade version of Microsoft's MS-DOS or Windows operating systems software intended for use on Intel-compatible personal computers;
>
> "Microsoft Applications Software" means any full or upgrade version of Microsoft's Word or Excel applications software or any full or upgrade version of Microsoft's Office, Works Suite, or Home Essentials application suites, intended for use on Intel-compatible personal computers;

[15] The wrongs pleaded in the statement of claim date back to 1988. However, the claim is limited to products bought by class members from January 1, 1994 to the date of certification. It is claimed that by the mid-1980s Microsoft had become entrenched as the standard in the operating systems market but by engaging in anti-competitive conduct Microsoft increased, maintained and abused its dominance in the market. Therefore the claim takes the dominance of Microsoft in the mid-1980s as a starting point and says that, but for Microsoft's wrongful acts beginning in 1988, Microsoft would not have been able to maintain or increase that position to the same extent.

[16] The class for which certification is sought is:

> … all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing.

[17] Class members include those who purchased new computers pre-installed with Microsoft's software. Software which was not pre-installed was sold through a large number of different distribution channels.

[18] Microsoft says that when different versions of the software packages are taken into account, 582 operating systems and 879 applications are in issue in the litigation.

[19] The statement of claim alleges that Microsoft committed specific anti-competitive acts aimed at a number of competing products. These include:

(a) DRI's DR DOS operating system;

(b) IBM's OS/2 operating system;

(c) Go's PenPoint, an operating system designed to accept handwriting as an input;

(d) Be's BeOS operating system;

(e) Linux and other open source operating systems;

(f) Lindows.com, Inc.'s LindowsOS operating system, now known as Linspire;

(g) Micrografx's Mirrors developer tool;

(h) Borland's C++ programming language;

(i) Netscape's Navigator web browser;

(j) Sun's Java programming language;

(k) RealNetwork's audio and video streaming software;

(l) Burst's video streaming technology;

(m) Intel's NSP software to enhance graphics and video performance of PCs with Intel computer chips;

(n) Samba open source software that allows Linux and UNIX machines to act as files, print and authentication servers for Windows clients;

(o) Lotus' Lotus 1-2-3 spreadsheet software;

(p) WordPerfect (later Corel's) WordPerfect word processing software;

(q) Sun's StarOffice office application;

(r) Corel's WordPerfect Office application;

(s) Lotus' SmartsSuite application.

III. THE REQUIREMENTS FOR CERTIFICATION

[20] The criteria for certification are set out in the *Class Proceedings Act* as follows:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[21] Apart from the disclosure of a cause of action the plaintiffs must establish an evidentiary basis for each of the four remaining s. 4(1) criteria.

[22] The first requirement – the existence of a cause of action – is not at issue here; that was dealt with by way of the motion to strike. The main criteria in issue are s-s. (b), (c) and (d) and they all engage Pro-Sys' ability at trial to prove both the overcharges and the pass-through to the ultimate purchasers. The standard to which this must be shown at the certification stage was a matter of dispute between the parties. That issue has now been settled by the Court of Appeal in *Infineon*: the plaintiff need only show a credible or plausible methodology.

IV. OVERVIEW OF PRO-SYS' METHODOLOGY FOR ESTABLISHING CLASS-WIDE OVERCHARGES AND THEIR PASS-THROUGH TO THE PROPOSED CLASS MEMBERS

[23] Pro-Sys relies primarily on the evidence of two economists, Dr. Janet Netz and Professor James Brander. Dr. Netz was an expert in several similar cases brought against Microsoft in the United States, some of which were co-authored with Professor Mackie Mason. In her affidavits for the case at bar, Dr. Netz described the methodology she proposes to use and she attached reports she prepared for litigation in Iowa, Arizona and Minnesota. She says that the same methodology used in those cases will be used by her in this litigation and that they will demonstrate the initial price overcharges and the pass-through to the ultimate purchasers. In other words, the methods can demonstrate both harm (or, to use the word employed by Dr. Netz, impact) and the quantum of damages.

A. The three methodologies

[24] Dr. Netz describes three alternative methods by which harm and damages can be calculated. The first two methods calculate overcharges at the initial level in the distribution chain, namely the sales from Microsoft directly to its customers. Therefore both of these methods require further analysis in order to establish that the overcharges were passed on to the ultimate consumer, namely the proposed class members. The third method employed by Dr. Netz calculates overcharges at the retail or ultimate customer level. Therefore this method does not require a further pass-through analysis. All three methods were used by her in her analyses done for similar cases brought against Microsoft in the United States.

[25] The two methods which require a pass-through analysis are the rate of return and profit margin methods. Dr. Netz described these as follows:

> **Rate of return method:** I based one method on a comparison between Microsoft's actual rates of return on investment to the rates of return for a benchmark of successful software firms. To obtain Microsoft's prices on the products at issue in the counterfactual world (i.e., the competitive world absent Microsoft's allegedly illegal conduct), I calculated the amount by which Microsoft's prices would have been lower than its actual prices in order to generate the counterfactual rate of return (the rate of return earned by the benchmark firms). The overcharge was then the percentage by which the actual price was above the counterfactual price.
>
> **Profit margin method:** I based a second method on a comparison between Microsoft's profit margins to the profit margins of a benchmark group of successful software firms. To obtain Microsoft's prices on the products at issue in the counterfactual world, I calculated the amount by which these prices would have been lower than Microsoft's actual prices in order to generate the profit margin earned by the benchmark firms. The overcharge was then the percentage by which the actual price was above the counterfactual price.

[26] The method which does not require a pass-through analysis is the price-premium method. The price-premium method deals directly with prices paid for Microsoft products at the ultimate consumer level, or in other words, the prices paid by the prospective class members. Dr. Netz describes this method as follows:

> Under this method, one calculates the *retail* price premium that Microsoft products have relative to competing products for the products at issue and for

> a set of benchmark products where there have not been allegations of anticompetitive conduct. The overcharge equals the percentage decrease in the retail price of the products at issue such that Microsoft would still realize the same retail price premium as it does on the benchmark products (i.e., products in markets not affected by Microsoft's unlawful conduct).[1]
>
> …
>
> Specifically, the price premium for a product is the price of the Microsoft product less the price of the non-Microsoft product, divided by the price of the Microsoft product. For example, if the price of the Microsoft product is $100 and the price of the non-Microsoft competing product is $75, then the price premium is 25% (= ($100 - $75) / $100).[2]

[27] Dr. Netz stated that when she used the three different methodologies in the U.S. litigation, they yielded similar results.

[28] Pro-Sys also filed the report of an economist at the University of British Columbia, Professor Brander. He largely echoed the approaches and opinions of Dr. Netz.

B. Pass-through

[29] As I indicated above, Dr. Netz's rate of return and profit margin approaches require further analysis in order to show that the alleged increased prices were passed through the various levels of the distribution chain to the class members.

[30] A zero per cent pass-through rate represents no pass-through at all; a rate of less than 100% represents a pass-through of less than the full amount of the initial increase ("partial pass-through") and a 100% pass-through rate represents a full pass-through of the increased price. Finally, a pass-through rate of more than 100% ("magnified pass-through") indicates that one or more intermediaries in the distribution chain have taken a mark-up on the increased price.

[31] Dr. Netz addresses pass-through in several ways which I describe in the following paragraphs.

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[1] Netz 2 para. 55
[2] Netz 2 page, f.n. 64

1. Non-quantitative approaches to pass-through

[32] Dr. Netz's first approach to establishing pass-through may be described as non-quantitative. It relies on the economic theory that in a competitive industry some pass-through will occur. In a very highly competitive industry 100% or greater pass-through will occur. As Dr. Netz explains it:

> If costs increase, a firm can either pass them on or absorb them. In order to absorb the cost increase, the firm would have to "take the hit" in profits. This is a possibility when the industry structure is such that there are profits to be reduced. When an industry is very competitive, the firm cannot absorb the cost increase because competitive pressures will have already driven price very close to cost. Put another way, in a low-margin industry, firms either have to pass on cost increases or go out of business.[3]

[33] That leads to the question as to the degree of competitiveness of the market in which Microsoft sells its products. Dr. Netz says: "Market participants recognize that the PC market (not to be confused with the PC operating systems market) is highly competitive." She then provides numerous quotes from sources such as annual reports and securities filings from companies in the computer and software industry which say that the industry is competitive. For example, she quotes two comments from Gateway Computer's 2000 annual report[4]:

> The PC industry is highly competitive.
>
> The Company has encountered increasingly aggressive competition in its industry.

[34] Dr. Netz also relies on the following as showing pass-through:

(a) Microsoft's experts in litigation in the United States accepted that there was a pass-through;

(b) Microsoft concluded in an internal document entitled "Everyday Low Prices Analysis" that a change in cost leads to a 121% change in price; and

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[3] Netz #2 para. 50

[4] Netz #1 para. 36 and note 17

(c) Studies commissioned by Microsoft from the Viewpoint Group "contain information regarding the pass-through rate".[5]

2. Quantitative pass-through analysis

[35] Dr. Netz says that she can perform a regression analysis in order to determine the pass-through rate. She describes regression analysis as follows:

> Regression analysis is an accepted and widely used tool in economics. Regression analysis is a tool for estimating the value of what is known as the dependent variable on the basis of the values of one or more independent variables. For example, one might try to explain weight on the basis of a person's age, sex, and income. There may or may not be any relationship between weight and any of these factors. With appropriate data and methods, regression analysis can be used to determine whether weight is causally connected to, or depends (i.e., is a dependent variable) on age, sex or income (i.e., the independent variables). In the case of pass-through, the goal is to describe the relationship between cost changes and price changes to determine whether cost changes (the independent variable) affect price (the dependent variable).

She refers to the studies she did for the litigation in the United States as having successfully demonstrated pass-through.[6]

3. Aggregation and averaging of claims

[36] The proposed class action includes different products sold through different distribution channels, over an extensive period of time. The same software was sold at differing prices to different customers and at differing prices to the same customers, depending on timing and volume. Pro-Sys says that while the plaintiffs do not need to rely on the aggregate damages sections of the *Class Proceedings Act* because they can prove class-wide impact and damages, the aggregate damages provisions of the *Class Proceedings Act* can be used to determine causation or damages so long as there is a reasonable prospect of establishing liability against *some*, not *all*, of the class.

[5] Netz #2 paras. 58-61
[6] Netz #1 paras. 44-48

[37] The relevant provisions of the *Class Proceedings Act* are contained in Part 4, Division 2. Section 29 sets out the circumstances in which a court may make an order for an aggregate monetary award:

> **29** (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under that subsection, and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[38] Section 30(1) sets out when statistical evidence may be used:

> 30 (1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

[39] Section 31(1) provides for the ability of the Court to distribute an aggregate award on an average or proportional basis:

> 31 (1) If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if
>
> (a) it would be impractical or inefficient to
>
> (i) identify the class or subclass members entitled to share in the award, or

> (ii) determine the exact shares that should be allocated to individual class or subclass members, and
>
> (b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.

[40] Pro-Sys says that the methodologies proposed by the plaintiffs will prove harm across product lines on an aggregate basis. As Professor Brander states:

> Overcharges might vary over time and from product to product. It is possible to assess overcharges at a disaggregated level. However, it would likely be more efficient to calculate average overcharges over fairly broad classes of products. Such averages, properly done, would not reduce the accuracy of aggregate economic damage estimates.[7]

[41] It follows from this that the entitlement of a class member to damages will be determined on an average basis and that s. 29 of the *Class Proceedings Act* will be used to establish the quantum of damages. As I indicated at para. 35, as an alternative argument, Pro-Sys says that that the aggregate damage provisions can, in addition, be used to establish causation.

V. WAIVER OF TORT

[42] Pro-Sys claims waiver of tort as an alternative cause of action. Peter D. Maddaugh and John D. McCamus, in The Law of Restitution, looseleaf ed. (Aurora, Ontario: Canada Law Book Inc., 2009), at 24-1, describe waiver of tort and its remedy:

> The doctrine known as "waiver of tort" is perhaps one of the lesser appreciated areas within the scope of the law of restitution. From the outset, it seems to have engendered an undue amount of confusion and needless complexity. … One source of this confusion stems from the doctrine's very name. As one writer has pointed out, not entirely facetiously, it has "nothing whatever to do with waiver and really very little to do with tort". Although the phrase might be interpreted to mean that the plaintiff is somehow excusing the defendant from the wrongful act and thereby forgoing the remedy at law, the plaintiff, in fact, does no such thing. Rather, the plaintiff is simply giving up the right to sue in tort and instead electing to base the claim in restitution, thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct. In essence, then, the concept is really quite simple: in certain situations, where a tort has been committed, it may be to the plaintiff's

[7] Brander #1, para. 66

> advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages.

[43] Pro-Sys says that it is entitled to claim Microsoft's profits from the wrongful conduct without having to show harm to the class members. In other words, waiver of tort avoids the issue of causation and therefore pass-through.

[44] Pro-Sys' waiver of tort claim survived Microsoft's motion to strike. Tysoe J. noted that there were two unsettled issues with respect to waiver of tort. The first was whether it constituted an independent cause of action, or was only a remedy. As Tysoe J. noted, if it was an independent cause of action the plaintiff would not be required to prove the damage required for most of the other torts claimed by Pro-Sys. Tysoe J. felt it was not necessary for him to decide that since he was not striking most of the other causes of action.

[45] The second unsettled aspect of waiver of tort noted by Tysoe J. is whether a plaintiff claiming waiver of tort must establish all of the elements of unjust enrichment: an enrichment of the defendant; a corresponding deprivation of the plaintiff; and an absence of juristic reason for the enrichment. Tysoe J. held that the matter was not plain and obvious and declined to strike the claim for waiver of tort.

[46] These issues are still relevant to the certification application, although not with reference to the existence of a cause of action. Rather they are germane to the common issue and preferability questions. As will be seen, they were dealt with in that context in *Infineon*.

VI. OVERVIEW OF THE ARGUMENTS ADVANCED BY MICROSOFT

[47] Microsoft says that:

1. Pro-Sys has not established that there is an identifiable class. This is so because the class is too broad and class membership cannot be objectively determined.

2. Pro-Sys has not established that the claims of the proposed class members raise common issues: liability is not a common issue and Pro-Sys' evidence is insufficient to prove class-wide loss.

3. A class action is not the preferable procedure.

4. The proposed representative plaintiffs are unsuitable.

[48] Many of these arguments relate to what Microsoft says are deficiencies in Dr. Netz's and Professor Brander's methodologies. I will deal with these specific arguments later in these reasons. Before doing so, there are threshold issues which underlie much of Microsoft's argument that can be dealt with discretely. These are:

a. the standard of proof required of a plaintiff in a certification application with respect to a methodology to demonstrate class-wide harm and damages;

b. the use of s. 29 of the *Class Proceedings Act* and the use of averages; and

c. whether proof of harm is a necessary element in a waiver of tort claim.

[49] These have been difficult issues in applications to certify class action anti-competition and similar cases, which are pure economic loss claims. In such cases, the evidence that will prove harm and causation is usually the same evidence that will be used to prove the quantum of damages. Therefore the interplay between damage calculation issues (for which the aggregate damage sections of the *Class Proceedings Act* may be used) and causation (for which, the defendants argue, they may not) is engaged.

[50] It may be useful to briefly outline and trace the evolution of the Canadian case law in this area in order to set the backdrop for the Court of Appeal's decision in *Infineon*, which I will come to later and which decides these issues for the purposes of certification. Further, the *Class Proceedings Act* is relatively young legislation and

the use of waiver of tort in the *Act*'s context is an emerging phenomenon in the jurisprudence.

VII. THE CANADIAN CASE LAW RELATING TO CERTIFICATION OF ANTI-COMPETITION AND SIMILAR CLAIMS

[51] I deal with the cases in this section in chronological order. Where a case has been considered by an appellate court, I use the date of the appellate decision. For each of the cases, I have focussed on the three issues set out above at para. 48.

A. *Price v. Panasonic Canada Inc.*

[52] *Price v. Panasonic Canada Inc.* [2002] O.T.C. 426, 22 C.P.C. (5th) 382 (S.C.J.), was one of the first[8] Canadian post-*Class Proceedings Act* certification case involving allegations of anti-competitive behaviour other than misleading advertising. Certification was denied. The plaintiffs claimed that Panasonic maintained resale prices of audio-visual products. Shaughnessy J. decided that the plaintiffs would "be required on an individual basis, to prove that [they] suffered loss caused by the acts of the Defendant" (at para. 27). Since the plaintiffs were relying on ss. 61 and 36(1) of the *Competition Act*, the Court found that in order for claims to be made out, proof of actual loss or damage was necessary to establish liability. The situation was similar for the plaintiffs' other claims under s. 38(1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (the predecessor to the *Competition Act*), and their claims of intentional interference with contractual relations or infliction of economic injury by unlawful means, and their claims in unjust enrichment.

[53] On the issue of whether the aggregate damages section (s. 24) of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [*Ontario CPA*] (the equivalent to s. 29 of the B.C. *Class Proceedings Act*) could be used to prove loss on a class-wide basis, the Court found that s. 24 of the *Ontario CPA* only permitted the *quantum* of

[8] The lower court decisions in *Chadha*, and *Vitapharm*, *infra* actually came before *Price*, but as mentioned, I have ordered the judgments in this chronology according to the date of the highest court decision in the case.

damages to be assessed on an aggregate basis, not the fact of entitlement to damages. The provisions of the *Ontario CPA* are essentially the same as those in British Columbia.

[54] Similarly, the Court decided, at para. 31, that statistical evidence could not be adduced by experts to resolve the problems of proof on a class-wide basis and to determine liability. This was because s. 23(1) of the *Ontario CPA* provided that statistical evidence could only be received "for the purpose of determining issues relating to the amount or distribution of a monetary award." Thus there was no need for the Court to assess any expert economic evidence at the certification stage in that case.

[55] The plaintiffs did not plead waiver of tort, but they did claim in unjust enrichment. The Court stated, at para. 29, that evidence of unlawful conduct by the defendant alone, without proof of a corresponding deprivation to the plaintiff, would not establish such a claim.

B. *Chadha v. Bayer Inc.*

[56] In *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22, 223 D.L.R. (4th) 158 (C.A.), leave to appeal to S.C.C. ref'd (2003), 65 O.R. (3d) xvii, the plaintiffs alleged price-fixing of iron oxide pigments used to colour bricks in new houses in breach of the *Competition Act*. The class representative had built a home using bricks containing iron oxide. The proposed class was defined as all persons who had purchased Bayer's product directly or indirectly and suffered losses resulting from Bayer's overcharging.

[57] The Court of Appeal held that the aggregate damage provision (s. 24) was only applicable once liability had been established. While it provided a method to assess the quantum of damages, it could not establish the fact of damage.

[58] The Court, at para. 30, found that the motion judge had erred by relying on the expert evidence filed by the plaintiffs as the basis for the certification order, when the expert's models were based on the assumption (without a method of proof) of a

full pass-through of the price increase to the indirect purchasers. The Court said, "it is that assumption that is the very issue that the Court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such."

[59] The Court cited *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, where McLachlin C.J.C. clarified the role of evidence at the certification stage when she said, at para. 22, that the class representative is required "to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own." The Court also referred to McLachlin C.J.C.'s comment at para. 25 of *Hollick* that "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the [*Ontario CPA*], other than the requirement that the pleadings disclose a cause of action."

[60] Having concluded that the fact of liability could not be a common issue because of the problems with pass-through proof, the Court of Appeal concluded that the remaining issues, namely the price fixing conspiracy and the measure of damages, would not be important in relation to the claims as a whole, and thus the class action would not be the preferable procedure. It upheld the Divisional Court's decertification of the class action.

[61] Waiver of tort was not before the Court in *Chadha.*

C. *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*

[62] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 226 (S.C.J.), the plaintiffs applied for certification as part of the approval of a settlement. Therefore the decision cannot be considered a strong precedent for a case in which the issues are contested. Nevertheless, for the sake of completeness, I will summarise the outcome of the case which involved a claim for price-fixing and market-sharing conspiracy related to the sale of vitamins in Canada.

[63] The settlement involved the fixing of an aggregate overcharge amount on the defendants' side, and then the distribution of a portion of that amount. Some of the overcharge would be repaid through credits to direct purchasers; a portion distributed *cy-près* to industry organizations for the benefit of intermediate purchasers, and a portion distributed *cy-près* to consumer organizations for the benefit of ultimate consumers.

[64] With respect to the issue of expert evidence, the Court noted and approved of the plaintiffs' expert's method of calculating the aggregate damages using a "but for" test – absent the conspiracy, the aggregate cost of the vitamins would have only been $749 million when it actually cost $870 million. The method used was a weighted average of the overcharge using regression analysis. However, the ultimate amount of aggregate damages was negotiated in the settlement agreement.

D. *Reid v. Ford Motor Co.*

[65] *Reid v. Ford Motor Co.*, 2006 BCSC 712, involved a motion to amend a statement of claim to include a cause of action in "waiver of tort" in a products liability case involving indirect purchasers. Gerow J. held that the elements of unjust enrichment, which would be required to be proven for any waiver of tort claim, could not be satisfied in the case of indirect purchasers because prior unjust enrichment claims only permitted recovery when a benefit was conferred directly and specifically on the defendant, such as goods or services purchased by the plaintiff from the defendant. (See *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 797, 98 D.L.R. (4th) 140.)

[66] However, as I mentioned above (at para. 44 and following) in the motion to strike in the case at bar, Tysoe J. took a different approach. He noted that Gray J. had distinguished *Peel* in *Innovex Foods 2001 Inc. v. Harnett*, 2004 BCSC 928, on the basis that the concern raised in *Peel* related only to incidental collateral benefits. He was not prepared to find that the benefits received by the defendants were plainly and obviously incidental collateral benefits. Tysoe J. further stated at 2006 BCSC 1047, at para. 85, that "it is not plain and obvious that the Plaintiff will have to

establish all elements of unjust enrichment (and in particular, the absence of a juristic reason for the enrichment) before being entitled to rely on the doctrine of waiver of tort."

[67] The issues of aggregate damages and expert evidence were not before the Court in either *Reid* or Tysoe J.'s decision in the case at bar.

E. *Knight v. Imperial Tobacco Canada Ltd.*

[68] In *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 267 D.L.R. (4th) 579, the British Columbia Court of Appeal upheld Satanove J.'s certification (2005 BCSC 172), of class proceedings in a claim brought under the *Trade Practices Act*, R.S.B.C. 1996, c. 457. The plaintiffs claimed that the defendants deceptively marketed "light" or "mild" cigarettes that were not in fact any lighter or milder than normal cigarettes, and thus they had paid a higher price for these products than they would have absent the deceptive marketing.

[69] On the issue of aggregate damages, Satanove J. stated the following, at para. 51 of her reasons:

> The plaintiff submits that ss. 29 and 30 of the *CPA* permit aggregate monetary awards and the use of statistical evidence to determine the amount of an aggregate monetary award and how it should be distributed. The plaintiff has tendered some affidavit evidence to indicate that the quantum of restitution or disgorgement can be established through the defendant's business records and statistical evidence. Alternatively, the plaintiff proposes to prove that the defendant's alleged deceptive practices have distorted the entire marketplace for tobacco products through the defendant's creation and sale of a supposedly safer cigarette, a product which the plaintiff says does not exist. The plaintiff's theory is that the fair market price of the defendant's product would have been different but for the defendant's alleged deceptive conduct. Therefore all class members paid too much for the product. There is no need for individual trials when the quantum of such an economic claim can be proved for the class as a whole. [Emphasis in original]

[70] The Court of Appeal upheld the decision stating, at para. 40:

> Although there may be elements of novelty and difficulty with the proposed methodology of damages calculation advanced by the respondent, it seems to me that it is appropriate for this issue to be left to be worked out in the

> laboratory of the trial court. Then, if and when the issue reaches this Court, we will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.

F. *Serhan (Trustee of) v. Johnson & Johnson*

[71] *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Div. Ct.), was another case where waiver of tort was considered in Ontario. The plaintiffs applied for certification of a class action against the defendant for the defective manufacture of blood glucose testing devices for diabetics. The motion judge, Cullity J., had found that there was no method of proving causation and damages on a class-wide basis. However, he certified on the basis that the evidence and pleadings disclosed a possible cause of action in the emerging doctrine of waiver of tort.

[72] The Divisional Court agreed with Cullity J. They wrote, at para. 24:

> Cullity J. observed that waiver of tort, as a cause of action, arguably has the advantage for a plaintiff that proof of loss as an element of the tort, is not required. If such is the case, this may have special significance when identifying common issues for the purposes of the *CPA*.
>
> While Cullity J. was aware that his view was contrary to the reasoning in *Stoke-on-Trent City Council v. W. & J. Wass Ltd.*, [1988] 3 All E.R. 394, [1988] 1 W.L.R. 1406 (C.A.), he noted that the case had been criticized and that two recent decisions of the Ontario courts had accepted the proposition that benefits may be recoverable even when the plaintiff suffered no loss.
>
> The critical finding of the motion judge is at para. 38, where he states:
>
>> It has been held more than once that a motions judge should be slow to strike novel causes of action or those in an area of the law that is unsettled, or undergoing significant change or development. In my opinion, the law relating to waiver of tort falls within each of these categories. In particular, although there are many cases in which remedies have been granted on the basis of the "doctrine" of waiver of tort, its scope, and the extent to which it reflects general principles, have not, as far as I am aware, received authoritative analysis in Canadian appellate courts.

[73] The Divisional Court then went on, at paras. 45-124, to summarize the academic writing and the jurisprudence on the waiver of tort issue. They split the analysis into three issues: firstly, whether waiver of tort was available as a separate

cause of action, not requiring proof of loss or damages; secondly, if a waiver of tort was proven, whether a constructive trust would be available as a remedy; and thirdly, whether an accounting and disgorgement of profits would be available as a remedy. The Court decided there was enough support in the jurisprudence to disclose an arguable case on each of the three issues.

[74] The Divisional Court reasoned that s. 24 of the *Ontario CPA* could arguably be used to calculate aggregate damages as a common issue, since there would be no need to prove loss or damages on an individual basis; therefore there would be no outstanding issue of fact or law, as required by the statute.

G. *Markson v. MBNA Canada Bank*

[75] In *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, the Ontario Court of Appeal adopted a different approach to the use of the aggregate damage provisions of the *Ontario CPA*.

[76] *Markson* was a class action over transaction fees and compound interest charged by the defendant credit card company on cash advances. In some, but not all cases, the fees and interest added up to an effective interest rate that exceeded the 60% threshold for a criminal rate under s. 347(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. However, the defendants opposed the motion for certification on the basis that only a subset of the members of the class were actually charged the criminal interest rate, and in order to find out which members of the class had been victimized, a detailed analysis of their individual account activity needed to be undertaken.

[77] The motion judge and the Divisional Court refused to certify the case. The Court of Appeal reversed those decisions.

[78] A key factor for the Court of Appeal was that "*all* members of the class [were] at risk of being charged a criminal interest rate and thus, potential beneficiaries of the declarative and injunctive relief sought, but *only some* of the members - a much

smaller number of the class - were actually victims of the defendant's practice and thus, entitled to damages and restitution. [Emphasis in original.]" (para. 4.).

[79] With respect to the aggregate damages issue, the Court of Appeal said, at para. 41:

> If the common issues relating to the application for a declaration and injunctive relief were to be determined in the plaintiff's favour, the trial court will have found that the defendant received interest in excess of an effective annual rate of 60 per cent on cash advances. Thus, liability to some class members will have been established. At least some members of the class would therefore be entitled to a remedy, either by way of restitution or damages for breach of contract. In my view, those two findings - liability and entitlement to a remedy - are sufficient to trigger the application of ss. 23 and 24.

Thus, the requirements for triggering s. 24 were the establishment of bad conduct on behalf of the defendant, and a corresponding deprivation of at least some of the class members.

[80] The Court of Appeal identified the problem with using s. 24 in this context – that there would still be questions of fact or law other than those relating to the assessment of monetary relief remaining to be determined after resolution of the common issues, contrary to s. 24(1)(b) of the *Ontario CPA*. However, the Court pointed out, at para. 46, that such a problem only existed because there was a need for individual assessments of each class member's credit card account, and that the result of not allowing the class action to proceed would be contrary to public policy: "Large institutions allegedly receiving large amounts of illegal profits from millions of small transactions will effectively be immunized from suit."

[81] The solution, according to the Court, was to read s. 24(1)(b) in harmony with the other provisions of the *Ontario CPA*, particularly s. 24(3), which reads:

> In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award.

The section contemplated that aggregate awards might be necessary in cases where it would be impractical or inefficient to determine the amount of liability on a case-by-case basis. By reading the entire section harmoniously, condition (b) would be satisfied "where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments." (para. 48). The Court went on to write, at para. 49:

> In the context of this case, if the plaintiff can establish that the defendant administered its cash advances in a manner that violated s. 347 and/or breached its contract with its customers, it will have established potential liability on a class-wide basis. Each member of the class would be entitled to declaratory and injunctive relief. The only matter remaining would be the application of the decision on the common issues to the specific account activity of each class member to determine that class member's entitlement to monetary relief. Section 23 can be used to calculate the global damages figure. Section 24 can be used to find a way to distribute the aggregate sum to class members. It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because "it would be impractical or inefficient to identify the class members entitled to share in the award".

H. *Cassano v. Toronto-Dominion Bank*

[82] Shortly after *Markson,* the Ontario Court of Appeal released its ruling in *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401. The facts were somewhat similar to *Markson*. The defendant bank was sued by the plaintiffs over "conversion fees" and "issuer fees" charged on foreign currency transactions. The fees were allegedly not disclosed in the customer cardholder agreements. The Court applied its reasoning from *Markson* in determining that an aggregate award could be calculated.

I. *Harmegnies c. Toyota Canada Inc.*

[83] In *Harmegnies c. Toyota Canada Inc.*, 2008 QCCA 380, leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 173, the Quebec Court of Appeal declined to certify a contested class action proceeding brought on behalf of indirect purchasers of

Toyota vehicles. In that case, Toyota was accused of price fixing by forbidding dealers to sell to consumers certain models of cars below a certain price.

[84] On the issue of the evidentiary burden, the Court had this to say, at para. 34:

> On remarquera d'entrée de jeu qu'il suffit pour remplir cette condition que les faits énoncés dans la requête paraissent, c'est-à-dire semblent au premier abord, justifier les conclusions recherchées. Le requérant n'a donc pas à faire une preuve par prépondérance, mais seulement, à cette étape du processus, à démontrer une apparence sérieuse de droit.

In short, proof was not required by preponderance of the evidence at the certification stage, only that there be the serious appearance of a claim. However, the judge went on to say that the method of proof offered by the plaintiffs did not meet this evidentiary standard.

[85] The issues of waiver of tort and aggregate damages were not before the Court in *Harmegnies*.

[86] The next decision was that of the chambers judge in the *Infineon* case, however I will deal with that and the Court of Appeal's reasons later in these reasons, beginning at para. 96.

J. *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*

[87] *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, 250 O.A.C. 87 (Div. Ct.), did not involve indirect purchasers in a complex vertical supply chain arrangement, but did involve a situation with a horizontally complex set of factors. The class consisted of Quizno's restaurant franchisees who sued the franchisor claiming, among other things, breach of s. 61 of the *Competition Act* (price fixing) with respect to food supplies (with the availability of a remedy under s. 36). The economic evidence was such that, due to a number of indeterminate variables, it would be very difficult to prove the amount of damage that individual stores had suffered on a class-wide basis.

[88] The Divisional Court found that there was a basis in fact to support a finding of a breach of s. 61 of the *Competition Act*, and that although there was not a basis to establish proof of loss as a constituent element under s. 36 (the provision establishing a civil remedy), this was not necessary – the breach of s. 61 was a significant enough common issue. The Court contrasted the “bottom-up” approach to proving damages that was relied upon by the motions judge, an approach which focused on the individual prices paid by the various members of the class, to the “top-down” approach preferable in this case, which focused on the conduct of the defendants and the mark-ups that they charged.

[89] On the question of s. 24 (aggregate damages) of the *Ontario CPA*, the Court cited *Markson* where Rosenberg J.A. found that at the certification stage, the plaintiff need only to establish that it was reasonably likely the preconditions of that section would be satisfied and an aggregate assessment made if the plaintiffs were otherwise successful at a common issues trial. Using this “top-down” approach, the Court in *Quizno’s* allowed the plaintiffs to prove the fact of damages suffered in the aggregate as a common issue, even if there was no method for proving the quantum of damages for individual class members on a class-wide basis. Thus, showing a breach of s. 61 (but not s. 36) of the *Competition Act* would be enough, at a common issues trial, to trigger the application of s. 24 of the *Ontario CPA*.

[90] With respect to the issue of expert evidence, the Court said, at paras. 101-2:

> The court was faced with conflicting expert opinions by highly specialized economists. The experts disagreed on the validity of a methodology for assessing loss amongst franchisees. They based their opinions on different economic principles and assumptions.
>
> It is neither necessary nor desirable to engage in a weighing of this conflicting evidence on a certification motion. The plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent that they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader. Where the assumptions are debated by experts, these questions are best resolved at a common issues trial. A motions judge is entitled to review the evidentiary foundation to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports.

[91] The issue of waiver of tort was not before the Court in *Quizno's*.

K. *Irving Paper Ltd. v. Atofina Chemicals Inc.*

[92] Another case involving indirect purchasers was *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (S.C.J.) (Q.L.), where the defendants sold hydrogen peroxide and allegedly conspired to allocate markets, restrict supply, and increase prices. The class was defined as all purchasers of hydrogen peroxide and products containing or produced using that chemical. The alleged conspiracy had been the subject of a criminal investigation in Europe and the United States and the European Commission had concluded that nine companies including several of the defendants had participated in the cartel.

[93] On the issue of the use of the aggregate assessment provisions, Rady J. said the following, at para. 118:

> I am of the view that *Markson* and *Cassano* signal a different approach to be taken to certification whether it be in breach of contract or other types of cases. Justice Rosenberg spoke of the need to establish "potential liability" before resort to the aggregation provisions could be had. That being so, it seems to me that the plaintiffs here need only prove potential liability -- in other words, that the defendants acted unlawfully. This would trigger the aggregate assessment provisions. Further, *Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis.

[94] On the expert evidence issue, Rady J. wrote, at para. 119:

> It is necessary to next examine the evidence of Drs. Beyer and Schwindt. Before doing so, however, it bears remembering that it is not necessary to reconcile the conflicting opinions at this stage of the proceeding. Indeed, it has been said that at the certification motion, "the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis, in fact, for the certification requirement in issue": *Hague v. Liberty Mutual Insurance Co.*, [2004] O.J. No. 3057 (S.C.J.) …

[95] Again, waiver of tort was not before the Court in *Irving Paper*.

VIII. THE *INFINEON* DECISION AND ITS APPLICABILITY TO THE CASE AT BAR

[96] In *Infineon*, the defendant companies were a number of manufacturers of dynamic random-access memory ("DRAM"). DRAM is an essential component in almost all electronic products used today, including computers, automobiles, cell phones, cameras, and even such things as microwaves ovens.

[97] Certification was sought for a class to include all direct and indirect purchasers of DRAM. Because DRAM was such a fundamental component of electronics, the distribution chain and number of potential types of purchasers was large. Similar to the iron oxide pigment in *Chadha*, the cost of a unit of DRAM was often only a small fraction of the final cost of the electronic device in which it was ultimately contained.

[98] Not surprisingly, given that fact that the plaintiff and its counsel were the same in *Infineon* as they are in the case at bar, the causes of action in that case and this one are virtually identical.

[99] Most of the defendants in *Infineon* had, in the United States, pled guilty to participating in an international conspiracy to fix prices for DRAM. The plea agreements acknowledged that direct purchasers were "directly affected" by the conspiracy; they were silent with respect to indirect purchasers. A number of the defendants had also settled class action claims by direct purchasers. Claims by indirect purchasers were pending at the time of the chambers judgment by the chambers judge. In the case at bar, there is no such guilty plea by Microsoft.

[100] In *Infineon*, the chambers judge declined to certify the case. The Court of Appeal reversed that decision.

[101] *Infineon* is highly relevant to the case at bar. Although *Infineon* involved a single product it involved many defendants, whereas this case involves only one. Further, the distribution channels between the defendants and the indirect purchasers in both cases are on the same order of complexity. In short, *Infineon*

was as complicated a case as the one at bar with respect to proving causation on a class-wide basis.

[102] Because of its importance to the case at bar, I will outline the differences in the approaches taken by the chambers judge and the Court of Appeal with respect to:

(a) the standard of proof required of the plaintiff in a certification application;

(b) whether harm and damages to the plaintiff class members need be shown with respect to a waiver of tort claim; and

(c) whether the aggregate damage sections of the *Class Proceedings Act* can be used to establish harm (an element required for liability for all of the torts pleaded, with the possible exception of waiver of tort).

A. Standard of proof

[103] In *Infineon*, the chambers judge was of the view that the plaintiff had not demonstrated a class-wide methodology to show harm and damages. He stated (these passages are also quoted by the Court of Appeal):

> [139] In a case such as this where the context is pass through, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology that is capable of relating harm to Class Members. This is not an application such as in *Vitapharm* where a settlement has been effected such that the threshold assessment can be "relaxed somewhat": see *Furlan v. Shell Oil Co.*, 2002 BCSC 1577 at para. 11. Given the inherent complexities, the scrutiny cannot be superficial. The evidence must establish that the proposed methodology has been developed with some rigour and will be sufficiently robust to accomplish the stated task.
>
> ...
>
> [141] I think it is obvious that an informed observer having an appreciation of: the dynamics of the market place generally; the DRAM industry specifically; the different forms of DRAM; the vast array of products that contain DRAM; the numerous and differing channels by which DRAM and products containing DRAM travel to reach intermediate and end markets and consumers; the number of participants at each level of distribution; and the numerous variables that can impact the price of a product containing DRAM, would not accept the proposition that it is possible to determine an

> overcharge to each indirect consumer in such a complex product and distribution context without serious scrutiny of the methodology. Dr. Ross' opinion that "it is possible to assess and quantify the overcharge" to direct purchasers and passed through to downstream purchasers cannot simply be taken at first blush. If scrutiny is not conducted at this stage there is the real risk of dysfunction which cannot be in the interest of the litigants or the judicial process.

[104] At para. 166, also quoted by the Court of Appeal, the chambers judge refused to accept the evidence of the plaintiff's expert evidence. He said it:

> ... is not seasoned with industry knowledge or industry analysis; is premised on the need for considerable information which he was not able to state was available; requires analysis of pass through at every level of distribution channel for each product, and is hypothetical and simplified - not based upon real world economics; looking at the evidence overall, there are significant deficiencies regarding the approaches proposed by the plaintiff. It is apparent that the methods proposed by the plaintiff do not avoid the need for a vast number of individual inquiries regarding the participants and conditions in the market place for DRAM. As a result, I find that the plaintiff has not sufficiently demonstrated that a workable class-wide methodology is available to establish harm.

[105] The Court of Appeal held that the chambers judge applied too high a standard. Writing for the Court, Smith J.A. said:

> [63] In my view, this analysis set the bar for the appellant too high.
>
> ...
>
> [65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: Hollick at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: Hollick, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a "minimum evidentiary basis": Hollick, at paras. 21, 24-25; Stewart v. General Motors of Canada Ltd., [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in Cloud v. Canada (Attorney General) (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [Cloud],
>
> > [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.
>
> [66] Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting

scrutiny required at a trial. On this point, I adopt the remarks of J.L. Lax J. in Griffin v. Dell Canada Inc., [2009] O.J. No. 418 (S.C.J.) at para. 76:

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

[106] At para. 68, the Court of Appeal said that:

> <u>The appellant was</u> required <u>to show only a credible or plausible methodology.</u> It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. Ms. Sanderson gave evidence that aggregate harm had been estimated by two experts in the U.S. litigation. ...

and:

> ... In my view, Dr. Ross' evidence met <u>the low threshold</u> required to establish for purposes of certification that gain and its counterpart, damage, can be shown on common evidence.
>
> (Emphasis added)

B. Waiver of tort

[107] With respect to waiver of tort, the chambers judge held, at para. 145:

> ... Even under the doctrine of waiver of tort, the unlawful gain must be referable to the Class Members, as I will now explain. No methodology capable of providing this necessary link has been proposed. While that failure may not be fatal under the "common issues" criteria, it will likely doom the certification application to failure under the "preferable procedure" criteria.

[108] The Court of Appeal took a contrary view. At para. 31, it endorsed the view of Epstein J. in *Serhan* that for unjust enrichment, constructive trust and waiver of tort:

> ... there is an argument to be made that these claims may be established on the basis of proof of wrongful conduct and resulting gain without proof of any loss by the plaintiff.

And at para. 32, it endorsed the view expressed in *Heward* that "... causation could be proven for the class as whole upon proof that the gain would not have been obtained but for the defendants' wrongful conduct."

[109] Microsoft argues that the Court of Appeal misinterpreted *Heward*. I do not think I need or should grapple with that issue: the Court, by adopting what it said *Heward* stood for, clearly enunciated its view of the legal point in issue.

C. The use of the aggregate damages sections of the *Class Proceedings Act*

[110] The chambers judge held that the aggregate damages sections of the *Class Proceedings Act* could not be used to establish harm to the plaintiff class. At para. 176, he stated:

> In my view, *Chadha* remains good law in precluding the plaintiff from resorting to the aggregation provisions of the Act to establish liability when there is otherwise no basis to do so, and I follow it. In this case, liability requires that a pass-through reached the Class Members. That question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked.

[111] The Court of Appeal disagreed. Recognising that there might be a conflict in the law in Ontario on the point, the Court of Appeal said that *Knight* settled the law in this province and stood for a different proposition than that set out by the chambers judge. It said:

> [39] In my view, the chambers judge misapprehended the decision in *Knight*. In *Knight*, this Court affirmed the certification of an aggregate monetary award under the *CPA* as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct without an antecedent liability finding – rather, the aggregate assessment would establish **concurrently** both that the defendant benefited from its wrongful conduct and the extent of the benefit.
>
> (Emphasis added)

[112] Microsoft argues that *Infineon* cannot be taken as authority for using the aggregate damage provisions to establish harm, i.e. liability, because the *Infineon* judgment was predicated on the defendants' guilty pleas, which are not present here.

[113] It is true that, as Microsoft points out, the Court of Appeal referred in several places to the fact that the defendants had pled guilty in the United States and that, at paras. 42 and 44, the Court stated:

> [42] Statistical evidence is admissible to prove the amount of the respondents' gain by virtue of s. 30(1) of the CPA if the three preconditions set out in s. 29(1) are satisfied.
>
> ...
>
> [44] The second requirement is that "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability". As I have explained, the admissions inherent in the guilty pleas and the plea agreements in the U.S. criminal proceedings, if proven, would establish liability in the restitutionary claims, leaving nothing to be determined except the assessment of the amount of the respondents' gain attributable to this particular class, if any, and its distribution. Accordingly, the second precondition is satisfied.

[114] Further, at para. 33, the Court stated:

> ... These respondents' guilty pleas to the conspiracy charges and their agreement to pay fines calculated as a function of the gross pecuniary gain they derived from the crime amount to admissions that they engaged in the wrongful conduct alleged by the appellant and that they obtained an unlawful benefit from that conduct. Proof of these admissions would therefore establish liability in the restitutionary actions.

[115] Nevertheless, it appears to me that this does not detract from the clearly-stated general proposition enunciated by the Court of Appeal in para. 39 of its reasons (quoted and underlined above at para. 111). Furthermore, while the Court of Appeal was dealing with the claims of the indirect purchasers, the guilty pleas were only made with respect to direct purchasers and therefore irrelevant to the indirect purchaser claims.

[116] In my view, the Court of Appeal did sanction the use of economic and statistical evidence to determine the benefit obtained by the defendants from their wrongful acts, which would be the measure of recovery by the plaintiff class under its waiver of tort claim. That this is made clear by the following passage:

> [34] The appellant contends it can prove on common statistical evidence that the respondents obtained a benefit attributable to this class from their unlawful conduct. It proposes to rely on expert economic evidence based on economic theory and statistical analysis to establish the prices the respondents would have received for DRAM absent their unlawful conspiracy. Then, by deducting what the respondents actually received from members of this class as determined from the respondents' records, the appellant submits it will derive the amount of the unlawful gain attributable to this class. Accordingly, in the appellant's submission, it will prove the respondents benefited from their conspiracy, thus establishing liability in the restitutionary claims, and, at the same time, it will prove the amount of the benefit.
>
> [35] This approach to <u>proof of causation on a class-wide basis</u> has been approved in this province.
>
> (Emphasis added)

[117] On a different tack, I do not think that Pro-Sys need rely on s. 30 to have its economic evidence admitted to prove that Microsoft profited from a breach of statute or common law duty or the amount of the profit. Statistical (and economic) evidence, properly incorporated into an expert opinion, is admissible to prove profits, or loss of profits. The fact that the same evidence will also be used to prove damages does not detract from its admissibility to prove the profits Microsoft earned from the alleged increased prices. Section 30(1) does not purport to be a complete code for the admissibility of statistical evidence in class proceedings; it does not render evidence inadmissible that would otherwise be admissible.

[118] That disposes of Microsoft's objection to the use of the Netz and Brander evidence with respect to proving causation (if it can be called such, given that it is proof of the defendant's gain) for the waiver of tort and restitutionary claims.

[119] The next question is whether the plaintiffs need rely on the aggregate damage sections to show harm and causation in support of their damage claim (as

opposed to a restitutionary claim) and whether the *Infineon* decision allows for such use.

[120] Once again, for similar reasons, it is my view that the aggregate damage provisions are not engaged. Pro-Sys will use economic evidence to attempt to show harm to all members of the class; in other words, all members of the class overpaid for their software. It is the thesis of Dr. Netz that there was a pass-through (perhaps at varying rates) of all price increases. At the stage of showing causation, it is sufficient if the plaintiffs show that all members of the class suffered at least some detrimental pricing impact, no matter how small. For the purposes of establishing causation, it does not matter that different members of the class may have been impacted differently, depending on the software they bought or from whom it was purchased.

[121] On that basis, apart from the *Class Proceedings Act*, statistical and economic evidence would be admissible to prove class-wide harm or impact. If and when that is established, s. 29 could then be used to calculate the amount of damages because at that point no issue of liability would remain to be determined. Section 31 would also no doubt come into play in distributing the award. As was said in *Markson*:

> [58] If these issues are determined in favour of the class, the trial judge will be able to resort to ss. 23 and 24 of the CPA to resolve the issues of quantum and distribution of the monetary award. Section 26 provides a shopping list of methods for distributing an award under s. 24, including abatement and credit to class members by the defendant (s. 26(2)(a)). That said, the trial judge might nevertheless find, pursuant to s. 24(4) that individual claims need to be made to give effect to the order. If so, it may well be that the trial judge will be asked to exercise the power under s. 10 of the CPA to "amend the certification order, . . . decertify the proceeding or . . . make any other order it considers appropriate".

[122] This conclusion with respect to the damage claims addresses Pro-Sys' main argument: that it has a credible or plausible methodology to show that all class members were harmed by Microsoft's alleged illegal activities. Pro-Sys' alternative argument is that all class members need not have suffered harm and that the

aggregate damages sections of the *Class Proceedings Act* can be used to establish causation – i.e. liability – for the alleged causes of action apart from waiver of tort. Pro-Sys submits that it is therefore sufficient that it show a plausible methodology – on an aggregate basis – to demonstrate harm to some class members. Pro-Sys relies on both *Markson* and *Infineon*.

[123] I do not think that *Markson* goes quite as far as Pro-Sys says it does. In deciding *Markson*, the Ontario Court of Appeal distinguished it from *Chadha*:

> [55] ... In *Chadha*, the plaintiff adduced no evidence that the result of the defendants' allegedly illegal acts were passed through to the consumers who made up the proposed class. That is not an issue in this case. There is no question that the allegedly illegal fees were passed on to the class members and received by the defendant. The only serious issue is how many members of the class actually suffered an economic loss. This issue can be addressed by ss. 23 and 24.

Markson was not an indirect purchaser case. Assuming there was a breach of the criminal interest provision (which was to be assumed as part of the pleaded cause of action) some account holders would have paid the criminal rate of interest. In contrast to *Markson*, in the case at bar there is an issue with respect to whether the alleged overcharges were passed on to any of the proposed class members at all.

[124] The judgment in *Infineon* did not address this issue directly. However, there was a dispute as to the terms of the Court's order, and the matter was referred back to the panel. Its reasons settling the terms of the order (referred to above at para. 11) were brief, simply stating that the Court adopted Pro-Sys' submissions and attaching the terms of its order, but the arguments disclose that the issue was whether the Court of Appeal meant to certify only the restitutionary claims or, in addition, the damage claims. In the end result, the Court of Appeal ordered that both types of claim be certified. For example, with respect to the claim for tortious interference with economic interests, the Court certified the following questions:

- Did the defendants, or any of them, intend to injure the Class Members?

- Did the defendants, or any of them, interfere with the economic interests of the Class Members by unlawful or illegal means?
- Did the Class Members suffer economic loss as a result of the defendants' interference?
- What damages, if any, are payable by the defendants, or any of them, to the Class Members?
- Can the amount of damages be determined on an aggregate basis and if so, in what amount?

[125] Given the arguments and evidence in that case, the Court of Appeal must be taken to have accepted that for certification of the damage claims, a method of showing harm to all class members need not be demonstrated and, further, that the aggregate damages sections can be used to establish liability.

[126] To summarise, *Infineon* stands for the following with respect to a certification application:

a. A plaintiff need only show a “credible or plausible methodology” for proving class-wide issues. The threshold is a low one and conflicting expert evidence is not to be given the level of scrutiny to which it would be subject at a trial.

b. Until the issue has been determined substantively, a waiver of tort claim may be certified on the assumption that it will be sufficient at trial to show wrongful conduct by and resulting gain to the defendant without proof of any loss to the plaintiff.

c. In a claim for damages for tortious economic loss, it is not necessary to show a methodology that can demonstrate harm to all class members: it is sufficient if harm can be shown to some of the class members. In addition, the aggregate damages section of the *Class Proceedings Act* allow the harm to be shown in the aggregate to the class as a whole.

[127] Furthermore, for the reasons stated above, I do not think that the aggregate provisions of the *Class Proceedings Act* are engaged where the plaintiff seeks to use economic or statistical evidence to show that all members of the class have suffered detrimental financial impact from a defendant's wrongdoing. Expert evidence would be admissible to prove that apart from the aggregate provisions.

[128] With these principles in mind, I now turn to review the specific objections raised by Microsoft with respect to Pro-Sys' evidence.

IX. MICROSOFT'S ARGUMENTS

[129] As indicated above, Microsoft makes the following arguments:

1. Pro-Sys has not established that there is an identifiable class. This is so because the class is too broad and class membership cannot be objectively determined.

2. Pro-Sys has not established that the claims of the proposed class members raise common issues: liability is not a common issue and Pro-Sys' evidence is insufficient to prove class-wide loss.

3. A class action is not the preferable procedure.

4. The proposed representative plaintiffs are unsuitable.

[130] Arguments 1 to 3 rely almost entirely on Microsoft's assertion that Pro-Sys does not have a credible or plausible methodology for demonstrating overcharges at the first level of the distribution chain and the class-wide pass-through of the overcharges. Most of Microsoft's argument with respect to that are dealt with as part of the common issues argument. I will therefore deal with that argument first.

X. COMMON ISSUE

[131] Microsoft says that Pro-Sys has failed to establish that the claims of the class members raise common issues because the plaintiff's evidence is insufficient to prove a class-wide loss. I will review each of Microsoft's main arguments.

A. Dr. Netz does not consider the Canadian context

[132] Microsoft criticises Dr. Netz for not taking the Canadian context into account. They argue that she:

- does not use specific British Columbia or Canadian data
- assumes that data collected by a company called "N.P.D." in Canada is the same as that for the United States
- does not consider whether practices in the United States are also illegal in Canada
- assumes that the barriers to entry are as high in Canada as she says they are for the United States.

[133] It is true that Dr. Netz has not used Canadian data in her analyses. But she is not required to do so. Once again, at the certification stage, the plaintiff must only show a credible or plausible methodology. That does not mean preparing an actual report. While the plaintiffs here rely on the reports done in the United States, they are not meant to be the reports to be used in this litigation; rather, they are pointed to in support of the contention that a credible or plausible methodology exists. The fact that Pro-Sys has the advantage of being able to point to such reports does not mean that that is the level of proof they need meet.

[134] Dr. Netz says that the methods she has used in the United States are equally applicable to Canada. I do not see that the defendants have raised a sufficient case to allow me to conclude otherwise. The markets might have different characteristics, but that does not mean that the methodologies used in the U.S. will not work here.

B. Dr. Netz fails to provide an evidentiary basis for determining causation on a class-wide basis

[135] Responding to a critique of the use of benchmarks in her analysis, Dr. Netz said:

> Profs. Hubbard and Giammarino [Microsoft's experts] state that the benchmarks I used in the U.S. proceedings are inadequate to show that Microsoft's conduct resulted in anti-competitive harm. My damages studies in Arizona, Iowa and Minnesota do not use benchmarks to show causation, they use benchmarks to measure impact.
>
> In my previous testimony, I relied on the liability experts to describe how Microsoft's behaviour was anti-competitive. I summarize the evidence in Section II of my Minnesota report, and Section II of my Arizona report. In my Arizona and Minnesota reports I then carefully laid out the evidence showing that the anti-competitive impact was higher prices, see Section II.B.2 of my Arizona and Minnesota reports.
>
> (Emphasis added)

Microsoft focuses on and takes issue with the two portions which I have underlined.

[136] Dr. Netz's statement that she only addresses impact and not causation is somewhat opaque, however it must be taken in context. In this case it is difficult to distinguish between determining causation, impact and damage: they all amount to economic harm caused by the alleged wrongs.

[137] If the wrongful conduct had a financial impact on the class members, namely increased prices, then causation would be shown. The detrimental financial impact and the quantum of damages will both be proved by Dr. Netz's damage model, according to the plaintiffs. Thus Dr. Netz's damage model will be used to prove causation.

[138] The second point raised by Microsoft is the reliance placed by Dr. Netz on other experts. In addition to the second underlined portion in the above quote from Dr. Netz's affidavit, Microsoft points to Dr. Netz's Iowa report (co-authored with Professor Mason). In section II, p. 15 of the report, Dr. Netz states:

> Since at least 1988 Microsoft has employed a number of strategies to substantially lessen completion. As stated above, for the purpose of our

> damages study, we assume that the conduct alleged in the complaint and the conduct discussed in Professors Noll and Martin's expert reports was illegal. As a direct consequence of these illegal acts, Microsoft's prices were not constrained by competitors. However, when Microsoft faces effective competition, it responds with competitive pricing. Thus, Microsoft's illegal conduct has caused the monopoly process that consumers paid for the products at issue.
>
> ...
>
> Microsoft's illegal conduct and its adverse effects on competition in the markets for operating system, word processing, and spreadsheet software are detailed in the expert reports of Professors Noll and Martin. We merely summarize some of the highlights here, to establish that there is a sufficient basis for our conclusion that, but for Microsoft's illegal conduct, there would have been more competition and lower prices in the markets at issue.

[139] In introducing section II.B.2 at p. 31 of the report, Dr. Netz states:

> The impacts of Microsoft's illegal conduct on its competitors and competition are detailed in the Expert Reports of Professors Noll and Martin. Below we present our conclusions on the impact that Microsoft's successful monopolization had on prices.

[140] On my reading, Dr. Netz relies on these opinions as showing that Microsoft acted illegally. That is something to be assumed as part of the existence of the causes of action pled by the plaintiffs – an issue that is not before me. If Dr. Netz has referred to other reports dealing with harm or damages, I have not placed any weight on that.

C. Dr. Netz's benchmarks are flawed

1. Dr. Netz fails to account for network externalities

[141] This argument is not only directed specifically to benchmarks, but is also an overriding criticism of Pro-Sys' methodology.

[142] Microsoft argues that its operating systems are "network goods": they provide a platform on which other applications can run. The value of the operating system increases with the size of its installed base. As such, network externalities likely create extra value for productivity applications such as Word and Excel, and explain

why they can command premium prices. Microsoft says that Dr. Netz's analysis does not take this into account.

[143] Dr. Netz says that to the extent that factors apart from Microsoft's alleged anti-competitive conduct are the causes of Microsoft's high prices and profits, her proposed analyses can take them into account and that she has done so in the studies she did for the U.S. litigation. For example, Dr. Netz specifically chose benchmarks to take into account and control for ordinary network externalities and economies of scale. Further, the benchmarks include firms that dominate markets (in the sense of having large market shares), but unlike Microsoft, these firms do not have extremely high profit rates because they face potential competition.

[144] Dr. Netz's methodology is not implausible in this regard. The weighing of and concluding in favour of one of several – all plausible – competing expert opinions on this issue is not something that can and should be done in a certification application.

2. Dr. Netz does not know what the "but for price" would be

[145] In order to measure the alleged harm (i.e. economic impact) to the class members, Dr. Netz compares the actual economies of the Microsoft market and Microsoft's prices to the "counterfactual world". This means nothing more than comparing what the market and pricing for the Microsoft products are to what they would have been apart from the illegal conduct.

[146] As Microsoft points out, In her Iowa report, appended as Exhibit B to her Affidavit #2, Dr. Netz posits three different potential counterfactual worlds:

> One reasonable counterfactual is one in which, but for its illegal conduct, Microsoft would have earned about the same profit margin as the average margin earned on all products offered by other successful software companies during this period.
>
> ...
>
> [A]nother reasonable counterfactual is one in which, but for its illegal conduct, Microsoft would have earned about the same rate of return on its products at issue as the average return earned on all products offered by other successful software companies during this period.

> ...
>
> [A]nother reasonable counterfactual is one in which, but for its illegal conduct, Microsoft would have earned about the same price premium on its products at issue as the average premium Microsoft earned on several benchmark products.

[147] Microsoft says that Dr. Netz's methodology is undercut because she has admitted that she does not know what the counter-factual world would look like. Microsoft relies in particular on the following answer she gave in a deposition in the Iowa litigation:

> I do not know what specifically the but-for world would have looked like had Microsoft not engaged in illegal behavior … We do not know what would have happened in the counter-factual world, it would be a gross simplification to say that of all the different possibilities that are out there, this particular firm or this particular market is what the products at issue would have looked like but for Microsoft's bad behaviour.

and an answer Dr. Netz gave in her cross-examination:

> Let me, once again, clarify that the market for software is a worldwide market that includes sales to Canada as well as the U.S., and in -- what I am saying here is that there are -- there's a range of counter-factual worlds that are plausible, but, no, I cannot point to a specific market structure whereby Microsoft has a specific market share as the counter-factual world ...

[148] I take her responses to mean that Dr. Netz cannot postulate the exact software world that would have existed had Microsoft not engaged in the alleged illegal conduct. It is clear that Dr. Netz is not saying that she cannot arrive at what she feels is a realistic estimate of the alleged economic harm. It is not necessary for a plaintiff in any action to make out a precise calculation of damages. Damages are an assessment. In *Infineon*, at para. 68, quoted above, the Court of Appeal indicated that it is sufficient for the plaintiff to show "reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases."

3. Dr. Netz's benchmarks include firms that are not comparable to Microsoft

[149] Microsoft argues that Dr. Netz has included companies in her benchmark analysis that are not comparable to Microsoft (see para. 25 above for Dr. Netz's use

of benchmarks). For example, some companies are much smaller and some larger firms such as Oracle, earn much of their revenue from consulting services and some companies do not earn profits.

[150] However, as Pro-Sys points out, Microsoft has criticised only a few examples of the companies used as benchmarks. Furthermore, Dr. Netz points out that she “would not expect the benchmarks to look exactly like Microsoft in the real world, since the benchmarks are in fact intended to provide a measure of what Microsoft would have looked like in the but-for world where no illegal conduct occurred and Microsoft did not dominate the market.”[9]

4. The price-premium method is biased towards higher priced Microsoft software

[151] Microsoft says Dr. Netz’s price premium method in her Iowa report was biased toward higher priced Microsoft software. This is so, it argues, because in this method Dr. Netz did not consider sales to the OEM channel (manufacturers of computer equipment) or to the volume licensing channels. Rather, it only included sales of products contained in shrink-wrapped packages. These channels involve software sold at lower prices and did not represent the majority of Microsoft’s sales.

[152] Dr. Netz says that it would have been inaccurate to include sales for volume licences because the terms of the pricing and discount levels charged by Microsoft to each volume purchaser varied to a great degree. With respect to the OEM channel, she says that because of Microsoft’s dominance, there was no comparable competitor company.

[153] Dr. Netz says that she therefore compared data from retailers and corporate re-sellers because that data is comparable across companies.

[154] Dr. Netz’s explanation is credible. In my view, for the purposes of the certification application, the price-premium method is a plausible methodology.

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[9] Netz #2 para. 15

D. Dr. Netz's methodologies for proving pass-through are not workable

[155] The arguments raised by Microsoft in this section deal with Dr. Netz's rate of return and profit margin methods. The arguments do not address the price premium method since, as I have noted above, it does not require a pass-through analysis.

[156] The rate of return and profit margin methods relate price increases at the initial-sale level of the distribution chain to prices at the ultimate consumer level. Microsoft argues that Dr. Netz's analysis fails to account for the possible absorption of price increases at the intermediate levels of the distribution chain. It also says that Dr. Netz's analysis will be overly reliant on the use of averages, resulting in the sweeping-in of uninjured plaintiffs.

[157] Dr. Netz says that she does not need to calculate the overcharge at every intermediate level of the distribution channel. She says that she can avoid that through the use of a regression analysis, a process which she describes as follows:

> When one runs a regression, one uses formulae (these days via a computer program) to calculate coefficients. The coefficients give the relationship between the independent variable (in this case cost would be an independent variable) and the dependent variable (in this case, price). The coefficient on the cost variable is then the estimate of pass-through.[10]

[158] There is no serious issue as to whether regression analysis is widely used in economic analysis, as stated by Dr. Netz. The question is its utility or accuracy in this specific case, with all the complexities it entails. This was also noted by the Court of Appeal in *Infineon*, where it said, at para. 68:

> The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. ... The dispute here is over whether total gain or loss can be determined as a practical matter on the particular facts of this case.

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[10] Netz 2, f.n. 82

[159] In my view, it cannot be said at this stage that regression analysis is not a credible or plausible methodology to show the pass-through to the proposed class.

E. Dr. Netz's methodologies ignore the differences between volume and non-volume licences

[160] Microsoft argues that Dr. Netz fails to appreciate that the nature and degree of negotiations vary between volume and non-volume customers and that within the volume customers there is a great variance of the degree of negotiations.

[161] Pro-Sys points to Dr. Netz's evidence where she said that class members who hold volume and non-volume licences make their purchases in the same highly competitive software distribution channels, face the same software markets dominated by Microsoft, and hence the class members face the same common issues. Thus, the same common methods that can be and have been used by Dr. Netz to calculate damages for holders of volume licences can be and have, in the United States, been used by her for holders of non-volume licences.

[162] Further, Pro-Sys points out that eight of Dr. Netz's studies were performed on "corporate resellers", entities that sold a large volume of volume licences. Their pass-through rates were 106%, on average, with a range from 103% to 108%. The pass-through rates of entities that sold mostly non-volume licences was 114.4% for the OEM channel, on average, and 109% for the retail segment, on average. Thus, in the U.S. proceedings, the evidence bears out the contention that the pass-through rates are consistently more than 100% for entities that sell mostly volume licences and for entities that sell mostly non-volume licences.

[163] I accept Pro-Sys' response to Microsoft's argument. That is not to say that there might not be some variance in the damages suffered by various members in the defendant class, but that is a matter that can most likely be dealt with by an aggregate damage award.

F. Conclusion re: the existence of a common issue

[164] I conclude that Dr. Netz has demonstrated a plausible methodology for proving class-wide loss. It is therefore not necessary for me to address the critiques of Professor Brander that were proffered by Microsoft.

XI. IDENTIFIABLE CLASS

[165] Microsoft submits that Pro-Sys has not established that there is an identifiable class.

[166] Microsoft's first argument is that there is no rational connection between the proposed class members and the common issue because Pro-Sys has failed to provide evidence or a method for establishing that any particular member of the proposed class suffered any harm as a result of Microsoft's alleged anti-competitive activities. This is the same point which I have addressed under the common issue criteria and my analysis there disposes of this argument.

[167] The second point raised by Microsoft is that class membership cannot be objectively determined. This is primarily due to the existence of pirated software in the marketplace.

[168] Microsoft relies on *Gariepy v. Shell Oil Co.*, [2002] O.T.C. 459, 23 C.P.C. (5th) 360, at para. 47 (S.C.J.). That case involved a proposed class action with respect to defective polybutylene pipes used in plumbing and related activities. The defendants were the manufacturer of the resin with which the pipe was made, the pipe manufacturer and the manufacturer of the fittings which joined sections of pipe together. The proposed class of plaintiffs was comprised of owners of residential dwellings in Ontario who had a polybutylene plumbing system in their dwelling. Certification was refused, in part due to the lack of an identifiable class. Nordheimer J. stated:

> 47 ... a clearly defined class is also required in order that persons will know if they are members of the class so that they may, in turn, decide if they wish to have their rights determined within the class proceeding, or if they

> would prefer to opt out of the class proceeding and have their rights determined in another fashion, or not at all. It is extremely important, therefore, that the class definition be one where any person can tell, with a minimum of effort, whether he or she is a member of the proposed class.
>
> 48 This requirement is met with respect to Shell because, as I have noted, the homeowner only needs to look at the pipes to determine if they are polybutylene pipes. The fittings are, however, another matter. It does not provide a clearly identifiable class if each homeowner is required to have the fittings removed from their plumbing systems and chemically tested in order to determine if the fittings are ones covered by the claims advanced. There is no evidence before me as to the costs of removing and testing these fixtures but, in any event, it would seem unlikely that, absent an existing problem with the plumbing system, any homeowner would be prepared to go through the expense and inconvenience of having such testing done nor should they be required to do so in order to determine if they are part of this action and, if so, whether they wish to have their rights dealt with in this action.

[169] The Courts in this province have noted that *Garipey* cannot be reconciled with the "general trend towards certification in this province." *(Cooper v. Merrill Lynch Canada Inc.*, 2006 BCSC 1905 at para. 100, quoting from *Olsen v. Behr Process Corp.*, 2003 BCSC 1252, 17 B.C.L.R. (4th) 315 at para. 33.) This comment applies with perhaps even greater force to the law in this province post-*Infineon*.

[170] Furthermore, even in Ontario the position appears to have been relaxed recently. In *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) (Q.L.), Lax J. stated:

> 28 At the margins, there may be some questions about class membership, but the *CPA* permits the Court to enter upon a "relatively elaborate factual investigation in order to determine class membership": *Serhan v. Johnson and Johnson*, [2004] O.J. No. 2904 (S.C.J.) at para. 52. As Cullity J. said, "The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable": *Risorto v. Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (S.C.J.) at para. 31.

[171] I accept that pirated software is a pestilence for Microsoft, and no doubt the software industry in general. However, I am not convinced that it represents a hurdle to certification here. First, Microsoft's own evidence shows that an experienced computer person (a computer re-seller who swore an affidavit) can tell when pirated software is installed.

[172] Second, and more pragmatically, the materials filed from the United States indicate that there are a number of ways in which a user can verify the authenticity of the software.

[173] The other cases relied on by Microsoft present far greater levels of difficulty in identifying class members than here. *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 at para. 37, 20 C.P.C. (6th) 262 (S.C.J.), aff'd (2008), 236 O.A.C. 199, 54 C.P.C. (6th) 167 (Div. Ct.) was a case where the class sought to be certified was "all persons in Canada who suffered injury, or loss, as a result of a fire that occurred after October 1, 1987, where the fire was caused by a cigarette manufactured by the defendant igniting upholstered furniture or a mattress." That definition involved a number of factual determinations that were not only difficult, but also depended on the merits of the case, namely causation. The class definition in the case at bar is predicated on the assumption that, for the tort claims, Pro-Sys will demonstrate at trial that harm was suffered by all of the class members.

[174] In *Chadha*, the determination as to class membership would have involved the determination of whether a homeowner had brick that contained the defendants' iron oxide pigments.

[175] No doubt there may be situations in this case that may present some difficulty; however, I am not convinced that they rise to the level which merits declining to certify this case.

[176] Finally, while not necessary for my decision, I note that the issue of piracy would not appear to affect the calculation of damages which will be based in part on the volumes of each type of product sold by Microsoft: those sales volumes will be generated from Microsoft's data with respect to legitimate products. The same can be said with respect to the restitutionary claim. Therefore, if there is a problem with respect to piracy it will likely manifest itself at the stage of distributing the proposed aggregate damage or restitutionary award, as opposed to calculating the quantum of such damages or awards. That would not be a concern for Microsoft. As the

Ontario Court of Appeal said at para. 49 of *Markson* with respect to the aggregate damage provisions of the *Ontario CPA*:

> It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because "it would be impractical or inefficient to identify the class members entitled to share in the award".

XII. PREFERABLE PROCEDURE

[177] The criteria against which to assess preferability of a class action is set out in s. 4(2) of the *Class Proceedings Act*, which I will not quote here.

[178] In *Infineon*, the Court of Appeal adopted the following approach from *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667; 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50:

> [73] As explained by the Supreme Court of Canada in *Hollick*, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification.
>
> [74] *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

[179] Microsoft's first argument is that individual issues are predominant because even if there was an overcharge, there is no reason to believe it was charged evenly on all of the approximately 1,500 products in issue in all time periods in all distribution channels through the various layers of intermediate re-sellers to each member of the indirect purchaser class. However, I think that my conclusions with respect to the question of common issues provide an answer this argument.

[180] Microsoft further relies on the concerns which the chambers judge raised in *Infineon* at para. 189. The Court of Appeal rejected those points in that case, and noted that the only alternative procedure to a class action is no action(s) at all. The other arguments made by Microsoft were likewise rejected in *Infineon*. Once again, I think that is determinative of this issue against Microsoft.

[181] A point which Microsoft raises that was not dealt with in *Infineon* relates to s. 4(20)(b) of the *Class Proceedings Act*. This provides that the Court must consider as a factor whether "a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions". Microsoft says that the volume purchasers of its software would have a valid interest in separate actions. Microsoft points to its "Select" and "Enterprise Volume" purchasers who have at least 250 desktop computers.

[182] In any class action claim there may be people who wish to run their own individual cases, or to not participate in any litigation. Indeed the ability of class members to opt-out of the class indicates that that possibility does not in and of itself preclude certification. It is one of the factors to be balanced in determining preferability.

[183] The fact that there exist large volume users of Microsoft software does not necessarily mean that they would want to run their own actions. The costs of those cases would be high because essentially the same economic analysis which is required in this case would be required in an individual case to prove the higher initial charge by Microsoft and the pass-through to the ultimate (volume) user who do not buy directly from Microsoft. It cannot be taken as a given that a purchasers of, say, 250 licences would want to undertake that litigation.

[184] To the extent that a number of volume users may come forward after this case has been certified wishing to pursue their own class proceeding, that can be dealt with by way of an application to certify sub-classes.

[185] I conclude that a class action is the preferable procedure with which to resolve the claims.

XIII. THE SUITABILITY OF PRO-SYS AS THE REPRESENTATIVE PLAINTIFF

[186] Microsoft argues that Pro-Sys is not a suitable representative plaintiff. Its primary argument is that Pro-Sys is a "shelf" plaintiff consistently used in proposed class actions of this nature and points to the *Infineon* case, and another action in this Court in which it is a representative plaintiff or proposed representative plaintiff.

[187] The Court of Appeal's sanctioning of Pro-Sys as representative plaintiff in *Infineon* is determinative of this issue.

XIV. LITIGATION PLAN

[188] Once again, the comments of the Court of Appeal in *Infineon* are apt here. It stated, at para. 79, that the plan "does not disclose any weakness in the appellant's case that would suggest a class proceeding is not the preferable procedure ..." I find the same to be the case with the litigation plan at bar.

XV. CONCLUSION

[189] I conclude that Pro-Sys has met each of the requirements for certification. (As I said initially, the issue of a valid cause of action has already been determined by Tysoe J.)

[190] Pro-Sys has referred to this case as one with a "dream record", because of the evidence, including actual analyses, from the United States. While I would not necessarily use that term (one person's dream is another's nightmare), I do make this observation, although my conclusions do not hinge on it. I reviewed the plaintiff's reports in the *Infineon* case. The evidence in support of certification for the case at bar is, because of the work done in the United States, far more detailed and specific. I also referred above to the similarities in complexity between this case and *Infineon*. If the Court of Appeal was satisfied in that case that the plaintiffs had shown a credible or plausible methodology to prove class-wide harm, and that a

class action was, with all its complexities, the preferable procedure, that standard is met in the case at bar.

[191] The evidence here included reports authored by Dr. Netz in the United States. It is therefore prudent to note that my comments in this judgment are addressed to the standard required in a certification application. I should not be taken to have assessed the validity of the reports, their methodology or the conclusions in them according to the standard which will be appropriate at trial. That will be a different issue.

[192] No argument was made to the specific form of order sought by Pro-Sys, which essentially mirrored the form of order set out by the Court of Appeal in *Infineon*. If there is any dispute with respect to this, the parties may appear back in front of me. If not, the case will be certified as requested by Pro-Sys in its Notice of Motion.

"E. M. MYERS J."