IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watson v. Bank of America Corporation,* 2014 BCSC 532

Date: 20140327
Docket: S112003
Registry: Vancouver

Between:

Mary Watson

Plaintiff

And

Bank of America Corporation, BMO Financial Group, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Bank (Canada Branch), Citigroup Inc., Fédération des caisses Desjardins du Québec, MasterCard International Incorporated, National Bank of Canada Inc., Royal Bank of Canada, Toronto-Dominion Bank, and Visa Canada Corporation

Defendants

Before: The Honourable Chief Justice Bauman

Reasons for Judgment

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Bank of Nova Scotia	M. Sclisizzi B.W. Dixon
Canadian Imperial Bank of Commerce:	K.L. Kay D.K. Royal
Capital One Bank (Canada Branch):	J.K. McEwan, Q.C. C.E. Hunter
Citigroup Inc.:	M.D. Adlem S.P. Strukoff
Fédération des caisses Desjardins du Québec:	R. Anderson, Q.C. C. Chatelain V. de l'Étoile
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Royal Bank of Canada:	D.G. Cowper, Q.C. A. Borrell
Toronto-Dominion Bank:	F.P. Morrison C. Lonsdale J.S. Yates
Visa Canada Corporation:	R.E. Kwinter D.T. Neave J.R. Lysyk

Place and Date of Trial, Hearings and Telephone Conference:	Vancouver, B.C. April 22-26, 2013 April 29-30, 2013 May 1-2, 2013 July 30, 2013 October 30-31, 2013
Written Submissions Received:	December 13, 2013 February 11, 2014 February 24, 2014 March 4, 2014
Place and Date of Judgment:	Vancouver, B.C. March 27, 2014

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I. OVERVIEW

[1] The plaintiff seeks to represent two classes of Canadian merchants who accepted payments for goods or services by way of Visa or MasterCard credit cards commencing on 28 March 2001 and continuing through to the present. The plaintiff seeks certification of this proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*").

[2] The defendants include some of the largest financial institutions in Canada and the two dominant credit card networks in this country: Visa Canada Corporation ("Visa") and MasterCard International Incorporated ("MasterCard").

[3] There are five players in the two credit card networks affected by these proceedings. They are:

- the networks themselves, i.e. Visa and MasterCard;
- the financial institutions ("Issuers") that issue credit cards to cardholders, neither Visa nor MasterCard actually issue credit cards and except for Visa and MasterCard, all of the defendants in this case are or were Issuers;
- the institutions ("Acquirers") that enter into arrangements with merchants that permit the latter to accept various Visa and/or MasterCard credit cards and, via the network, receive payment for goods and services provided to cardholders - some Issuers, including some of the defendants, are also Acquirers but that is not always the case;
- the merchants who accept various Visa and MasterCard credit cards; and
- the cardholders.

[4] The plaintiff alleges that the defendants have breached various provisions of the *Competition Act*, R.S.C. 1985, c. C-34, engaged in civil conspiracies, and unlawfully interfered with the economic interests of the proposed class members. These causes of action are said to be continuing.

[5] Dominating the litigation are the so-called "Default Interchange Fees" which are paid by Acquirers to Issuers. The Default Interchange Fees (set respectively by Visa and MasterCard), in turn, form the largest portion of the fees ("Merchant Discount Fees" or "Card Acceptance Fees") paid by merchants to Acquirers, at least on the plaintiff's characterization of the evidence. Merchant Discount Fees are paid by the members of the proposed classes to their Acquirers as the price for access to the credit card networks for the payment for the goods and services supplied to their customers. The effect of interchange is that merchants do not receive 100% of the price paid by cardholders for their goods and services. The actual percentage received by merchants depends on the exact card used.

[6] Also at issue are the "Network Rules" set by Visa and MasterCard that govern merchant participation in the credit card networks. These rules include, as I will define them below:

- the "Honour All Cards Rule";
- the "No Surcharge Rule"; and
- the "No Discrimination Rule".

[7] The defendants vigorously deny the allegations, and forcefully submit that there is no genuine controversy before the Court. Over the course of a nine-day certification hearing and various supplemental hearings and submissions, the defendants, in principal submissions running more than 147 pages, exclusive of appendices, literally dissect the plaintiff's alleged causes of action, and proposed litigation plan in joining issue on virtually every certification requirement under s. 4 of the *CPA*.

[8] The plaintiff, on the contrary, says that the case for certification is quite straightforward.

[9] In addition to the certification application, the plaintiff seeks to amend the Notice of Civil Claim and the defendants apply to strike it. My reasons will deal with the issues as follows. In Part II, I will outline the general background to the credit

card industry in Canada and I will discuss other proceedings in Canada, the United States, Australia, New Zealand, and the European Union which touch on the complaints levelled by the plaintiff. In Part III, I will examine in some detail the proposed Amended Notice of Civil Claim.

[10] In Part IV, I will discuss the legal principles which generally govern the Court's consideration of applications to certify class proceedings under the *CPA*.

[11] In Part V, I will discuss the case under each of the *CPA* s. 4(1) certification requirements and I will end in Part VI with my conclusions.

[12] This certification application was originally heard at the end of April 2013. Since then, these reasons have been delayed so that I could incorporate the effect of four substantial decisions that impact this case:

(a) The Competition Tribunal's decision in *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10, that was released in September 2013;

(b) The Supreme Court of Canada's judgment in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, that was released in October 2013;

(c) The Court of Appeal's judgment in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36, that was released in January 2014; and

(d) The Supreme Court of Canada's judgment in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, that was also released in January 2014.

[13] It was necessary for the parties to tender supplemental submissions in response to each of these four decisions, and I am grateful for their able submissions in each instance; these reasons were delayed as a result.

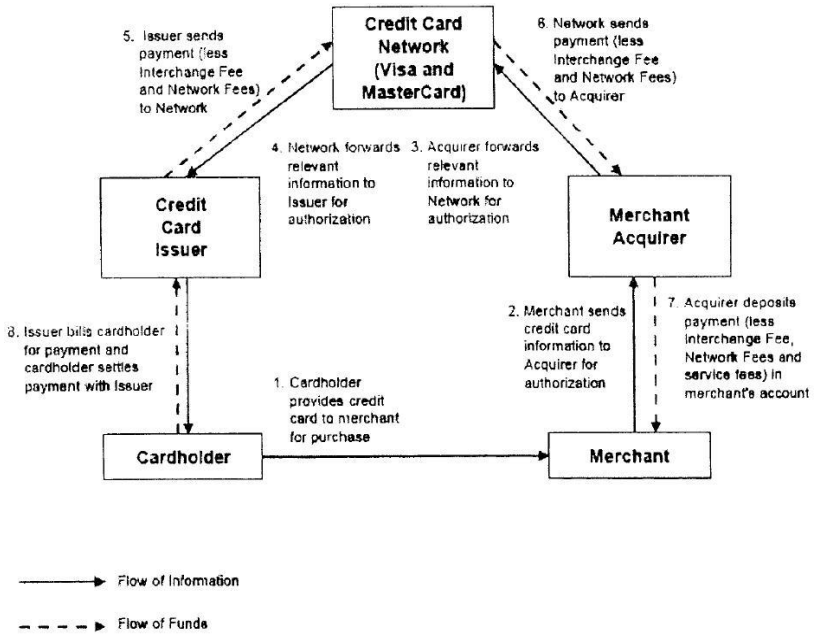
II. BACKGROUND TO THE CREDIT CARD INDUSTRY

[14] Many of the affiants before the Court describe the credit card industry in Canada generally. What follows is based largely on the evidence of the expert economist tendered by the plaintiff, Dr. James A. Brander, the Asia-Pacific Professor of International Business at the Sauder School of Business at the University of British Columbia. Dr. Brander's evidence in this regard is largely uncontroversial.

[15] Both Visa and MasterCard operate networks that provide infrastructure and services enabling merchants to obtain authorization, clearance and settlement of transactions ("credit card network services").

[16] A number of schematics purporting to depict a typical credit card transaction, and the flow of information and money between the players, were tendered on the certification hearing. Each arguably contains some slight inaccuracies or, at least, does not depict all of the various nuances in such transactions. However, I will reproduce that offered by Dr. Brander at paragraph 23 of his first affidavit:

Figure 1 – Credit Card Network



[17] Some of the differing nuances are identified in the narrative description of a typical Visa credit card transaction found in the evidence of Brian Weiner's first affidavit. Mr. Weiner is the head of Strategy and Interchange at Visa and he deposed (at paras. 36-44):

> 36. In a typical Visa credit card transaction, when a credit card customer purchases goods or services from the merchant using a Visa credit card, the merchant provides the relevant card data electronically to the Acquirer (or to a third party firm acting on the Acquirer's behalf). The Acquirer presents the data to Visa through the visa network, and Visa in turn contacts the Issuer (that issued the credit card to the customer) to approve the transaction (which would include, for example, evaluating the amount of funds available in the customer's credit line). The Issuer then advises Visa whether it is approving or declining the transaction. Visa relays that message to the Acquirer. This transmittal of transaction information from the Acquirer to the Issuer and back over the Visa network to the Acquirer, for purposes of determining whether the purchase is approved, is known as "authorization" and typically takes less than one second.
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> 37. Once the Acquirer knows whether the Issuer approves the transaction, the Acquirer notifies the merchant through a message to the card terminal at the merchant's point of sale. If the transaction has been authorized, the merchant provides the goods or services to the cardholder, and indicates to its Acquirer that the transaction has been completed.
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> 38. The Acquirer then sends a request to the Issuer for payment through the Visa network. The Issuer pays the Acquirer (through the Visa network) the amount of the purchase price of the goods or services provided by the merchant (usually within 24 to 48 hours), less a fee known as the "interchange fee." The Acquirer pays the merchant for the price of goods or services sold, less the Merchant Discount Fee (the fee for the Acquirer's services). The VIORs [Visa International Operating Regulations] require the Acquirer to credit promptly the merchant's account.
>
> 39. Although this example traces through a single Visa credit card purchase. Issuers do not transfer funds to Acquirers for each separate transaction. Rather, at the end of each business day, Visa determines the net position of each Issuer and each Acquirer. The processing by Visa of information regarding amounts owed by Issuers and Acquirers to each other, and processing by Visa of payments from Issuers to Acquirers is known as "clearing and settlement."
>
> 40. Based on a monthly billing cycle, the Issuer will send the cardholder a credit card statement for payment of the purchases made within a grace period, after which interest typically accrues. The Issuer (which has already paid the Acquirer and which it in turn has already paid the merchant) bears the risk that the cardholder will not pay the Issuer for the purchase that he or she made.

> 41. Visa's revenues are tied directly to the number and value of transactions on its system (i.e. network volume). Visa seeks to maximize transaction volume on its payments network in order to increase its revenues.
>
> 42. Visa's principal source of revenue is the network service and processing fees paid by Issuers and Acquirers with which it contracts for use of Visa trademarks, authorization, clearing and settlement of transactions over the Visa network and related services.
>
> 43. For example, both Issuers and Acquirers pay quarterly service fees, which are calculated as a percentage of sales volume. Fees are also charged to Issuers and Acquirers on a per transaction basis for authorization, clearing and settlement, with the amount of the fee depending upon technological processing choices made by Issuers and Acquirers. Visa also charges Issuers and/or Acquirers for other services, including international transactions, copies of documents, optional fraud/risk management services, optional emergency customer assistance services, arbitration, and training and workshops.
>
> 44. Visa does not receive any revenue from the interchange fees that Acquirers pay to Issuers or any portion of the Merchant Discount Fees that Acquirers charge to merchants. As I explain more fully below, interchange plays a key role as a balancing mechanism designed to maximize network volume, but Visa does not receive revenues from interchange fees.

[18] As for the scope of the credit card business in Canada, Visa (which became a publically traded corporation in March 2008) has issued approximately 32.4 million Visa credit cards which are accepted by approximately 493,300 merchants (approximately 150,000 of whom are located in British Columbia). There are approximately 44 million MasterCard credit cards in circulation in Canada.

[19] According to the plaintiff, Visa and MasterCard have entered into agreements with Acquirers which, in turn, require the Acquirers to impose and enforce a set of requirements on merchants. Dr. Brander describes these requirements at paras. 37-42 of his first affidavit; he also provides his economic critique of these requirements:

> 37. The rules include four requirements of particular interest, three of which are referred to as *merchant restraints,* along with a fourth rule related to the setting of interchange fees.
>
> These rules are as follows.
>
> a. The Honour All Cards Rule
>
> b. The No Surcharge Rule
>
> c. The No Discrimination Rule
>
> d. The Default Interchange Rule

> 38. The Honour All Cards Rule requires that a merchant must honour (i.e. accept) all credit cards of the same network (Visa or MasterCard). From an economic point of view I see this rule as a form of "'tied selling". A merchant who wishes to purchase one class of credit card services, such as services associated with a basic "'no frills" credit card, is also required to purchase other services, such as services associated with premium credit cards. If a merchant could opt out of accepting premium cards, such cards would be less attractive to customers. Thus, this provision artificially enhances the demand for premium cards and enhances the overall market power of the underlying credit card network (Visa or MasterCard). Furthermore, this rule prevents a merchant from declining to accept credit cards from a particular issuer.
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> 39. The No Surcharge Rule prevents merchants from charging a surcharge or extra fee for transactions using a particular credit card, such as premium credit cards that impose higher costs on merchants. This rule, in effect, prohibits merchants from setting prices that reflect the actual cost of the payment method chosen by the customer on a transaction by transaction basis. One economic effect of such a rule is to restrict competition between different credit cards given that merchants cannot charge impose a surcharge on transaction paid by premium cards to discourage other means of payment that might otherwise be treated more favourably by merchants.
>
> 40. The No Discrimination Rule requires that merchants not make it more difficult to pay by one credit card rather than another and also requires that preferential treatment not be offered to customers paying by other means. As with the no surcharge rule, this rule restricts competition between different credit cards.
>
> 41. The Default Interchange Rule gives Visa and MasterCard the ability to establish default interchange fees for their respective networks that will apply except in the rare circumstance than an alternative rate is allowed and implemented. Such a rule allows Visa and MasterCard (and the associated conspiracies) to control pricing of credit card network services.
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> 42. The net effect of these provisions is to reduce price competition for payment methods and to enhance barriers to entry and market power for the Visa and MasterCard networks. If merchants were able to charge the full cost they incur, on a transaction by transaction basis, for particular credit cards, such as premium cards, then customers would be more inclined to use lower cost methods of payment, such as "no-frills" credit cards. In the absence of these rules it is likely, in my view, that issuing banks of a given type of card (Visa or MasterCard) would be more competitive with one another.
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> [Citations omitted.]

[20] I should note two points. First, the “No Discrimination Rule” appears to be confined to the MasterCard network. Second, the defendants object that there is no Default Interchange Rule as such. However, there are schedules of default interchange rates in both networks which are automatically applied between Issuers

and Acquirers in the absence of any specific negotiated rate and the evidence on this application supports Dr. Brander's assertion that alternative rates are a "rare circumstance". I would suggest an exceedingly rare circumstance.

[21] The homogeneity of the proposed classes of merchants is potentially affected by the existence of small numbers of merchants who are themselves Issuers and merchants who are so-called co-branders - ones who have associated their companies expressly with a credit card network, for example, the General Motors Visa card.

[22] The defendants quite dramatically contrasted the fact that they literally represent the largest and most respected financial institutions in Canada with the serious allegations of corporate impropriety levelled at them by the plaintiff over the 29 pages of the Amended Notice of Civil Claim. This submission was as much to say: how could such large and revered institutions have ever stooped to the scandalous conduct alleged by this reckless plaintiff? While, in part, it is an effective bit of advocacy in setting a realistic stage for the plaintiff's difficult case, its relevance on the certification hearing bears serious critical consideration.

[23] But it does make relevant the following discussion of proceedings involving a number of these defendants before the Competition Tribunal and proceedings, similar to those at bar, involving other distinguished financial institutions in the United States and within the European Union.

[24] In December 2010, the Commissioner of Competition brought an application before the Competition Tribunal asserting that Visa and MasterCard engaged in price maintenance contrary to s. 76 of the *Competition Act.* Specifically, the Commissioner sought an order restraining Visa and MasterCard from implementing or enforcing the Honour All Cards Rule, the No Surcharge Rule and the No Discrimination Rule. Toronto-Dominion Bank ("TD"), an Issuer and a defendant in this case, was granted leave to intervene in the proceedings, but the Commissioner's application did not target issuers of credit cards, nor did it deal with the provisions of the *Competition Act* that are in issue in this case. The Tribunal's

complete decision, *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 (the "*Tribunal Decision*") was released on 9 September 2013.

[25] The Tribunal reviewed the legislative history of s. 76, which was added to the *Competition Act* in 2009 to replace s. 61, which was repealed at the same time and is in issue in this case. In analyzing the new provision, the Tribunal found that a resale of the product in question was a required element of the offence. After analyzing the Canadian credit card market, the Tribunal concluded that no resale existed (at paras. 147-148):

> [147] The Tribunal has carefully reviewed the evidence adduced regarding the products sold by Visa and MasterCard and those sold by Acquirers. It finds that the products sold by the Respondents to Acquirers can be described as "Credit Card Network Services" and those sold by Acquirers to Merchants can be described as "Credit Card Acceptance Services". These services are different and Acquirers do not resell either Visa or MasterCard Credit Card Network Services.
>
> [148] Visa and MasterCard operate their respective networks by which MasterCard or Visa card transactions are authorized and paid. They supply authorization, clearance and settlement of transactions services to Acquirers over their respective network ("Credit Card Network Services"). Acquirers, on the other hand, provide to Merchants services that enable them to accept credit cards ("Credit Card Acceptance Services"), which services are different than those of Visa and MasterCard.

The Commissioner's failure to establish a resale was, on its own, fatal to the application: *Tribunal Decision* at para. 157.

[26] However, the Tribunal went on to consider the other elements of the offence in the event it was incorrect about some aspect of the resale requirement. In determining the relevant product market, the Tribunal determined that its standard hypothetical monopolist test and the related small but significant and non-transitory increase in price (SSNIP) analysis could be applied to one side of a two-sided market "provided that both the interdependence of demand, feedback effects and ultimately changes in profit on both sides of the platform are taken into account" (at para. 189). As I will discuss when evaluating the commonality of the issues in this

case, the feedback, or network, effects at play in this case are of considerable importance.

[27] When assuming the existence of a hypothetical resale from Acquirers to merchants, the Tribunal found that Visa and MasterCard indirectly influenced upward the resale price through the implementation of their respective No Surcharge Rules. However, the Tribunal found that there was insufficient evidence to conclude that the Honour All Cards Rule or MasterCard's No Discrimination Rule had a similar effect on Merchant Discount Fees. The Tribunal also found that the No Surcharge Rule has the effect of suppressing price competition between Visa and MasterCard in the market for services sold to Acquirers and that this conduct has had an adverse effect on competition in the relevant market.

[28] However, the Tribunal concluded that even if a resale had existed it would not have exercised its discretionary power to issue an order for relief. The Tribunal emphasized that the proper solution to the Commissioner's legitimate concerns was a regulatory framework. Relying on evidence from other jurisdictions, the Tribunal found that issuing an order would risk "replacing one set of distorted incentives by another" (at para. 396) and held that "it is uncertain that the supposed 'cure' will not be worse than the 'disease'" (at para. 398).

[29] On 30 September 2013, the new Commissioner of Competition announced that the *Tribunal Decision* would not be appealed, and that the Competition Bureau would instead "focus [its] efforts on identifying alternate means of addressing the competition issues in the supply of credit card services in Canada" and "work with the federal government and relevant stakeholders to advocate for changes in the credit card market" (Competition Bureau, Announcement, "Competition Bureau Will Not Appeal Credit Cards Decision" (30 September 2013)). The federal government's "Economic Action Plan 2014" tabled in the House of Commons on 11 February 2014 as part of the federal budget acknowledges the *Tribunal Decision* and states an intention to lower credit and acceptance costs to merchants (p. 186).

[30] While cases challenging interchange fees and the structure of the credit card networks operated by Visa and MasterCard are novel in Canada, several have been brought in the United States. Historically, such claims have generally been unsuccessful. In *National Bancard Corporation v. VISA U.S.A. Inc.*, 779 F.2d 592 (11th Circuit 1986), in which the plaintiff claimed that Visa fixed specific interchange rates, the Court held that that the rates in question were ultimately pro-competitive as they were vital to the survival and stability of the Visa network as a whole.

[31] Several other American challenges to interchange fees and Network Rules, such as *Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042 (9th Circuit 2008), failed because the plaintiff ran into the "*Illinois Brick* Wall", a reference to the U.S. Supreme Court's ban on the offensive use of passing on in actions by indirect purchasers in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). There is no ban on claims by indirect purchasers in Canada: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*].

[32] However, other claims against the networks have succeeded. For example, in *United States v. VISA U.S.A., Inc.*, 344 F.3d 229 (2nd Circuit 2003) the Court prevented Visa and MasterCard from implementing and enforcing rules that prevented their member banks from issuing competing American Express or Discover credit cards.

[33] More recently, Visa, MasterCard, and several issuing and acquiring banks, settled a proposed class action brought by merchants, which alleged that interchange fees were fixed and challenged the Network Rules. The settlement agreement, among other relief, provided for a cash fund of over $7 billion (before reductions for merchants who opt-out) and the removal of the No Surcharge Rule, with some conditions on how merchants could then apply surcharges. However, the settlement agreement preserved the Default Interchange System and the Honour All Cards Rule. The settlement was approved by the Court on 13 December 2013: *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720 (E.D.N.Y. 13 December 2013).

[34] The European Commission has also been dealing with interchange fees and similar network rules for over a decade. The Commission sent a comfort letter to Visa after it began operating in Europe, but withdrew it and began an investigation in 1992. A formal complaint centering on interchange fees was made by a European retailers association in 1997. In 2001, the Commission cleared some of Visa's network rules, but the decision explicitly did not refer to interchange fees.

[35] In 2002, the Commission released a decision concerning Visa's cross-border interchange fees, also referred to as multilateral interchange fees, or MIF (European Commission Decision COMP/29.373 - *Visa International*, 24 July 2002). The Commission found that MIF restricted the freedom of banks to decide their own pricing policies and distorted competition in the Visa issuing and acquiring markets.

[36] However, following the complaint, Visa proposed a modified MIF scheme for cross-border transactions. The modifications included capping interchange fees based on the costs of providing designated services. The Commission accepted that Visa's modifications would mitigate some of the major concerns with the MIF and granted it an exemption from the applicable anti-competitive provisions until 2007. The Commission launched a new investigation when the exemption expired.

[37] In 2007, the Commission also issued a decision (European Commission Decision COMP/34.579 - *MasterCard*, 19 December 2007) concerning MasterCard's MIF and Network Rules following a complaint from an association representing British merchants. As with the 2002 Visa decision, the Commission found that MasterCard's MIF restricted competition. However, unlike the 2002 Visa decision, the Commission refused to grant an exemption to MasterCard and gave the company six months to remedy its practices. The Commission's decision was affirmed: *MasterCard, Inc. v. European Commission*, T-111/08, General Court (Seventh Chamber), 24 May 2013.

[38] Because of the expert testimony provided by the parties in this case, the state of the credit card industry in Australia, and to a lesser extent New Zealand, is of considerable importance. While the parties disagree over whether the Canadian

credit card industry can be compared to its counterparts in Australia and New Zealand, there does not appear to be any genuine disagreement about the changes that have taken place in those countries since 2001. However, as this background information was not contentious or critical to this certification hearing, it was generally not discussed in the evidence except in part through the affidavits of Dr. Ware and other witnesses. Accordingly, I have relied in part on the *Tribunal Decision* in summarizing the Australian and New Zealand industries. Of course, the factual findings of the Tribunal are not binding on this Court now or at trial.

[39] On 1 July 2003, the Australian government began to regulate the Default Interchange Fees set by Visa and MasterCard. The regulations require that an objective, transparent, and cost-based benchmark be used to determine a weighted cap on the default rate of interchange. The original weighted average was 0.55% of each credit card transaction, but it was revised to 0.50% on 1 November 2006, where it has remained since. In addition, Visa and MasterCard were required to remove their No Surcharge Rules on 1 January 2003.

[40] Notably, Visa and MasterCard's competitors, American Express and Diners Club, were not subject to the interchange regulations or to the prohibition on preventing merchants from surcharging. However, both entities provided the Reserve Bank of Australia with written undertakings that they would not prohibit surcharging. Since the 2003 regulations were introduced, American Express and Diners Club have gained approximately 5-6% market share among cardholders at the expense of Visa and MasterCard.

[41] Surcharging by Australian merchants has become common since the regulations were introduced. As found by the Tribunal, many merchants are surcharging at a rate that exceeds, sometimes grossly, their cost of accepting credit cards. In response, the Reserve Bank of Australia has apparently decided to let Visa and MasterCard limit surcharges to an amount reasonably related to the cost of acceptance.

[42] 2003 also marked the year that the New Zealand Commerce Commission began an investigation into interchange fees and surcharging. It filed a claim against Visa and MasterCard in 2006 that was settled in 2009. As part of the settlement, Visa and MasterCard were prohibited from preventing merchants from surcharging, but they retained the right to enforce rules ensuring that surcharges bore a reasonable relationship to the cost of acceptance.

III. THE PROPOSED AMENDED NOTICE OF CIVIL CLAIM

[43] I will first address the proposed amendments to the Notice of Civil Claim (the "Amended Claim"). They are described in the plaintiff's application dated 23 April 2012.

[44] The plaintiff has met the low threshold permitting amendments and I so order. The defendants' application to strike of 4 January 2012 will, in turn, be considered in light of these amendments when I address each of the *CPA* s. 4(1) requirements for certification.

[45] The defendants in these proceedings are described at paragraphs 2-14 of the Amended Claim. I note that the defendant Fédération des caisses Desjardins du Québec ("Desjardins") led extensive evidence on the application seeking to distinguish its operations in significant respects from that (or those) of the other defendants and I will say more about the thrust of the ensuing submissions on behalf of Desjardins later in these reasons.

[46] Further, Bank of America Corporation, ("MBNA") entered into a settlement agreement with the plaintiff after the conclusion of the certification application hearing, but before some of the later supplemental submissions. On an interlocutory application to approve that settlement, I adjourned the application pending the pronouncement of judgment on the certification hearing.

[47] The plaintiff proposes two classes defined in similar terms. That in respect of Visa is defined (Amended Claim at para. 15):

> 15. This action is brought on behalf of members of a class (the "Visa Class Members") consisting of the plaintiff and all Canadian resident persons who, during some or all of the period commencing March 28, 2001 and continuing through to the present (the "Class Period"), accepted payments for the supply of goods or services by way of Visa credit cards pursuant to the terms of merchant agreements, or such other class definition or class period as the Court may ultimately decide on the application for certification.

[48] At the heart of the claim are two alleged conspiracies described generally in this way (Amended Claim at paras. 20-21):

> 20. The credit card network services market is characterized by contractual relationships amongst and between Visa, its Issuing Banks, the Acquirers, and merchants, and amongst and between MasterCard, its Issuing Banks, the Acquirers, and merchants, giving each credit card network market power in the Canadian credit card network services market.
>
> 21. The agreements and contractual relationships that govern the Visa and MasterCard credit card networks constitute two separate but interrelated conspiracies in operation by way of contracts which are between and among:
>
> (a) the Visa network and its member banks (which are Issuing Banks and Acquirers); and
>
> (b) the MasterCard network and its member banks (which are Issuing Banks and Acquirers).

[49] At para. 24 it is alleged:

> 24. In order to accept payments by Visa or MasterCard credit cards, merchants must enter into agreements with Acquirers. These agreements include standard terms and conditions imposed by the Issuing Banks and Visa or MasterCard through their respective agreements with the Acquirers. These agreements include the terms of the Visa International Operating Regulations (the "Visa Rules") and the MasterCard Worldwide MasterCard Rules (the "MasterCard Rules").

[50] The Visa Rules and the MasterCard Rules (also referred to as the Network Rules) include the three "rules" which I described earlier and the rules governing Default Interchange Fees.

[51] The plaintiff pleads that the effect of the so-called merchant restraints or "Network Rules" (again collectively the Honour All Cards Rule, No Surcharge Rule and the No Discrimination Rule) impede or restrain competition for credit card network services, including competition with respect to Default Interchange Fees. At para. 42, the plaintiff pleads:

> 42. The result of the Default Interchange Rule and Merchant Restraints is to allow Interchange Fees to be maintained at supracompetitive levels by restricting the pressures that, in a competitive market, would drive lower Interchange Fees. The operation of the Visa and MasterCard credit card network schemes by the Defendants are intended to maximize, increase, and maintain the total Merchant Discount Fees, including Interchange Fees, paid by merchants, including the Visa and MasterCard Class Members.

[52] The Visa conspiracy is pled at paras. 43-48 and that of MasterCard at paras. 49-54 of the Amended Claim. In paras. 56-58 of the Amended Claim, the plaintiff pleads further or, alternatively, that the acts previously pled were in breach of ss. 45 and/or 61 of the *Competition Act*. In the result, the plaintiff pleads two civil conspiracies based in unlawful acts and predominant purpose (as more particularly discussed in *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 at 471-472). Further, and again in the alternative, the plaintiff pleads the same allegation as founding unlawful interference with the economic interests of the two classes.

[53] As for damages, the plaintiff pleads that (Amended Claim at para. 61):

> 61. The plaintiff and the other Visa and MasterCard Class Members suffered the following damages:
>
> (a) the rates of Merchant Discount Fees and in particular Interchange Fees have been maintained at or increased to a supracompetitive level; and
>
> (b) competition in the supply of credit card network services has been lessened.

[54] These damages - principally excessive and supracompetitive Merchant Discount Fees - and, in particular, Default Interchange Fees, are characterized respectively as the “Visa Overcharge” and the “MasterCard Overcharge”. The plaintiff seeks punitive damages as well.

[55] In the alternative, the plaintiff waives the tort and seeks recovery under restitutionary principles.

[56] The prayer for relief seeks these orders (Amended Claim at para. 71):

71. The plaintiff, on its own behalf, and on behalf of the Visa and MasterCard Class Members, claims against the defendants:

(a) a declaration that the defendants, and each of them, participated in conspiracies to impose and maintain the Networks' Rules and in particular the Default Interchange Rule and the Merchant Restraints during the Class Period, and to raise, maintain, fix or stabilize the rates of Merchant Discount Fees, and in particular Interchange Fees, in violation of statutory, common law, and equitable laws as alleged in this claim;

(b) an order certifying this action as a class proceeding against Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, and appointing the plaintiff as representative plaintiff in respect of the Visa Class Members;

(c) an order certifying this action as a class proceeding against MasterCard, BMO, Capital One, CIBC, Citi, Desjardins, MBNA, National, RBC, and TD, and appointing the plaintiff as representative plaintiff in respect of the MasterCard Class Members;

(d) general damages for conspiracy and unlawful interference with economic interests;

(e) general damages for conduct that is contrary to Part VI of the *Competition Act,*

(f) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to impose the Networks' Rules;

(g) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to raise, maintain, fix or stabilize the rates of Merchant Discount Fees, and in particular Interchange Fees;

(h) punitive damages;

(i) costs of investigation and prosecution of this proceeding pursuant to section 36 of the *Competition Act*;

(j) pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act,* RSBC 1996, c 78, s 128; and

(k) such further and other relief as to this Honourable Court may seem just.

[57] The defendants have not yet filed their responses.

IV. GENERAL PRINCIPLES GOVERNING CERTIFICATION

[58] The certification stage of a class proceeding is not meant to test the merits of the claim, or to determine if it is likely to succeed. Instead, this stage is concerned with the form of the action and whether it can properly proceed as a class proceeding: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16; *Microsoft* at para. 99.

[59] To this end, s. 4(1) of the *CPA* contains the five requirements for certification:

> 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.

These criteria are similar to the requirements for certification in other Canadian provinces. Notably, if these requirements are met, the Court *must* certify the action; there is no residual discretion. The plaintiff bears the evidentiary burden for each requirement, but that burden should not be overstated.

[60] Subsection (a) requires that the pleadings disclose a cause of action. This requirement is assessed on the same standard as on a motion to strike pleadings under Rule 9-5(1)(a). Accordingly, the plaintiff satisfies this requirement unless it is plain and obvious that the claim cannot succeed: *Hollick* at para. 25; *Microsoft* at para. 63. For this analysis, the Court must assume that all the pleaded facts are true

unless they are patently unreasonable or incapable of proof. Further, a claim must not be struck merely because it is novel or complex: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980.

[61] Subsections 4(1)(b)-(e) of the *CPA* require the plaintiff to show "some basis in fact" for each requirement: *Hollick* at para. 25. The plaintiff must show that there is some basis in fact which establishes each of the four requirements, but does not need to establish some basis in fact for the claim itself. Again, the Court is concerned with the appropriateness of a class proceeding, not the strength of the claim. Further, courts are ill-equipped to resolve conflicts in the evidence at certification: *Microsoft* at paras. 100-102.

[62] There is limited utility in attempting to define the "some basis in fact" standard in the abstract; each case must be decided on its own facts. The standard does not require proof on a balance of probabilities, but it requires more than a symbolic scrutiny of the sufficiency of the evidence. Ultimately, the Court must be satisfied "that the conditions for certification have been met to a degree that allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met": *Microsoft* at paras. 103-104.

[63] Thus for subsection (b), the plaintiff must provide some basis in fact for the existence of an identifiable class of two or more persons. The class must be clearly defined at the outset of the litigation as doing so identifies the individuals entitled to notice under the *CPA*, entitled to relief if the case succeeds, and bound by judgment unless they opt-out: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38 [*Dutton*]; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 57.

[64] To meet this requirement, the plaintiff must define the class with reference to objective criteria. Similarly, while the definition should be rationally related to the alleged common issues, the membership of the class must not hinge on the outcome of the litigation. Further, the class must not be defined too broadly or too

narrowly in relation to the common issues. Ultimately, it is not necessary for the plaintiff to identify every class member, but it must be possible to determine whether or not a specific individual is a member of the class: *Sun-Rype* at paras. 52-62; *Dutton* at para. 38; *Hollick* at paras. 20-21.

[65] Subsection (c) requires the plaintiff to provide some basis in fact that at least some of the issues raised by the claims are common issues, whether or not they predominate over individual issues. Section 1 of the *CPA* defines "common issues" as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[66] In *Dutton*, the Court held that the underlying question when analyzing commonality is "whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis" (at para. 39). In *Microsoft*, the Court summarized the other holdings of *Dutton* regarding commonality (*Microsoft* at para. 108, citing *Dutton* at paras. 39-40):

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[67] The Court recently clarified the final point and held that "success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another" (*Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45). Further, questions may be common even if the answers to those questions vary from class member to

class member (*Vivendi* at paras. 45-46). In any event, concerns about unproven material differences are not determinative at certification. If they actually emerge during the proceeding, Courts can deal with them when the time comes, through decertification if necessary: *Microsoft* at para. 112; *Dutton* at para. 54.

[68] Under subsection (d), the plaintiff must show some basis in fact that a class proceeding is the preferable proceeding for the fair and efficient resolution of the common issues. In British Columbia, in contrast to some other provinces, there is legislative guidance that informs the preferability inquiry. Section 4(2) of the *CPA* provides:

> 4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Section 4(2) does not provide an exhaustive list of factors relevant to preferability. In addition to the five enumerated factors, preferability must be examined with reference to the three principal advantages of the class action regime: judicial economy, access to justice, and behaviour modification. However, the plaintiff does not need to prove that the class action will actually achieve those goals: *Hollick* at para. 27; *Microsoft* at para. 137; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 22.

[69] The term “preferable” must be construed broadly within the *CPA*. It encompasses two related issues: the issue of whether or not the class proceeding would be a fair, efficient and manageable procedure for resolving the claims, and the

issue of whether the class proceeding would be preferable to all other reasonably available means of resolving the class members' claims: *Hollick* at paras. 28 and 31.

[70] Moreover, in determining whether a class action would be the preferable procedure for "the fair and efficient resolution of the common issues" as required by the *CPA*, the court must consider the common issues in the context of the action as a whole and their importance in relation to the claims as a whole. To a certain extent, this is captured by s. 4(2)(a) of the *CPA*: *Hollick* at paras. 29-30; *AIC Limited* at para. 21.

[71] Finally, under subsection (e), the plaintiff must show some basis in fact that she is an appropriate representative plaintiff with reference to the three specified requirements of the *CPA*. First, the plaintiff must fairly and accurately represent the interests of the class. The Court considered the nature of this requirement in *Dutton* (at para 41):

> [41] …In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class [citations omitted].

[72] Further, the most important attributes of a representative plaintiff are a common interest with class members and the ability and desire to vigorously prosecute the claims (*Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (C.A.). at para. 75, citing *Endean v. The Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.).

[73] Second, the plaintiff must have a litigation plan with a workable method of advancing the proceeding and of notifying the class members. The purpose of this requirement was described in *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717 at para. 77:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members [citations omitted].

[74] Moreover, the plan must support the idea that a class action is the preferable procedure for the resolution of the claim. The amount of detail in the plan must correspond to the circumstances and the complexity of each specific case, but the plan must at least be individualized and not a mere outline of the steps that would occur in any case. The plan must also deal with individual issues that will be left over after the common issues are resolved: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 79 [*Infineon*]; *Pardhan v. Bank of Montreal*, 2012 ONSC 2229 at paras. 334-337.

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

V. *CPA* SECTION 4 REQUIREMENTS

A. Section 4(1)(a)

[76] The defendants advance essentially four reasons supporting their submission that it is plain and obvious that the pleadings do not disclose causes of action (Defendants' Joint Submissions at paras. 155-158):

> 155. First, the Amended Claim does not meet the minimum standard required to plead each cause of action.

> 156. Second, the plaintiff's claims for damages under the *Competition Act* are barred by the two year period of limitation under section 36(4) of the *Competition Act.*
>
> 157. Third, the claims in civil conspiracy, IIER [intentional interference with economic relations], unjust enrichment, and waiver of tort all fail because each of these is founded upon a breach of the *Competition Act*. The remedy under the *Competition Act* is the sole remedy available both as a matter of statutory construction and under common law principles.
>
> 158. Fourth, the plaintiff's claims are indirect and barred by application of the principles set out by the Court of Appeal in *Sun-Rype v. Archer Daniels Midland et al*. The plaintiff does not have a cause of action for restitutionary relief, or damages against the Issuers or networks. Appeals from both of these decisions is on reserve at the Supreme Court of Canada.
>
> [Citations omitted.]

[77] I will examine each cause of action pled in light of these submissions. But I will begin by discussing the general bar advanced by the defendants: that the plaintiff's classes are indirect customers and barred by application of the principles set out by the British Columbia Court of Appeal in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company,* 2011 BCCA 187.

[78] That decision has been, of course, overtaken by the Supreme Court of Canada's decisions in that case (2013 SCC 58) and in *Microsoft* (see also *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59).

[79] In *Microsoft*, the Court reviewed the issue of whether indirect purchasers have a cause of action against a party who has effectuated a supracompetitive overcharge at the top of a distribution chain that has allegedly injured indirect purchasers as a result of the overcharge being "passed on" to them through the distribution chain. The Court concluded (at para. 60):

> 60. Although the passing-on *defence* is unavailable as a matter of restitution law, it does not follow that indirect purchasers should be foreclosed from claiming losses passed on to them. In summary:
>
> (1) The risks of multiple recovery and the concerns of complexity and remoteness are insufficient bases for precluding indirect purchasers from bringing actions against the defendants responsible for overcharges that may have been passed on to them.

(2) The deterrence function of the competition law in Canada is not likely to be impaired by indirect purchaser actions.

(3) While the passing-on defence is contrary to basic restitutionary principles, those same principles are promoted by allowing passing on to be used offensively.

(4) Although the rule in *Illinois Brick* remains good law at the federal level in the United States, its subsequent repeal at the state level in many jurisdictions and the report to Congress recommending its reversal demonstrate that its rationale is under question.

(5) Despite some initial support, the recent doctrinal commentary favours overturning the rule in *Illinois Brick*.

[80] In any event, the plaintiff's case in conspiracy includes the Acquirers with whom the plaintiff and members of the proposed classes are in a direct commercial relationship by way of payment of the Merchant Discount Fees, which, on the plaintiff's theory, consist in huge measure of the supracompetitive Default Interchange Fees. From this perspective, the plaintiff maintains that as pled, it is not an indirect purchaser complaining of torts up the distribution chain.

[81] Under either scenario - the plaintiff and the proposed classes as the victims of a conspiracy directly aimed at them by their immediate "vendors", or the plaintiff and the classes as indirect purchasers of the "product" which has been supracompetitively priced, in light of *Microsoft*, the plaintiff does not founder on the now discredited "indirect purchaser" bar.

[82] On a related issue, I have concluded that it is not plain and obvious that the plaintiff's claim will fail because the *Tribunal Decision* found that Acquirers do not resell the service they receive from the networks to merchants. First, the *Tribunal Decision* is not binding on this application and such a factual finding is premature at this stage. Second, in allowing actions by indirect purchasers the Court in *Microsoft* was primarily concerned with the effect of overcharges on subsequent purchasers. Whether those subsequent purchasers, in this case the merchants, actually purchase the original service may be irrelevant if they are still, effectively, overcharged for it.

[83] One can consider a hypothetical case of a cartel of jet fuel producers engaged in a price-fixing conspiracy. In such a case airlines would presumably pass the increased cost of the fuel on to passengers via a fuel surcharge or a simple increase in ticket prices. There would be no true resale of the jet fuel as it would be consumed in flight and the passengers would never acquire any rights to it. In light of *Microsoft*, I do not believe that an indirect action by the passengers against the cartel would fail on the plain and obvious standard. I am similarly convinced that this case may proceed despite the Tribunal's findings on the resale issue.

[84] I turn to each cause of action in turn and the remainder of the parties' submissions.

1. *Competition Act* Claims

[85] The plaintiff pleads that the defendants breached ss. 45 and 61 of the *Competition Act* and consequentially seeks damages under s. 36.

a) Section 45

[86] The defendants note that the class period engages two versions of s. 45 of the *Competition Act*, that before 12 March 2010 and the new s. 45 brought into force by amendments effective that date.

[87] The defendants say that the plaintiff's pleadings are deficient regardless of which version is being considered (Defendants' Joint Submissions at para. 163):

> 163. Section 45 provides for an indictable criminal offence, the current penalty for the commission of which is imprisonment of up to fourteen years, and a fine of up to $25 million or both. Contrary to the principles outlined above, the plaintiff's claims of criminal conduct are perfunctory and do not plead the elements of the *Competition Act* or the statutory amendments. As these pleading deficiencies obscure substantive bars to the plaintiff's claims, the statutory requirements are outlined below.

[88] Presently, s. 45 provides, in part:

> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (*a*) to fix, maintain, increase or control the price for the supply of the product…

[89] Prior to 12 March 2010, s. 45 provided, in part:

> 45 (1) Every one who conspires, combines, agrees or arranges with another person…
>
> (*c*) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or...
>
> is guilty of an indictable offence…

[90] The main effects of the amendment are that it is now only an offence to conspire with competitors and that there no longer needs to be an analysis concerning whether the conspiracy had an *undue* effect on competition. I will refer to the sections as New Section 45 and Old Section 45, respectively.

[91] Both sections are criminal offences with an *actus reus* and a *mens rea*. For Old Section 45, the elements of the *actus reus* are a conspiracy, an agreement or arrangement entered into by the accused and an undue preventing or lessening of competition flowing from that agreement. For New Section 45, the *actus reus* is simply a conspiracy, agreement or arrangement with a competitor to fix, maintain, increase, or control the price of a product. For Old Section 45, the *mens rea* has both a subjective and an objective component. The elements of the subjective component are the accused's intention to enter the agreement and the accused's knowledge of the terms of the agreement, unless there is evidence that the accused did not intend to carry out that agreement. The only element of the objective component is an objective intention to unduly lessen competition. This objective element will likely be established if the *actus reus* is made out. Given the similarities in the sections, I see no reason why the elements of the *mens rea* required for New Section 45 would differ, except to the extent that the objective requirement should require an objective intention to fix, maintain or control a price instead of an objective intention to unduly lessen competition (*R v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 643-660, discussing s. 32(1)(c), the predecessor to Old Section 45(1)(c); *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at paras. 615-634 [*Tim Hortons*]).

[92] The Amended Claim sets out the allegations of the Visa Conspiracy at paragraphs 43-48. In summary, the plaintiff pleads that:

(a) Visa and its Issuers entered into anti-competitive agreements, such as the Network Rules, to fix the rate of Interchange payable by Acquirers to Issuers;

(b) Visa, the Issuers and the Acquirers entered into anti-competitive agreements, and that pursuant to these agreements the Acquirers entered into agreements with merchants that imposed anti-competitive terms and conditions including the Network Rules;

(c) The agreements had the effect of imposing supracompetitive Merchant Discount Fees (in particular, Default Interchange Fees); and

(d) Senior executives of the defendants communicated and through those communications the defendants imposed the Visa Rules on merchants, fixed the default rates of interchange, exchanged information about compliance with the Network Rules by merchants, concealed the elements of Merchant Discount Fees from merchants, and disciplined Acquirers who failed to impose certain rules and restrictions.

[93] Effectively identical facts are pled regarding the MasterCard Conspiracy at paragraphs 49-54. At paragraphs 56-58, the plaintiff particularizes the breach of the *Competition Act* claim by specifying that the defendants conspired to fix, maintain, increase, or control the price for the supply of credit card network services.

[94] I will deal with the *actus reus* of both New and Old Section 45 before turning to the *mens rea*.

[95] For both New and Old Section 45, the plaintiff has pled the existence of a conspiracy via anti-competitive agreements, including the various Network Rules. For Old Section 45, the plaintiff has pled that the conspiracy involved all of the major networks and Issuers in a concentrated industry (Amended Claim at paras. 17-18). On that basis and on the basis of the content of the alleged anti-competitive agreements, the plaintiff has pled an undue lessening of competition. Given the alleged imposition of supracompetitive Interchange Fees and Merchant Discount Fees via the alleged agreements the plaintiff has certainly pled the fixing and maintenance of a price for New Section 45.

[96] In response the defendants argue that, regarding New Section 45, there is no pleading of an agreement between competitors. To be competitors, the relevant person must compete or be likely to compete with respect to the products that are the subject of the New Section 45 claim (*Competition* Act, s. 45(8); *Tim Hortons* at para. 631). I accept the defendants' argument that in the context of this case this means an agreement between Visa and MasterCard, between Issuers, or between Acquirers. An agreement between Visa and TD, for example, could not be in breach of New Section 45.

[97] The defendants argue that the only agreements pled are between non-competitors, such as the Network Rules. Visa and MasterCard are not alleged to have entered an agreement together and the defendants claim that the allegation that the Issuers entered agreements with Visa, MasterCard, and critically, each other is merely speculative.

[98] My understanding of the pleadings set out above is that the defendant Issuers all agreed, in conjunction with Visa or MasterCard, depending on the conspiracy, to maintain or increase Interchange Fees and Merchant Discount Fees while maintaining the Network Rules. Thus the agreement between Issuers was an agreement to maintain prices. Visa and MasterCard are alleged to have been parties to those agreements given their role in setting Default Interchange Fees. While the pleadings are not specific concerning these alleged agreements, I cannot say that it

is plain and obvious that the claim will fail, especially since I must assume the facts set out in the pleadings to be true.

[99] Regarding Old Section 45, the defendants argue that the plaintiff fails to address how the agreements would unduly restrain competition. First, for the reasons set out above I think the possibility of an undue lessening is apparent from the pleadings. Second I have trouble envisioning how such a pleading would read. What more could the plaintiff plead beyond a statement that any lessening of competition was undue? Even if that were required I would not strike the claim on such a technical omission and would grant leave to amend it. I would not give effect to this argument.

[100] As a result, the plaintiff has properly pled the *actus reus* of both New and Old Section 45.

[101] Concerning the *mens rea*, the plaintiff has pled that the defendants entered the alleged agreements. Again a sentence in the pleadings alleging that the agreements were entered voluntarily and that the defendants knew of the content of the agreements would be wholly redundant and can be inferred. An objective intention to both unduly limit competition and fix or maintain Interchange Fees and Merchant Discount Fees can be inferred from the *actus reus* pleadings and the content of the alleged agreements.

[102] The defendants argue that the pleadings do not identify, when, where, or through whom any agreements, with the necessary criminal intent, were reached in relation to any or all of the defendants. First I doubt that the "where" is relevant at this stage. More substantially, and as before, assuming the facts setting out the alleged conspiracies are true, the failure to plead in the level of specificity desired by the defendants is not fatal. It is not plain and obvious that the claim will fail as a result.

[103] Consequentially, the plaintiff has pled the necessary elements of both New and Old Section 45.

[104] The defendants also argue that the New Section 45 claims are bound to fail because of the defence in s. 45(4), which provides:

> 45 (4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if
>
> (*a*) that person establishes, on a balance of probabilities, that
>
> (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
>
> (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
>
> (*b*) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

[105] Whether this defence has been made out on these facts is an issue for trial as it requires significant evidentiary findings. The section even explicitly calls for proof on a balance of probabilities. Moreover, *Tim Hortons*, the case relied on by the defendants when advancing this argument, was a decision where summary judgment for the individual claims followed a decision on certification. In that case the Court found, for the purposes of certification, that the pleadings disclosed a cause of action under the *Competition Act*, specifically New Section 45, Old Section 45 and s. 61 (at paras. 210-212), before considering the defence when evaluating summary judgment (at paras. 625-634). As a result this argument is premature and will be an issue for trial.

[106] By virtue of s. 36, the plaintiff can only succeed under either New or Old Section 45 by proving loss or damage resulting from a violation of those sections. The Amended Claim alleges that the plaintiff suffered the effects of the alleged overcharge from the supracompetitive Merchant Discount Fees and Interchange Fees so this element has also been pled.

[107] As a result, the plaintiff has properly pled causes of action under both New and Old Section 45.

b) Section 61

[108] Before the repeal of s. 61 on 12 March 2009 it provided in part:

> 61 (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,
>
> (*a*) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada…

[109] The constituent elements of s. 61 are: (*2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation* (2009), 96 OR (3d) 252 (Div. Ct.) at para. 55, aff'd 2010 ONCA 466):

> (1) a person engaged in the business of producing or supplying a product;
>
> (2) who, directly or indirectly, attempts to influence upward or discourages the reduction of the price at which another person supplies or offers to supply a product within Canada; [and]
>
> (3) by agreement, threat, promise or any like means.

[110] The Amended Claim clearly alleges that the defendants produce and supply a product, be it credit card network services or something similar. Moreover, it is beyond doubt that all the defendants are engaged in a business that relates to credit cards, which can also satisfy the first element.

[111] The conspiracies pled in the Amended Claim clearly allege that the defendants reached agreements with Acquirers and that pursuant to those agreements Acquirers imposed supracompetitive Merchant Discount Fees on merchants. Thus, I take the allegation to be that the defendants influenced upward the price of credit card network services. It is not plain and obvious that this alleged conduct does not meet the second element above.

[112] The existence of an agreement has been pled for the same reasons set out under New and Old s. 45.

[113] The defendants argue that the s. 61 claim is an afterthought that the plaintiff did not raise until the Amended Claim was filed. I agree, but the necessary elements are nonetheless pled in the Amended Claim. I would not give effect to this argument or to the argument that the Amended Claim does not even attempt to plead the necessary elements.

[114] Following the *Tribunal Decision*, the defendants argue that s. 61 is inconsistent with economic analysis, fails to distinguish between anti-competitive practices and benign or pro-competitive practices, does not advance access to justice and ultimately does not promote sound competition policy. Even if true, these are policy arguments that do not affect whether it is plain and obvious that the claim will fail. At best they can impact the analysis under s. 4(1)(c) and (d) of the *CPA*.

[115] As a result, the plaintiff has properly pled a cause of action under s. 61.

c) Limitation Period

[116] Then the defendants submit that, in any event, the *Competition Act* claims are barred by the two-year limitation period set out in s. 36(4) (Defendants' Joint Submissions at paras. 187-188):

> 187. Federal court jurisprudence has directly addressed the question of when the statutory limitation in the *Competition Act* begins to run. In *Garford Pty Ltd. v. Dywidag Systems International Canada Ltd.*, the court granted the defendant's motion for summary judgment on the ground that the limitation period for the plaintiff's claims under sections 36 and 45 had expired. Section 36(4) expressly states that the limitation period runs from the "day on which the conduct was engaged in" and speaks to the conduct, and not its effect, in the commencement of the limitation period. As the conduct complained of, namely the execution of certain agreements, had occurred over two years prior to the commencement of the action, the claim disclosed no reasonable cause of action. Moreover, the discoverability rule does not apply to section 36(4).
>
> 188. Where, as here, the conduct complained of remains executory over a longer period of time, the "conduct" is nonetheless complete and the limitation period begins to run once an allegedly anti-competitive agreement has been entered into. In *Tim Hortons*, the plaintiff franchisees alleged a conspiracy between the defendant franchisor and a joint venture to force franchisees to buy ingredients at inflated prices. The impugned joint venture agreement and various related distribution agreements, which included prices that continuously varied throughout the Class Period, were executory over a long

> period of time, but all had been entered into more than two years prior to the commencement of the action. On this basis, the Ontario Superior Court held that the claim was statute-barred.
>
> [Citations omitted.]

[117] Regarding both New and Old s. 45, the defendants argue that the "conduct" in s. 36(4)(1)(a)(i) can only refer to the agreements in furtherance of a conspiracy and that the relevant agreements in this case were all executed more than two years before the original Notice of Civil Claim was filed. Regarding s. 61, the defendants argue that it was repealed more than two years before the original notice was filed and thus any claims are under it are barred in any event.

[118] For their arguments concerning New and Old s. 45, the defendants rely on three cases: *Tim Hortons; Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996, aff'd 2012 FCA 48; and *No. 1 Collision Repair & Painting (1982) Ltd. v. I.C.B.C.*, [1998] B.C.J. No. 581 (S.C.), aff'd 2000 BCCA 463.

[119] As previously mentioned, *Tim Hortons* found that the *Competition Act* claims were suitable for certification before rejecting them on a motion for summary judgment. *Garford* was also a case of summary judgment. The judgment in *No. 1 Collision* followed a trial. Accordingly, the plaintiff responds that a limitation period is not a defence unless it is pleaded and that it has no place is determining whether it is plain and obvious that a claim will fail. The plaintiff also relies on the judgment of Justice Donald in our Court of Appeal in *Microsoft*, dissenting on a different issue (2011 BCCA 186 at paras. 60-61):

> [60] The second issue is a limitations argument. Section 36(4) prescribes a two-year prescription period running from a day on which conduct contrary to any provision of Part VI was engaged in. While this is not strictly a pleadings point, on the submission of Microsoft, it should have the same effect as striking the claim because there is no possibility of overcoming the limitation obstacle. This is said to be the effect of the notoriety of the United States and European Union litigation in which the same or similar restrictive trade practices were alleged many years before the commencement of this action. In other words, no credible postponement or discoverability argument can arise and the claim has no reasonable prospect of success. In the alternative, Microsoft says the matter will break down into individual enquiries as to postponement and the class action will cease to be the preferable procedure.

> [61] The short and simple answer to this argument is that it is premature. Limitations problems like this are so bound up in the facts that they must be left to a later stage of the process. Moreover, the force of the argument is considerably diminished by the timing of its presentation – it looks and feels like an afterthought.

[120] I accept this statement and also that of Justice Low in *Fuoco Estate v. British Columbia*, 2001 BCCA 325 at para. 15:

> [15] Counsel have been unable to direct us to any cases in which Rule 19(24)(a) [Striking Pleadings, now Rule 9-5(1)(a)], standing alone, has been used to resolve a limitation issue. That may be because statements of claim do not raise limitation issues, as is the case here. The statutory limitations is a defence pleading. It is an issue that does not arise until it is pleaded in defence…I do not wish to state categorically that a limitation argument cannot properly arise under Rule 19(24)(a). But in the circumstances that exist here, in particular the allegation of an ongoing breach of contract, I am of the opinion that the limitation issue cannot properly be dealt with under Rule 19(24)(a).

[121] In *Garford*, the limitation period applied because the Court found that the "conduct engaged in" for the purposes of s. 36(4) was the entering into of three purchase agreements, the last of which had been entered over two years before the claim was brought (at paras. 16-22). The Court distinguished between conduct, which was relevant to the limitation period, and effects, which were not (at paras. 43-44):

> [43] As the authorities show, the continuing effects of a conspiracy, agreement or arrangement are not what are actionable under subsection 36(1) of the *Competition Act*. The limitation period in subsection 36(4) is based upon "conduct" - i.e. the conspiracy or agreement in this case - and not upon its effects.
>
> [44] Even though Justice Gauthier accepted in *Eli Lilly*, above, that conduct contrary to Part VI of the *Competition Act* could "be an isolated incident or can be ongoing" depending upon which offence is in play, this does not change the distinction between the offence (the "conduct" for the purposes of subsection 36(4)) and its effects or consequences, and it is the offence in this case that starts the time running. A continuing offence under Part VI of the *Competition Act* would require ongoing acts that, in themselves, are an offence under Part VI, and there is no evidence of that in this case.

[122] A similar conclusion was reached in *Tim Hortons* (at paras. 635-650). However, both *Garford* and *Tim Hortons* and other cases acknowledge that it is *possible* for an offence grounding a s. 36 claim to be ongoing (*Laboratoires Servier*

v. Apotex Inc., 2008 FC 825 at paras. 482-486; *351694 Ontario Ltd. v. Paccar of Canada Ltd.*, 2004 FC 1565; *Bass Clef Entertainment Ltd. v. HOB Concerts Canada Ltd.*, 2004 CanLII 4804 (ONSC) at paras. 17-18).

[123] Notably, none of those cases dealt with the issue when striking pleadings. *Bass Clef Entertainment* found that the limitations issue was properly addressed at trial with a full evidentiary record. In *Apotex Inc. v Eli Lilly and Company*, 2005 FCA 361, in response to an argument that s. 36(4) barred the claim, the Court found that even a summary judgment motion was not the appropriate venue to resolve the issue given the evidentiary concerns (at paras. 51-52).

[124] In this case, the plaintiff has pled that the defendants increased *and maintained* Merchant Discount Rates and Interchange Fees. I cannot agree that it is plain and obvious that the "conduct engaged in" was terminated when a specific agreement was reached, as in *Garford* and *Tim Hortons*. In *Fuoco Estate*, the Court found that it was premature to decide whether a contract was ongoing. It is similarly premature to decide whether the conduct in this case was ongoing.

[125] Regarding the s. 61 claim, the defendants argue that since the original Notice of Civil Claim in this case was filed more than two years after the section was repealed, the claim is bound to fail due to the limitation period. The plaintiff does not directly counter this point, but instead alleges that any violation of s. 61 is a possible unlawful act for other causes of action, such as civil conspiracy and unlawful interference with economic interests, with longer limitation periods.

[126] If, as *Fuoco Estate* indicates, it is not impossible to rely on a limitation period to strike pleadings, I think it is appropriate in response to a pleading that is based entirely on a repealed statutory cause of action where the limitation period has clearly expired before the claim is filed. It is plain and obvious that such a claim would fail, and little would be gained from requiring a statement of defence or a trial, as no evidentiary findings would be necessary. This is in contrast with the usual issues surrounding limitation periods discussed above.

[127] Nevertheless, it is not open to me to accept the plaintiff's submission on this point. As discussed more comprehensively below, it is now plain and obvious that the s. 61 claim will fail. The Court of Appeal's recent decision in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36, prevents the plaintiff from using a historical breach of s. 61 to ground another cause of action and the repeal of s. 61 bars any claim for damages under s. 36 because of the expiration of the limitation period. Accordingly, the plaintiff's s. 61 claim, while properly pled, must be struck.

2. Civil Conspiracy

[128] I turn to the cause of action in civil conspiracy. Here, the defendants advance a number of complaints. First, it is said that the pleadings do not rise to the required level of particularity called for in cases such as *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, [1993] B.C.J. No. 2958; 96 B.C.L.R. (2d) 156 (C.A.). Then it is said that causes of action dependent on breaches of the *Competition Act* are not maintainable, either because the doctrine of merger applies (citing amongst others *Bank of Montreal v. Tortora*, 2010 BCCA 139 [*Tortora*]), or because common law claims are not maintainable for breach of provisions of the *Competition Act*.

[129] The tort of conspiracy has two branches (*Cement LaFarge* at 471-472):

> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result
>
> In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[130] I will refer to the first branch as conspiracy to injure and the second branch as unlawful means conspiracy. The plaintiff has pled both (Amended Claim at para. 55).

[131] The plaintiff alleges two predominant purposes for each conspiracy: to harm the class members by requiring them to pay supracompetitive Merchant Discount Fees, including Interchange Fees, and to illegally increase the profits of the conspirators (Amended Claim at paras. 47, 53). The plaintiff subsequently alleges that the predominant purpose of both conspiracies was to injure the class members (at para. 55).

[132] While the phrase "*predominant* purpose" might imply that a conspiracy can only have one, it is not appropriate to strike pleadings merely because they allege more than one predominant purpose. Indeed, the alleged purposes in this case, to harm the plaintiffs and to increase the conspirators' profits, were also pled in *Microsoft* where the Court found that it was not plain and obvious that the claim would fail due to the uncertainty surrounding the actual predominant purpose of the conspiracy (at paras. 76-78). As in that case, it is possible that the evidence at trial will establish that harm to the plaintiff was the actual predominant purpose, even if it might seem unlikely at certification. This was the same approach adopted by this Court in that case: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2006 BCSC 1047 at para. 61.

[133] As the other elements of conspiracy to injure are common to unlawful means conspiracy, I will discuss them under that branch, where the parties directed more of their arguments.

[134] The defendants argue that the pleadings for conspiracy are deficient and lack the necessary particulars. They rely on *Can-Dive* for the requirements to plead conspiracy. Notably, *Can-Dive* is a decision upholding a chambers judge's decision to stay proceedings in a conspiracy case pending amendments to the pleadings. While the case has some useful discussion of what is necessary to successfully plead conspiracy, the discretion to grant a stay is broader than the discretion to strike a claim (*Can-Dive* at para.14).

[135] *Can-Dive* lists the elements of conspiracy as (at para. 5):

1. an agreement between two or more persons;

2. concerted action taken pursuant to the agreement;
   (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
   (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
3. actual damage suffered by the plaintiff.

[136] The plaintiff has pled these requirements. As discussed above, the plaintiff has alleged that the defendants entered agreements, including the respective Network Rules, concerning the rate of Interchange Fees; that pursuant to those agreements the defendants imposed supracompetitive Merchant Discount Fees, including Interchange Fees, and the Network Rules on the plaintiff and the proposed classes; and that the plaintiff and the proposed classes suffered damages, namely the Overcharges, as a result (Amended Claim at paras. 43-54).

[137] These requirements, numbers 1, 2 and 4 from *Can-Dive,* are also required for a conspiracy to injure and thus the plaintiff has met the requirements of that branch of the tort.

[138] Concerning the unlawful act necessary only for an unlawful means conspiracy, the plaintiff relies on the alleged breaches of the *Competition Act* (Amended Claim at para. 55). In *Microsoft*, this Court found that "if a breach of the *Competition Act* serves to satisfy one of the constituent elements of a tort, the courts may rely on the breach to grant a remedy in respect of the commission of the tort" (2006 BCSC 1047 at para. 20). On appeal, the Supreme Court of Canada held that the appropriateness of that finding would have to await its decision in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, leave to appeal granted [2012] S.C.C.A. No. 263. That decision has now been released and is indexed at 2014 SCC 12. On the basis of *Microsoft* (at para. 83) and that decision, I would not have concluded that it is plain and obvious that the unlawful means conspiracy claim will fail merely because it is based on a breach of the *Competition Act*. However, it

will be necessary to reconsider this conclusion in light of the Court of Appeal's decision in *Wakelam*, which I will discuss later in these reasons.

[139] The plaintiff has also pled that the defendants knew that their actions in the circumstances would likely cause injury to the plaintiff, in addition to pleading that causing injury to the plaintiff was the predominant purpose of the conspiracy. Thus the plaintiff has met the requirements of *Can-Dive*.

[140] The defendants claim that the pleadings are insufficiently particularized and rely on the following paragraphs from *Can-Dive* (at paras. 8-9):

> Esson J. also cited Bullen, Leake & Jacob's *Precedents of Pleadings,* 12th ed. (1975), p. 341. The current edition of Bullen, Leake & Jacob's *Precedents of Pleadings,* 13th ed. (1990), states at pp. 221-22:
>
> The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff…
>
> In my judgment, pleadings alleging conspiracy must be as specific as possible.

[141] As a result, the defendants claim that the pleadings are deficient for failing to disclose, among other particulars, the identity of every party to the conspiracy and their relationships, the date(s) of any alleged agreements, and the specific acts of each defendant.

[142] I do not consider *Can-Dive* to impose those requirements so strictly. They represent an ideal. The Court's conclusion in *Can-Dive* was that pleadings must be *as specific as possible*. The very nature of a claim in conspiracy resists particularization at the early stages (*North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993, (Div. Ct.) at para. 22). It may often not be possible to provide particulars as specific as the date of an agreement in a conspiracy case.

Given the nature of conspiracy claims, it would be perverse if the failure to plead a specific date was fatal to a claim that otherwise was not bound to fail.

[143] Many of the cases cited by the defendants, where claims of conspiracy have been struck as deficient, are cases where the plaintiff failed to meet the bare requirements of *Can-Dive*:

(a) In *Actton Super-Save Gas Stations Ltd. v. Superior Propane Inc.*, [1990] B.C.J. No. 2664 (S.C.) the plaintiff failed to name a single conspirator beyond the defendant and failed to plead any overt act beyond the conclusion that the price of propane was reduced.

(b) In *Taylor v. Tamboril Cigar Co.*, [2005] O.J. No. 4182 (C.A.) the plaintiff failed to plead the object of the conspiracy, that the defendants were conspirators, and any overt acts taken in furtherance of the conspiracy.

(c) In *Craig Wireless International Inc. v. Look Communications Inc.*, [2007] O.J. No. 223 (S.C.) the plaintiff failed to plead the existence of an agreement and failed to link damages to the conspiracy.

(d) In *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (C.A.) the plaintiff failed to plead the existence of an agreement and any overt acts taken in furtherance of the conspiracy.

(e) In *Hostmann-Steinberg v. 2049669 Ontario Inc*., 2010 ONSC 2441; *Gould v. Western Coal Corporation*, 2012 ONSC 5184; *Research Capital Corp. Skyservice Airlines Inc*., [2008] O.J. No. 2526 (S.C.) and *J.G. Young & Son Ltd. v. TEC Park Ltd*., [1999] O.J. No. 4066 (S.C.) the plaintiff lumped all the defendants together without indicating which ones undertook which overt actions pursuant to the conspiracy.

[144] In this case, the plaintiff has carefully set out the structure of the credit card industry and the relationships between the various parties are clear. This is not a case where the pleadings merely lump a diverse group of defendants together and claim they conspired to achieve some end state. To the extent there is homogeneity in the pleadings, it is presumably because *the defendants are all similar corporate entities that are alleged to have done the same thing*: maintained supracompetitive Interchange Fees and the Network Rules. This is not a case like *Research Capital Corp* or *J.G. Young & Son Ltd.* where the defendants included both companies and individuals.

[145] The defendants in this case may well desire more particularized pleadings, and they could arguably be improved, but the plaintiff has pled the requirements of *Can-Dive* and the cases raised by the defendants do not make it plain and obvious that the claim will fail in this case. The language relied upon by the defendants does not correlate with the jurisprudence.

[146] It would admittedly be preferable if the Amended Claim contained such statements as "On [date] [an executive] from [Issuer] met with [an executive] from [an Acquirer] at [location] and agreed to maintain the existing Interchange Fees", but any such utility would be limited and there can be little doubt what each defendant is alleged to have done. Requiring such specificity would also effectively doom many legitimate conspiracy claims.

[147] Further, the particularization of conspiracy pleadings is required so that defendants can meet a specific claim. Given the sheer breadth and depth of the defendants' arguments against certification, I find the suggestion that they are unable to respond specifically to the plaintiff's claims unrealistic, to say the least. I would not give effect to this argument.

[148] Finally, the defendants submit that the *Competition Act* is a comprehensive code and that the plaintiff cannot seek common law remedies that supplement those provided in the *Act*. The defendants originally relied on *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, where the Court concluded that the *Business Practices and*

Consumer Protection Act was such a comprehensive code and struck a waiver of tort claim based on a violation of that *Act*. However, that decision has been overtaken by the Court of Appeal's recent judgment in *Wakelam*, on which the defendants now rely. I find it preferable to deal with each cause of action in the Amended Claim individually before returning to this submission.

[149] Similarly, the defendants rely on the principles in *Tortora* and *Waters v. Michie*, 2011 BCCA 364 and submit that the conspiracy claims should merge with the other claims, specifically the alleged breach of the *Competition Act*. As a conspiracy to injure does not require an unlawful act it cannot merge in the manner described in *Tortora* and *Waters*. I will consider the issue of whether the unlawful means conspiracy merges with the *Competition Act* claim when discussing the application of *Wakelam* to this case.

3. Unlawful Interference with Economic Interests

[150] The three essential elements of this tort are (*Microsoft* at para. 81):

(1) the defendant intended to injure the plaintiff's economic interests;
(2) the interference was by illegal or unlawful means; and
(3) the plaintiff suffered economic loss or harm as a result.

[151] For the first element, the defendant must intend to cause loss to the plaintiff, either as an end goal or as the means of achieving an end goal, like self-enrichment (*Alleslev-Krofchak v. Valcom Ltd*., 2010 ONCA 557 at para. 50 [*Valcom*]). Thus, this element of the tort has been properly pled for the same reasons the plaintiff has properly pled a conspiracy to injure.

[152] The third element is satisfied based on the alleged overcharges.

[153] The second element of the tort was a subject of some debate until the Supreme Court of Canada's recent judgment in *Bram Enterprises Ltd.* The Court held that it was necessary to limit the definition of "unlawful means" for the purposes of this tort and concluded (at para. 76):

> [76] …in order for conduct to constitute "unlawful means" for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct.

[154] The involvement of a third party is therefore a critical component of the tort. As the Court held (*Bram Enterprises Ltd.* at para 23):

> [23] The unlawful means tort creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party)...
>
> [Citations omitted.]

[155] The Court also held that the tort is available even if the plaintiff has other causes of action against the defendant in relation to the alleged misconduct (at paras. 77-82). In doing so, the Court removed this prior limitation on the tort: *Valcom* at para. 60; *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, 2012 BCSC 597 at para. 47.

[156] Regardless, the Amended Claim does not identify any third party that the defendants are alleged to have committed an unlawful act against. The Acquirers cannot fulfill this role as they are alleged to be co-conspirators in the Amended Claim. On this basis alone it is plain and obvious that this claim will fail and I would strike it.

4. Restitutionary Claims

[157] This brings us to the claims in waiver of tort, unjust enrichment and constructive trust.

[158] Waiver of tort is a doctrine that allows a plaintiff to disgorge a defendant's gains from tortious conduct rather than recover his or her own loss. It is a benefit-based claim as opposed to a loss-based claim. The doctrine is the subject of substantial judicial and academic debate (*Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 579 [*St. Jude*]):

> [579] …the primary debate about waiver of tort has been whether the doctrine exists as an independent cause of action in restitution (the independence theory) or is parasitic of an underlying tort (the parasitic theory). Under the parasitic theory, waiver of tort may only be invoked where all of the elements of the underlying tort have been proven, including damage to the plaintiff if that is an element of the tort. If, however, waiver of tort exists as an independent cause of action, by invoking the doctrine, a plaintiff can claim the benefits that accrued to the defendant as a result of the defendant's wrongful conduct, even if the plaintiff suffered no harm. It is also noteworthy that the independence theory of waiver of tort is not the same as an action for unjust enrichment, as the plaintiff does not have to demonstrate a deprivation that corresponds to the defendant's enrichment.

As a result, it may not be necessary for a plaintiff to establish every element of the underlying tort, including proof of loss.

[159] Given this controversy, courts have generally refused to strike the claim at the pleadings stage; usually in favor of deferring the decision to a trial judge with the benefit of a full factual record (*Koubi* at paras. 15-40; *St. Jude* at paras. 578-582). However, it is doubtful that a full factual record is necessary, or even helpful, when considering the debate (*St. Jude* at paras. 584-587). The Court in *Koubi* did impose a minimal constraint on the doctrine at the certification stage (at paras. 79-80). Nevertheless, the Court in *Microsoft*, despite being presented with an opportunity, held that the appeal was not the proper place to resolve the debate and instead merely found that it was not plain and obvious that the claim would fail (at paras. 93-97).

[160] I echo the comments in *Koubi* and *St. Jude* that the debate needs to be resolved, but if *Microsoft* was not a proper venue for resolution then neither is this certification motion where the debate has received little attention from the parties. The plaintiff has pled and argued for a very standard waiver of tort claim based on the alleged overcharges; the kind that has been certified in many other class actions. In response, the only significant objection of the defendants is tied to their argument that the plaintiff is an indirect purchaser. For the reasons in *Microsoft* discussed above, and to be discussed below when considering unjust enrichment, this objection cannot stand, at least at this stage of the proceedings.

[161] Accordingly, the plaintiff has properly pled a claim in waiver of tort.

[162] The three elements required to establish an unjust enrichment are (*Microsoft* at para. 85):

(1) an enrichment of the defendant;
(2) a corresponding deprivation of the plaintiff; and
(3) an absence of juristic reason (such as a contract) for the enrichment.

[163] The plaintiff pleads that the alleged Overcharges are enrichments that caused corresponding deprivations and that there is no juristic reason for them because they resulted from the defendants' unlawful acts. The plaintiff also submits that the contracts giving rise to the enrichment violate the *Competition Act* and are therefore void and thus cannot provide a juristic reason for the enrichment.

[164] The defendants rely on *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 and similar cases and submit that the enrichment must be conferred on the defendant *directly* by the plaintiff. Given the indirect relationship here, the defendants argue that the claim is doomed to fail. This is the exact argument that the defendants in *Microsoft* relied on (at paras. 85-89). In that case, the Court concluded (at para. 87):

> [87] …The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent that the benefit to Microsoft is an "incidental blow-by" or "collateral benefit". Second, Pro-Sys relies on *Alberta Elders*, [2011 SCC 24] which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.

[165] I must reach the same conclusion as the Court in *Microsoft*; it is not plain and obvious that the unjust enrichment claim will fail for the reasons put forth by the defendants.

[166] Accordingly, the plaintiff has properly pled a claim in unjust enrichment.

[167] The plaintiff submits that an amount equal to the alleged Overcharges should be held on a constructive trust for the proposed class. The plaintiff argues this remedy flows from the defendants' alleged wrongful conduct and unjust enrichment. The Amended Claim alleges that justice, equity, and good conscience require the imposition of a constructive trust.

[168] In order to be entitled to a constructive trust, a plaintiff must demonstrate a link or causal connection between his or her contributions and the acquisition of specific property. Further, the plaintiff must establish the insufficiency of a monetary award (*Microsoft* at paras. 91-92, citing *Kerr v. Baranow*, 2011 SCC 10 at para. 50).

[169] Neither of these requirements was met in *Microsoft* (at para. 92) and neither has been met in this case. There is no referential property in the Amended Claim; the plaintiff makes a purely monetary claim. The plaintiff does not even attempt to explain why a monetary award would be insufficient. As the defendants point out, the plaintiff has sued the largest financial institutions in the country. There is no need for a proprietary remedy.

[170] As a result, it is plain and obvious that the claim for a constructive trust will fail. I would strike it from the Amended Claim. As the defendants submit, this will have implications for the limitation period and the Class Period.

[171] In conclusion, the plaintiff has properly pled claims in waiver of tort and unjust enrichment and those claims may proceed. However, the plaintiff's claim of a constructive trust is bound to fail and should be struck.

5. The Effect of *Wakelam*

[172] In *Wakelam*, the Court concluded that the *Competition Act* is a well-integrated scheme of economic regulation and that s. 36 limits recovery to the loss or damage actually suffered by the plaintiff, together with possible investigatory costs (at paras. 78-90). The Court's conclusion relied heavily on *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 where the Supreme Court of Canada also found the *Competition Act* to be a "well-orchestrated" and "complex

scheme of economic regulation" (at 674-676). As a result, the Court concluded that Parliament did not intend to allow plaintiffs to augment the statutory cause of action in s. 36 of the *Act* with claims in tort or restitution in an attempt to remedy breaches of the *Act* (*Wakelam* at para. 90). Restated, the Court in *Wakelam* found the *Competition Act* to be a complete code with exhaustive remedies.

[173] This conclusion appears to contradict the decision in *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 581, where the Court held that that the *Competition Act* was "not, on its face, a code purporting to comprehensively regulate an area of commerce" (at para. 43). However, the issue in *TELUS* involved an interim injunction, whereas the facts and pleadings in *Wakelam* are apposite to this case.

[174] Before *Wakelam*, there was a line of authority from other Canadian jurisdictions, which supports the view that a breach of the *Competition Act* may found civil causes of action.

[175] Those authorities begin with *Westfair Foods Ltd. v. Lippens Inc.*, 64 D.L.R. (4th) 335, [1989] M.J. No. 572 (C.A.), leave to appeal ref'd [1990] S.C.C.A. No. 17. The issues before that Court included whether there was an independent cause of action for unlawful interference with economic interests and for conspiracy in a case alleging a breach of ss. 45 and 61 of the *Competition Act*.

[176] Justice Helper (for the Court) noted that both the tort of unlawful interference with economic interests and the tort of civil conspiracy exist at common law. He referred to the defendant's reliance on *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. But the learned judge distinguished that case as presented "exclusively on the basis of the statutory duty under the *Canada Grain Act*" (at 338).

[177] Justice Helper continued (at 338):

> By analogy, in the present case, the use of the breach of the Competition Act as proof of the "unlawful means" of a conspiracy or an unlawful interference with economic interests is "intellectually acceptable." The statute in question here did not create the cause of action. Although English jurisprudence shows authority for allowing the pleading of a breach of a statute to

> substantiate a claim for damages [London Passenger Transport Board v. Upson, [1949] A.C. 155], the same is not true in Canada. The plaintiff is not pleading breach of a statutory duty giving rise to a cause of action. The plaintiff is pleading conspiracy and, in the alternative, unlawful interference with economic interests. The plaintiff will be obliged to prove the breach of the specific provisions of the Act as one of the elements of the torts pleaded.

[178] Justice Helper also relied on the Supreme Court of Canada's decision in *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265, which was followed by this Court in *Valley Salvage Ltd. v. Molson Brewery B.C. Ltd.*, [1976] 1 W.W.R. 597 (B.C.S.C.). There, Justice Andrews held that an unlawful means conspiracy may be based upon conduct in breach of a statute.

[179] The *Westfair Foods* case dealt with the submission that s. 36 of the *Competition Act* provides an exclusive remedy (an argument given effect to in *Wakelam*). The Court disagreed. Justice Helper referred to *General Motors of Canada Ltd.* (relied on by the Court in *Wakelam*) and the conclusion that s. 36 (then s. 31.1) does not create a general action for damages.

[180] Justice Helper then stated (at 340):

> The above comments of the Chief Justice in the *General Motors* case must be read in the context of his determination of the validity of s. 31(1) of the *Combines Investigation Act*, the forerunner of s. 36 of the *Competition Act*. There is no question that if the plaintiff had sued for damages for a breach of ss. 45 and 61, the defendant's argument would be compelling. However, such is not the case. The question to be answered here is whether that same prohibited conduct, if proved, can constitute an element in an independent cause of action, i.e., damages for an unlawful interference with economic interest or conspiracy.

[181] He referred to the *prima facie* presumption that where a statute itself provides a remedy, that remedy is intended to be the only one. But that presumption is subject to the true construction of the particular statute concerned (at 341):

> The General Motors case determined that the challenged provisions of the now *Competition Act* were functionally related to the *Act*. There was no infringement on provincial jurisdiction dealing with civil rights and liberties. I would amplify that reasoning to conclude that there is presently no inconsistency with recognized remedies available at common law. By relying upon breach of a federal statute to prove one of the elements of an existing common law remedy, there is no infringement on provincial jurisdiction. By

> allowing the plaintiff to rely upon a breach of a federal statute to prove the unlawful element of the common law right of action, the court is not endorsing the encroachment by Parliament upon provincial jurisdiction. By recognizing potential alternative causes of action to those set out in the *Competition Act*, Parliament is not using its power *ipso facto* to expand those existing causes of action. Each statutory prohibition or restriction is subject to the scrutiny of the courts in recognition of the division of power between the federal and provincial governments.
>
> Section 62 [of the *Competition* Act] which reads:
>
> > Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of any civil right of action.
>
> leads me to conclude that Parliament recognized provincial jurisdiction in the area of civil rights and liberties and rebuts the presumption…

[182] Since *Westfair Foods Ltd.*, and prior to *Wakelam*, many provincial appellate courts have either approved *Westfair Foods Ltd.* or allowed a breach of the *Competition Act* to ground other causes of action. Examples include: *Polar Ice Express Ltd. v. Arctic Glacier Inc.*, 2007 ABCA 20; *Acier Leroux Inc. v. Tremblay*, [2004] R.J.Q. 834 (C.A.); *Industrial Union of Marine and Shipbuilding Workers of Canada, Local 1 v. International Brotherhood of Electrical Workers, Local 625*, 2002 NSCA 56. The Supreme Court of Canada has, of course, allowed a breach of the *Competition Act* to ground other civil claims as recently as *Microsoft.*

[183] In particular, *Westfair Foods Ltd.* was followed by the Ontario Court of Appeal in 2000 in *Apotex Inc. v. Hoffmann LaRoche Ltd.*, [2000] O.J. No. 4732, 195 D.L.R. (4th) 244.

[184] In *Apotex*, the Court held (at para. 21), applying *Westfair Foods Ltd.*, that it was open to the appellant to rely upon a breach of s. 52 of the *Competition Act* to supply the element of unlawful means for both unlawful interference with economic interests and civil conspiracy.

[185] It is notable that an alleged breach of s. 52 was also before the Court in *Wakelam*, but as noted by the plaintiff before me, *Wakelam*, unlike *Apotex*, did not include claims in civil conspiracy.

[186] Apart from a claim for unlawful interference with economic relations which was struck by the chambers judge (for want of a third party, as here), only remedies in restitution were based on the alleged breach of the *Competition Act*.

[187] *Wakelam* also appears to contradict the result in *Microsoft*, where the Court ultimately certified tortious and restitutionary claims predicated on a breach of the *Competition Act*. However, the issue was not considered by the Court in *Microsoft* and does not appear to have been raised by the parties to that case. Further, the judgment in *Microsoft* was considered by the Court in *Wakelam*, and it was found supportive (*Wakelam* at paras. 79-80 and 91).

[188] Pleadings alleging breaches of the *Competition Act* as the basis for tort and restitutionary claims were also not struck and were permitted to proceed to trial by the Court of Appeal in both *Infineon* and *Steele v. Toyota Canada Inc.*, 2011 BCCA 98. While these cases were cited by the Court in *Wakelam*, this nuance was not expressly noted.

[189] In the end, however, I am left with the Court's clear conclusion in *Wakelam*. Referring to s. 36 of the *Competition Act*, the Court held:

> [90] …I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI. It follows in my view that the certification judge did err in finding that the pleading disclosed a cause of action under the *Competition Act* for which a court might grant restitutionary relief; …

Accordingly, the plaintiff's claims under the *Competition Act* cannot constitute the foundation for other causes of action. It is not open to the plaintiff to plead unjust enrichment or waiver of tort to the extent that those pleadings rely on acts that are only unlawful as a result of the *Competition Act*. As previously discussed, this effect of *Wakelam*, combined with a relevant limitation period and repeal of s. 61 of the *Competition Act*, is fatal to the plaintiff's claim under that section. Similarly, even if the plaintiff's claim in unlawful interference with economic relations was otherwise certifiable, the decision in *Wakelam* would be fatal to it.

[190] Moreover, the plaintiff's unlawful means conspiracy claim must fail, as it is based exclusively on a breach of the *Competition Act*; the issue of merger and the principles in *Tortora* and *Waters* do not need to be considered in light of *Wakelam*. I would accordingly strike the unlawful means conspiracy claim.

[191] However, the decision in *Wakelam* does not affect the plaintiff's conspiracy to injure claim as it is independent of the *Competition Act* and can survive even if the conduct of the defendants has been entirely lawful. As a result, the plaintiff's restitutionary claims should not be struck; they can attach to the surviving conspiracy to injure claim. As the plaintiff must now prove that the defendants acted predominately with a view to harming merchants, as opposed to in their own economic self-interest, these claims are now tenuous. However, the plaintiff must still be afforded the opportunity to prove the actual predominant purpose at trial (*Microsoft* at paras. 77-78).

[192] That said, I wish to point out exactly how tenuous the plaintiff's conspiracy to injure claim appears to be. As the plaintiff states in her Reply Submissions for Certification (at para. 15):

> Let us not be naïve. These corporations have a single objective - to maximize their own profits. It is not simply a question of their wanting to maximize the collective benefits of their merchant and consumer customers. These companies are under an obligation to their shareholders to maximize their own share from their unique position in the middle of the transaction.
>
> [Emphasis in original.]

[193] Accordingly, and since the conspiracy to injure claim is now the lynchpin of some of the plaintiff's claims, the utility of proceeding to trial on it must be questioned. Nevertheless, the plaintiff has met the requirements of s. 4(1)(a) and *Microsoft* in this regard, so the claim cannot be struck.

[194] In conclusion, as a result of *Wakelam*, the plaintiff now has two completely distinct categories of claims. The first category is her claim under s. 45 of the *Competition Act*. The second category is comprised of her claims in conspiracy to injure, unjust enrichment and waiver of tort. The plaintiff's desired terms of relief

beyond tort or restitutionary damages, including punitive damages, declaratory relief, and injunctive relief can similarly attach to the conspiracy to injure claim, even if such remedies are not found in the *Competition Act*.

[195] As discussed above, it is plain and obvious that her claims under s. 61 of the *Competition* Act, and in unlawful means conspiracy, unlawful interference with economic interests, and constructive trust will fail and they must be struck.

[196] As these matters are usually litigated to higher Courts, I should also deal with the merger argument by way of *obiter dicta*, at least as it relates to the claim in unlawful means conspiracy.

[197] The defendants argue that the conspiracy claims should merge with the other claims, specifically the alleged breach of the *Competition Act*. In *Hunt* the Court stated (at 991-992):

> Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.
>
> In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.
>
> This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This [is] a matter that

> should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.
>
> [Emphasis in original.]

[198] However, in *Tortora*, the Court, referencing *Hunt,* found that (at paras. 52-53):

> [52] In *Hunt*, the defendants submitted that "a cause of action in conspiracy is not available when a plaintiff has available another cause of action". The Court rejected this on the basis it was premature to bar conspiracy until it was known whether the other causes of action would succeed. The Court also concluded a trial judge should determine whether to allow the conspiracy claim: in light of the evidence, if the other nominate torts succeeded, the trial judge could consider submissions concerning the unavailability of conspiracy and if the nominate tort claims failed, the judge could consider whether the plaintiff could succeed in conspiracy. In my view, the situation in the case at bar is markedly different.
>
> [53] The conspiracy claim in this case relates to the alleged commission splitting. The unlawful acts alleged to support the conspiracy claim are breach of contract and breach of fiduciary duty. If there were no breach of contract or breach of fiduciary duty there would be no unlawful act. If there were a breach of contract or breach of fiduciary duty, the conspiracy allegation against Ms. Tortora and Ms. Poonja adds nothing. In my view, the judge correctly held the conspiracy claim is merged with the other claims and properly struck it.

And further (at para. 61):

> [61] We have been provided with no authority for the proposition a conspiracy pleading can never be struck based on merger. In a case like this, where the unlawful acts alleged to constitute the conspiracy are breach of contract and breach of fiduciary duty which are advanced as claims in the proceeding, in my view, a claim for unlawful act conspiracy is merged with those causes of action.

[199] The reasoning in *Tortora* was expanded in *Waters v. Michie*, 2011 BCCA 364, where the Court held (at paras. 60-63):

> [60] Despite these comments in *Hunt*, many Canadian courts have applied the doctrine of merger to strike conspiracy claims at the pleading stage,

> including this Court in the recent case of *Bank of Montreal v. Tortora*, 2010 BCCA 139.
>
> [61] In *Tortora*, the Court struck conspiracy claims against two former employees of the plaintiff bank on the basis of merger. The Bank alleged that the defendants split commissions on mortgages, which conduct amounted to breaches of their employment contracts, breaches of their fiduciary duties, and conspiracy by unlawful conduct. Mr. Justice Chiasson, writing for the Court, rejected the view that *Hunt* stood for the proposition that a conspiracy claim could never be struck at the pleadings stage on the basis of merger. He distinguished *Hunt* on the basis that in that case the plaintiff had pleaded no claim against Carey other than the conspiracy claim, which had been pleaded on the basis of both lawful and unlawful acts. As a result, the plaintiff might have succeeded in its conspiracy claim even if he failed to establish any tortious conduct on the part of any of the defendants. He concluded (at para. 53):
>
> > In a case like this, where the unlawful acts alleged to constitute the conspiracy are breach of contract and breach of fiduciary duty which are advanced as claims in the proceeding, in my view, a claim for unlawful act conspiracy is merged with those causes of action.
>
> [62] Framed in more general terms, the Court held that merger precludes a claim of unlawful act conspiracy where the alleged unlawful acts are torts or other independently actionable claims that have also been pleaded, such that the conspiracy claim adds nothing.
>
> [63] For the same reasons set out above with respect to the effect of the applicable family law and creditor protection legislative schemes, the application of the concept of merger to these facts leads to the same result: the conspiracy claim adds nothing to the statutory claims, and thus raises no reasonable claim.

[200] My understanding of the effect of these decisions is that it is appropriate to consider whether the claim of unlawful means conspiracy is redundant *regardless of whether* a distinct claim succeeds. This appears consistent with s. 4(1)(a) of the *CPA*.

[201] In Ontario the test was recently succinctly stated as (*Cannon v. Funds For Canada Foundation*, 2012 ONSC 399 at para. 214):

> [214] …whether it is plain and obvious that if the other causes of action do not succeed, the conspiracy claim could also not succeed, or that if the other cause of action does succeed, the conspiracy claim could add nothing.

I consider this an accurate statement of the law in British Columbia following the decisions in *Tortora* and *Waters*.

[202] The only unlawful act pled for the purpose of unlawful means conspiracy is a breach of the *Competition Act* (Amended Claim at para. 55). The plaintiff relies on a line of cases from Ontario, of which the decision in *Cannon* is largely representative (at paras. 216-218):

> [216] This is a case in which several causes of action are asserted against five sets of defendants. The allegations of conspiracy in the pleading are general and it is impossible to speculate what constellation of facts or combination of facts may ultimately be proven at trial and what underlying causes of action may ultimately be established against which defendants. It is possible, for example, that the unlawful conduct of the defendants might be sufficient to support the underlying cause of action, such as misrepresentation, fraud, or breach of the *Consumer Protection Act*, *2002*, but that the cause of action itself might fail for any number of reasons, leaving the cause of action for conspiracy still standing.
>
> [217] I am unable to say that it is plain and obvious that if none of the several causes of action succeeds, the conspiracy claim could not succeed, or, that if one of those claims does succeed, the conspiracy claim would add nothing.
>
> [218] I prefer, therefore, in this complex and multi-party action, to adopt the course suggested by Wilson J. in *Hunt v. Carey* and to leave it to the trial judge to determine, after all the evidence is in, whether conspiracy and any of the other causes of action have been made out and, if so, whether the conspiracy claim adds anything.

[203] The plaintiff also relies on *Fournier v. Mercedes-Benz Canada*, 2012 ONSC 2752 where the Court followed *Cannon* while apparently dismissing *Tortora* (at paras. 86-92).

[204] With respect to these cases, it may be difficult to envision a scenario where the plaintiff's claim under the *Competition Act* fails but the unlawful means conspiracy succeeds. As the defendants submit, if there is no breach of the *Competition Act* there is no unlawful act and hence no unlawful means conspiracy.

[205] The Court in *Cannon*, a case with a wider variety of defendants and causes of action, found that such a scenario was possible, but did not provide a single example (at para. 216). The plaintiff has also failed to provide an example of such a

scenario and instead merely relies on *Cannon* and similar cases with similarly general language. However, those cases are from Ontario and while informative, this Court is obviously bound to follow *Tortora* and *Waters* before *Cannon* and *Fournier*.

[206] Merging the claims in this case would, however, appear to contradict the result in *Microsoft*, where the two aspects of civil conspiracy were successfully pled together despite the submission that the alleged unlawful means (a breach of s. 36 of the *Competition Act*) was clearly and obviously deficient. It is not clear that merger was argued in *Microsoft*; it was not addressed in the judgment. The Court simply concluded (at para. 83):

> 83 [The causes of action in unlawful means conspiracy and unlawful interference with economic interests] must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v. Suffice it to say that at this point it is not plain and obvious that there is no cause of action in unlawful means conspiracy or in intentional interference with economic interests. I would therefore not strike these claims. Depending on the decision of this Court in *Bram*, it will be open to Microsoft to raise the matter in the BCSC should it consider it advisable to do so.

[207] I do not read the Court's decision in *Bram Enterprises Ltd.* as resolving the merger argument in the cause of action in unlawful means conspiracy. As a result, I prefer to follow the approach of the Court in *Microsoft* and not merge the unlawful means conspiracy claim at this stage of the proceedings. While *Tortora* and *Waters* are binding on this Court, unlike *Wakelam*, they do not deal with the *Competition Act*, as *Microsoft* does. As a result, it is not now plain and obvious that the plaintiff's claim in unlawful means conspiracy will merge.

6. The Defendants' Genuine Controversy Arguments

[208] Before I leave the s. 4(1)(a) requirement, I must comment on the defendants' suggestion that some "genuine controversy" must be demonstrated by the plaintiff, even in meeting the cause of action requirement.

[209] I agree with the plaintiff that this is the effect of the defendants' submissions. This is demonstrated in a number of areas of the defendants' written submissions but I note in particular, and by way of example, para. 170 of the Defendants' Joint Submissions where the defendants complain of the plaintiff's *Competition Act* claims:

> 170. Moreover, no basis in fact is provided by the evidence to show this to be more than a bald and speculative assertion. Indeed, the reason it can only be formulaically recited is that it is without substance. The uncontroverted evidence concerning the operation of the networks throughout the period that the new section 45 has been in force is that there are no relevant agreements between competitors at all. There is simply no basis in fact for the plaintiff's allegations.

[210] The "some basis in fact" threshold is one that is relevant in the consideration of the remaining requirements set out in s. 4(1) of the *CPA*. I agree with the plaintiff that the defendants are effectively importing it into the cause of action requirement where it is well established I am to take the pleadings as written.

[211] To the extent that the defendants say that the plaintiff must show, in their phrase, some "genuine controversy", in respect of the other s. 4(1) requirements, I say first, that I do not adopt that phrase or notion as a proper characterization of the threshold plaintiffs must meet under the *CPA*. I prefer the established language in *Hollick* of "some basis in fact" and the description of the plaintiff's burden reiterated in *Microsoft* (at paras. 102-105):

> 102 I cannot agree with Microsoft's submissions on this issue. Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to

> determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).
>
> 103 Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> 104 In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.
>
> 105 Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[212] Second, even if the threshold could be characterized as requiring a plaintiff to demonstrate a “genuine controversy” I say, respectfully, that for all of the defendants high dudgeon at the plaintiff’s allegations, in light of the Competition Tribunal proceedings and subsequent federal government interest, the U.S. class action litigation, the Australian experience and the European Union proceedings, there certainly can be said to be a genuine controversy engaging the alleged anti-competitiveness of the Network Rules and the setting and collection of Default Interchange Fees in the international credit card industry.

[213] The controversy is not simply an international one involving other Visa and MasterCard networks, it very much extends to Canada, as the Competition Tribunal proceedings indicate, and it includes the Retail Council of Canada (“RCC”) which advances the interests of retailers in Canada. Diane J. Brisbois, the Chief Executive

Officer of the RCC, has filed an affidavit on this application. The RCC represents approximately 45,000 retail establishments across Canada from big box stores to independent retailers. The RCC has a history of representing merchants concerned with increasing credit card fees and in that role appeared before the Senate Banking Committee in 2009. The Senate's study of the credit card industry in Canada led to its report "Transparency, Balance and Choice: Canada's Credit Card and Debit Card Systems". That report recommended that the federal government take action to permit surcharging by merchants and prohibit the enforcement of the Honour All Cards Rule.

[214] The RCC was also involved in making submissions which led to the Department of Finance's voluntary "Code of Conduct for the Credit and Debit Card Industry in Canada", which came into effect in August 2010. Ms. Brisbois has reviewed the pleadings in this matter, including the Amended Claim, and she has deposed (at para. 17):

> 17. The RCC supports the certification of this action as a class proceeding for the benefit of all retailers as the most effective, if not only, means to resolve the financial claims of the retailers who are members of the Class. The injunctive relief sought with respect to the Merchant Restraints would also be of value to the merchants represented by the RCC.

[215] Finally, surely the length and complexity of these certification proceedings is suggestive of a "genuine controversy" between the parties. Indeed, one might suggest, not cynically, that the strength of the genuiness of the controversy joined by a plaintiff rises in direct proportion to the length of the defendants' submissions in these matters.

B. Section 4(1)(b)

[216] The Certification Application defines the "Visa Class" as:

> All British Columbia resident persons who, during some or all of the period commencing March 28, 2001 and continuing through to the present (the "Class Period"), accepted payments for the supply of goods or services by way of Visa credit cards pursuant to the terms of merchant agreements, ...

[217] There is an identical definition of the "MasterCard Class" with the exception that they accepted payment by way of MasterCard credit cards instead of Visa credit cards.

[218] This definition identifies two or more persons. The definition references objective criteria and does not rely on the merits of the action. Every member of the class is not named but whether any given person is a member of the class can be readily ascertained.

[219] Notably, in their lengthy submissions opposing certification, this is the only requirement that the defendants do not challenge.

[220] The plaintiff has met the requirements of s. 4(1)(b).

C. Section 4(1)(c)

[221] The plaintiff proposes 22 common issues which I have attached to these reasons as Appendix A (Notice of Application for Certification, Schedule A). At the outset, issue 6 is not certifiable as it relates solely to the unlawful means conspiracy claim. Similarly, issue 9 is not certifiable as it relates exclusively to the unlawful interference with economic interests claim and issues 13 and 14 are not certifiable as they relate solely to the constructive trust issue. Also, I will not consider issue 16 as it is subsumed within issue 19 and is accordingly redundant.

[222] In *Microsoft*, the Supreme Court of Canada distinguished between issues relating to the scope and existence of the causes of action and issues relating to loss. As the Court noted, issues of the latter variety are inevitably tied to expert evidence in indirect purchaser class actions (at paras. 114-126). Indeed, the defendants here base most of their objections to commonality on criticisms of Dr. Brander's evidence. That evidence is largely confined to loss-related issues. Accordingly, I will deal with the cause of action issues first. I will then turn to the loss-related issues and the issues relating to remedies for any loss.

1. Cause of Action Issues

[223] These appear to include issues 1, 3, 4, 5, and 7. Issues 10, 11 and 12 have cause of action elements but also involve a finding of liability based on restitutionary principles and will be discussed below.

[224] The thrust of the defendants' objections to the certification of these issues is that there is no price, product or agreement that is common to the proposed classes. The defendants point out that merchants interact with the alleged conspiracy by dealing with Acquirers and that merchants only pay Merchant Discount Fees, regardless of how such fees are calculated. The defendants reference substantial affidavit evidence throughout their submissions, and specifically in Appendix D, that demonstrates the market between merchants and Acquirers is diverse and competitive. Acquirers do not provide uniform products and services to merchants, and merchants receiving similar services are not necessarily charged similar Merchant Discount Fees.

[225] The plaintiff's reply is simple. Essentially, she says that the only certainties in a merchant's life, in addition to death and taxes, are Default Interchange Fees and the Network Rules. Whatever variability might exist in the many other aspects of their relationships with Acquirers, there is commonality in respect of these issues. In response to the submission that merchants do not pay Default Interchange Fees, the plaintiff says that that overlooks the stark reality that Acquirers recover their costs and interchange is a consuming one which, in turn, makes up the bulk of Merchant Discount Fees.

[226] The *Tribunal Decision* effectively confirmed the defendants' submissions concerning the variability in relationships between merchants and Acquirers (at paras. 20 and 31). The *Tribunal Decision* also recognized that Default Interchange Fees are "rarely, if ever, departed from" and that Interchange Fees are generally passed on from Acquirers to merchants (at paras. 27, 29). I again recognize that these findings are not binding.

[227] However, the record before this Court includes evidence from the defendants themselves which supports the view that Default Interchange Fees are effectively paid by merchants to Acquirers. In his first affidavit, Mr. Weiner deposes at paragraph 76:

> 76. As already described, interchange represents revenue to Issuers and a cost to Acquirers on a typical purchase transaction. As such, to the extent that any merchant in Canada "pays" interchange, it does so indirectly, insofar as Acquirers include such costs in the Merchant Discount Fees they charge their merchant customers.

[228] Acquirers recovering their costs from merchants appears to be a constant fact even in a world of diverse arrangements between Acquirers and merchants. At paragraph 20, Mr. Weiner deposes:

> 20. Although Visa is not privy to the specific fee arrangements between particular Acquirers and particular merchants, based on my knowledge of the payment card industry, I understand that the acquiring business in Canada is highly competitive and that the charges levied by Acquirers to merchants are highly variable. For example, I understand that certain large Canadian merchants, because of their purchasing power, are able to negotiate various charges (generally referred to as Merchant Discount Fees) which are only marginally above their Acquirers' costs. Merchant Discount Fees are discussed below.
>
> [Emphasis added.]

[229] It will be seen that while charges to merchants appear to be "highly variable" the base appears to be "Acquirers' costs", which include Default Interchange Fees. This appears to be so even in the case of Desjardins, which, as I noted, mounted a very thorough response to the certification application on the premise that Desjardins' business practices are very different from those of other Issuers and Acquirers, especially in the setting of Merchant Discount Fees. **[CONFIDENTIAL]**.

[230] In this regard, this case is comparable to *Mackinnon v. National Money Mart Company*, 2005 BCSC 271. The plaintiff in that case sought certification against effectively the entire pay-day loan industry in a criminal rate of interest case. Notably, certification was eventually granted against a single defendant (2007 BCSC 348). However, on the first application, the plaintiff failed to meet the commonality

requirement due to the variety in the defendants' business practices, with the Court finding (at para. 16):

> [16] The uninitiated may think that payday loan companies operate in a similar fashion and have similar loan agreements. In fact, the ways in which the various defendants conduct their businesses and the documents they use differ widely. Some of the defendants charge for credit searches. Some deliver a cheque and charge a delivery fee. In some cases, a loan is brokered by one company, and a fee charged for brokerage, but a related company makes the loan and charges interest on the loan. Many of the defendants have changed their manner of conducting business and their loan agreements in the time frame contemplated by this action.

And further (at para 22):

> [22] Money Mart submits that, from its review of the materials filed on this application, over 20 different business models existed, more than 60 different forms were regularly used and over 50 different fees were charged, some payable to third parties. It was not unusual to negotiate individual arrangements with a borrower…

And concluding, in part (at para. 28):

> [28] While each claimant will require that each of the questions is answered, the answer to each for one claimant will not answer the questions for the next claimant, or for the same claimant against a different defendant.

[231] Ultimately, any inquiry into Merchant Discount Fees in the aggregate would likely run into similar problems. If the plaintiff had merely alleged that Merchant Discount Fees were fixed, I might well conclude that the proposed issues were not common and refuse certification.

[232] However, the plaintiff's real case is not about Merchant Discount Fees in the aggregate, but about Interchange Fees, the largest component of Merchant Discount Fees, and the Network Rules. In contrast to Merchant Discount Fees in the aggregate, there is some basis in fact underlying the claim that the alleged conspiracy regarding Interchange Fees, and the Network Rules, is a common one.

[233] Although not determinative of the commonality issue, in my view it is telling that for all of the defendants' complaints that the issues joined by the plaintiff are hopelessly bound up in the need for individual inquiries, the Competition Tribunal in

the proceedings leading to the *Tribunal Decision* apparently had no trouble considering the *Competition Act* issues engaged by the No Surcharge Rule and the Honour All Cards Rule and the No Discrimination Rule in a generic hearing. And the European Commission, in various proceedings, has considered the issue of Interchange Fees, or at least their ilk generally, on an industry-wide basis.

[234] The affidavit evidence tendered by the plaintiff supports the contention that virtually all transactions attract the payment of Default Interchange Fees and that all merchants are affected by the Network Rules as a condition of participation. Proposed Issues 1, 3, 4, 5, and 7 (and to some extent Issues 10, 11, and 12) ask the Court to determine whether Interchange Fees are fixed and whether the Network Rules are illegal. Every class member faces these issues and resolving them advances the potential claim of every class member. Unlike their submissions on the loss-related issues, the defendants do not credibly suggest that the answers to these common questions will differ from class member to class member. I conclude that these issues are common issues.

[235] As a result, Issues 1, 3, 4, 5, and 7 are acceptable for the purposes of certification. However, I would strike any reference to a conspiracy to increase Merchant Discount Fees *per se* from them, and substitute the alleged conspiracy to increase Merchant Discount Fees by increasing Interchange Fees to the extent that it is necessary, for the reasons discussed above. This is not fatal to the plaintiff's certification application. As I concluded at the outset, the plaintiff's claim is not bound to fail because there might not be a true resale in this case.

2. Loss-Related Issues

[236] These are Issues 2, 8, 15, 17, 19, and 20. The commonality of these issues hinges on the evidence of the plaintiff's expert Dr. Brander, and defendants' experts, Dr. Ware and Dr. LaCasse.

[237] The Court in *Microsoft* discussed the requirements for expert economic evidence in indirect purchaser cases (at paras 114-115):

> [114] One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.
>
> [115] The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.

And further (at paras. 118-119):

> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.
>
> [119] To hold the methodology to the robust or rigorous standard suggested by Microsoft, for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage…
>
> [Emphasis added.]

[238] However, *Microsoft* did not involve a two-sided market. Indeed, so far as I and the parties are aware, there is no Canadian jurisprudence dealing with two-sided markets. As I will discuss below, such markets are characterized in part by so-called network effects, also known as feedback effects, which significantly complicates the measurement of any net harm to the merchants by collusion in the setting of Default Interchange Fees; which, in turn, complicates the calculation of what the plaintiff

characterizes as the "Visa Overcharge and MasterCard Overcharge", the excess between what merchants pay for credit card network services and what they would pay in the absence of the alleged illegal collusive conduct - the so-called "But For" world. As a result of this complication, it is necessary to provide some background on two-sided markets and network effects.

[239] Though the market for credit cards is quite complex, two-sided markets, also known as two-sided networks, are relatively common. As Dr. Ware describes in paragraph 14 of his first affidavit:

> 14. …A simpler example of a two-sided market is an advertising print publication, such as *AutoTrader* (or any magazine that is predominantly populated by attractive advertisements). The magazine is sold to consumers at newsstands and stores at a certain purchase price. In addition, advertisers pay the publisher according to the size and prominence of the space used for their advertisement. The value of the publication to the customer increases, in part, with the number and quality of advertisements that are published, and the value to each advertiser increases with the number of customers who purchase the magazine. The publisher sets the newsstand price and the advertising rates so as to balance the net benefits received by the two sides (*i.e.*, advertisers and magazine purchasers) and to ensure that both the number of magazines sold and the number of advertisements placed in each magazine are maximized. To achieve this goal, the two sides of the market must be carefully balanced.

Newspapers are another example commonly used to explain two-sided markets, even though the consumer's focus is usually the articles, not the advertisements.

[240] As Dr. Ware describes, the supplier of a product to a two-sided market generally works to maximize the total profits received from both sides of the market. This can lead to drastically different prices charged to parties on different sides of the market. For example, some newspapers are given away for free to consumers, presumably because it is economically optimal for the publisher to distribute the newspaper to as many people as possible and thereby maximize advertising revenue while foregoing revenue from consumers. In some cases, one side of the market may even subsidize the participation of the other side of the market.

[241] Network effects are a defining feature of two-sided markets. Typically, those on at least one side of the market benefit from the participation of those on the other

side of the market. For example, newspaper advertisers benefit when more consumers read the newspaper; each additional consumer makes each advertisement more valuable. As a result of these network effects any change to one side of a two-sided market can have a significant impact on what happens to the other side of the market, and that impact can in turn have consequences for the side of the market that originally experienced the change.

[242] Visa and MasterCard operate in complex two-sided markets. As Dr. Brander describes, Visa and MasterCard are essentially selling a platform that brings together a network of merchants and Acquirers (one side of the market) and a network of cardholders and Issuers (the other side of the market) thereby making it possible for them to interact more easily. As Dr. Ware describes (first affidavit at para. 18):

> 18. …The merchant's store becomes more attractive to a customer the more likely it is to accept a card that the customer possesses, and thus the customer is more likely to enter the store and potentially make a purchase. For a given merchant, the more customers that carry cards accepted at the merchant's store, the more likely the merchant is to make any particular sale, and the greater is the volume of sales that the merchant can expect in general. For a particular customer holding a credit card, the more merchants that accept the customer's card, the more attractive that card is to the customer. Any given card is more valuable to a cardholder the more merchants that accept it, and, similarly, the card is more valuable to a merchant the more customers that carry it.

Ultimately, a credit card network needs a critical mass of both merchants and cardholders in order to function.

[243] The Visa and MasterCard networks use Interchange Fees to promote network effects. Interchange transfers funds from one side of the market to the other. Interchange Fees flow from merchants to Acquirers to Issuers. Issuers then use Interchange Fees to cover the cost of providing credit cards, including the collection costs and the costs of covering losses associated with fraud. Issuers also use Interchange Fees to subsidize cardholder rewards programs. As a result, the ultimate effect of Interchange Fees is that one side of the market (the merchants and Acquirers) subsidizes the other side of the market (the Issuers and consumers). This

occurs, according to Dr. Ware, to balance the benefits received by both sides of the market in order to maximize the total volume and value of transactions, which is in the best interests of Visa and MasterCard, if not all of the network participants.

[244] As a result, Interchange is not analogous to the price in a one-sided market for the purposes of a case alleging a price-fixing conspiracy. In a typical price-fixing case, where a one-sided market exists, a price increase is inherently harmful to consumers as the product or service they receive in return for that price remains unchanged. That rule does not apply directly to two-sided markets. It is conceivable that an increase in the rate of a two-sided market subsidy, like Interchange, could actually benefit both sides of the market through network effects. For example, it may be that an increase in cardholder rewards programs, funded by Interchange Fees, causes more consumers to acquire a credit card and thereby causes those consumers to make purchases from merchants they might not otherwise have made.

[245] While it would be wholly premature to reach a finding on the economically optimal level of interchange at this certification hearing, it is entirely plausible, if not probable, that it is greater than zero and that merchants might benefit from a certain level of interchange. Indeed, in contrast to the Network Rules, the plaintiff does not allege that Interchange Fees are anti-competitive *per se*.

[246] Further, even if a merchant would be better off by paying a lower level of Interchange in the But For world, they could very well be better off by less than the value of any overcharge as the overcharge might also have improved the market as a whole and increased their profits by some partially off-setting amount. Dr. Ware gives the example of some consumers switching from Visa and MasterCard to American Express in response to a decrease in Interchange Fees and a corresponding decrease in cardholder rewards programs offered by the defendants in this case. Dr. Ware notes that Visa and MasterCard's competitors have increased their market share by 5-6% in Australia since the 2003 regulation of Visa and MasterCard's interchange rates. Since American Express generally has higher Merchant Discount Fees than Visa and MasterCard, merchants might actually lose

revenue from those cardholders that chose to switch to American Express, even if their revenue from Visa and MasterCard cardholders, and thus their total profit, increases. Ultimately, even if merchants have suffered harm as a result of any overcharge, quantifying that harm is considerably more difficult in a two-sided market than in a traditional price-fixing case featuring a one-sided market.

[247] Thus, from an economic point of view, Dr. Ware and the defendants are correct to assert that network effects must be taken into account when analyzing the But For world. I will subsequently comment on the legal implications of this conclusion. However, I will first determine whether the plaintiff has met the standard in *Microsoft* from this purely economic perspective.

[248] So the question is this: with the presumption that such an overcharge exists in each network, do the methodologies proposed by Dr. Brander offer a realistic prospect of measuring that "overcharge" or, more importantly, any resulting "loss" or "harm" on a class-wide basis?

[249] *Microsoft* has been joined by another recent Supreme Court of Canada decision in class action jurisprudence: *AIC Limited v. Fischer*, 2013 SCC 69. Counsel put that decision before the Court without comment after the close of argument on *Microsoft.* It is highly relevant to the preferability analysis under s. 4(1)(d) and s. 4(2) of the *CPA*. But Justice Cromwell's reiteration of the principles describing the plaintiff's evidentiary burden on the certification application is helpful here. I reproduce these observations (at paras. 40, 42 and 43):

> 40 This Court recently reaffirmed these principles *in Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, in the context of the similar British Columbia class actions regime. In his discussion of the standard of proof with regard to the commonality and preferability requirements (para. 101), Rothstein J. indicated that the "'some basis in fact' standard does not require that the court resolve conflicting facts and evidence at the certification stage" (para. 102). This reflects the fact that a certification court "is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight*": Pro-Sys*, at para. 102, citing *Cloud*, at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc*. (2009), 99 O.R. (3d) 358 (S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.). Further, the "some basis in fact" standard cannot be assessed in a vacuum. As Rothstein J. puts it: "... there is

> limited utility in attempting to define 'some basis in fact' in the abstract. Each case must be decided on its own facts" (para. 104).
>
> …
>
> 42 The jurisprudence emphasizes the importance of not allowing the requirement to establish "some basis in fact" to lead to a more fulsome assessment of contested facts going to the merits of the case. For example, in *Cloud*, the Ontario Court of Appeal indicated that the some basis in fact standard "does not entail any assessment of the merits at the certification stage" (para. 50). Similarly, in *Pearson*, the Ontario Court of Appeal, having concluded that the representative plaintiff had adduced evidence to show a negative impact on property values concluded that the "some basis in fact" standard with regard to the commonality of the issues had been met. The court pointed out that while the defendant disputed the plaintiff's evidence, "the certification motion is not the place for resolving that controversy" (para. 76). These evidentiary principles equally apply to the preferability criterion: see e.g. *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), at para. 27, aff'd (2004), 70 O.R. (3d) 182 (S.C.J. (Div. Ct.)).
>
> 43 The standard of proof on a motion for certification was at the heart of the appeal in *Chadha v. Bayer Inc*. (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal refused, [2003] 2 S.C.R. vi. The decision makes clear that at the certification stage, the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements. In *Chadha*, the court denied certification on the basis that there was *no* evidence that the loss component of liability could be proved on a class-wide basis (and thus that there was no common issue). It was not necessary to establish that there was a compelling method to prove such loss, but it was necessary to provide some basis in fact to think that there was *some* method to do so. The plaintiffs had failed to provide that basis. This Court reached the opposite conclusion in *Pro-Sys* with regard to the commonality of the issues, because there was "an expert methodology that ha[d] been found to have a realistic prospect of establishing loss on a class-wide basis" (para. 140).
>
> [Emphasis in original.]

[250] The defendants have launched a broad attack on Dr. Brander's methodologies based on the evidence of Dr. Ware and Dr. LaCasse. Per *Microsoft* and *A.I.C. Limited*, among many others, resolving the conflicts between these experts is not appropriate at certification. Regardless of the decision on this certification application, it may be that the evidence of Dr. Ware is preferred to the evidence of Dr. Brander in the final analysis. My task is not to declare a definitive winner in any battle of the experts presented by the evidence on this application. The only relevant question now is whether Dr. Brander's methodologies meet the

realistic prospect standard; whether the plaintiff has provided some basis in fact to think that there is some method to measure the class members' loss on a class-wide basis.

[251] In his first affidavit, Dr. Brander deposes that economic methods can be used, on a class wide basis, to assess whether the class members paid an overcharge as a result of the alleged conduct and that such methods can quantify the overcharge. Dr. Brander suggests that the mark-up method and the benchmark method could be used to determine the price paid by merchants but-for the alleged overcharge. Dr. Brander describes the mark-up method as follows (at para. 65):

> 65. The **mark-up method** compares the mark-up of price over operating cost charged by the colluding firms with the mark-up that would be needed to allow the firms to earn a "normal" or competitive rate of return. Specifically we would obtain financial records from the defendants and determine their rate of return from credit card operations. It would then be necessary to obtain information about rates of return in undistorted parts of the financial sector to estimate an appropriate competitive rate of return - the return that should prevail in the absence of collusion. We could then determine the interchange fee and network fee that would be needed to allow the defendants to earn this normal rate of return rather than the supra-normal return that they would have earned from card acceptance fee overcharges.

And the benchmark method (at para. 69):

> 69. The **benchmark method** is based on comparing collusive prices with prices in a comparable but non-collusive market or "benchmark". In this case natural benchmarks would be other countries. The benchmark market should be similar to the collusive market under study, but the collusion should be absent. Ideally, the benchmark would be an undistorted competitive market. In this case, we expect that Visa and MasterCard would use similar arrangements to those used in Canada in other markets as well, so finding an undistorted benchmark might not be easy. However, if fees in other countries are lower than in Canada, after adjusting for relevant cost differences, that would suggest that overcharges are present in Canada. In short, it is not necessary to observe an undistorted market in order to use other countries (benchmarks) to infer the existence of overcharges in Canada. If other comparable countries have lower fees than in Canada and credit card networks are still able to willingly operate, this suggests overcharges in Canada.

[252] Dr. Brander deposes that the data necessary to perform either analysis is either publicly available or would be available from the defendants under normal

discovery procedures. Dr. Brander further notes that credit card markets are two-sided networks and that this would not impair his analysis.

[253] Concerning quantification, Dr. Brander deposes (at paras. 78-79):

> 78. The normal measure of aggregate harm for a class is the price overcharge multiplied by the volume of the product sold to class members. In this case, as the relevant price is normally quoted in percentage terms, the calculation of aggregate economic harm is particularly easy. Suppose, for example, that the average card acceptance fee was 2.5% over the relevant period. Suppose further that this fee incorporated an overcharge of 0.5%, based on the interchange fee. The aggregate harm would be 0.5% of the total transaction volume. If the relevant volume of transactions was, say, $100 billion, then the aggregate economic harm would be 0.005*100 = 0.5 billion or $500 million. This overcharge could be readily applied on a merchant-by-merchant basis to each merchant's volume of sales if that level of detail was desired.
>
> 79. In assessing economic harm there might be additional factors to consider, such as the evolution of the price overcharge and the associated economic harm over time. However, in principle, going from the overcharge to economic harm is relatively straightforward.

[254] In his consideration of the issues, and in response to Dr. Brander, Dr. Ware, as previously mentioned, deposes that Interchange Fees are a mechanism designed to balance the two sides of the credit card market and that they are not a traditional "price". As a result, Dr. Ware concludes that the concept of an overcharge does not apply to Interchange Fees in the traditional sense, or to network effects. Further, Dr. Ware deposes that any But For world would be dramatically different than the world today and that any given merchant could pay lower or higher Interchange Fees, depending on their bargaining power, in the absence of default rates. As a result, Dr. Ware concludes that any inquiry into harm, which he distinguishes from an overcharge, is inherently individual as there will inevitably be winners and losers. Dr. Ware reaches a similar conclusion regarding the elimination of the Network Rules. Moreover, Dr. Ware concludes that since merchants likely passed the cost of Interchange Fees onto consumers, they suffered no actual harm. Concerning Dr. Brander's proposed methodology, Dr. Ware deposes that no "normal" rate of return could be identified for the mark-up method and that interchange fees should

not be tied to costs. Regarding the benchmark method, Dr. Ware concludes that there is no appropriate comparator country.

[255] Dr. LaCasse's analysis is specific to one defendant, Desjardins, and is accordingly less useful when considering commonality. She deposes that the Merchant Discount Fees charged by Desjardins are not directly tied to Default Interchange Fees. She concludes that as Dr. Brander relied on this assumption in his affidavit, his conclusions are incorrect. In support of her conclusions, Dr. LaCasse undertook a statistical analysis and concludes that an increase in Interchange Fees does not cause a direct proportional increase in Merchant Discount Fees.

[256] Dr. Brander swore a second affidavit in response to Dr. Ware and Dr. LaCasse. He notes that some of information that could be used to carry out his proposed methodology was revealed by Dr. LaCasse's statistical analysis. He further deposes that even if Desjardins' business practices differ from the other defendants, those differences do not compromise his proposed methodologies. Dr. Brander acknowledges that his methods may provide different results for different defendants, but that the same method can be used for each defendant. He disagrees with Dr. LaCasse's assertion that Merchant Discount Fees are not directly tied to Default Interchange Fees, criticizes her for not constructing a But For world in her analysis and questions the statistical reliability of her empirical results.

[257] In response to Dr. Ware, Dr. Brander deposes that the concept of overcharge can apply to two-sided markets and to Interchange Fees specifically. Dr. Brander claims that the presence of a two-sided market might alter the results of his eventual analysis, but states that an overcharge by a cartel in a two-sided market is conceptually possible. In response to the individual winners and losers argument, Dr. Brander deposes that the preliminary evidence he has reviewed indicates that overcharges, not undercharges will be the norm. He further concludes that whether Interchange Fees are "prices" or "rates" or something else is a trivial semantic issue. In response to Dr. Ware's conclusion that merchants pass on their Interchange

Fees, Dr. Brander asserts that this does not affect his analysis, which is concerned with the existence of an overcharge in the first place. Dr. Brander also deposes that he is not assuming that the Network Rules are anti-competitive, but that this will be determined based on evidence at trial.

[258] In response to Dr. Ware's critique of his methodologies, Dr. Brander deposes that variation in the rates of return of comparator firms does not preclude the determination of a normal rate of return. He also asserts that differences in foreign markets can be taken into account when comparing them to the Canadian market under the benchmark method. Ultimately, Dr. Brander concludes that Dr. Ware and Dr. LaCasse are raising issues outside the scope of his mandate for certification and focusing on issues that will arise at trial.

[259] I accept that, in general, the methods proposed by Dr. Brander are common economic methods that can be used to determine overcharges in typical price-fixing cases. Despite differences in terminology, they resemble the methods that were deemed acceptable in *Microsoft* (*Pro-Sys v. Microsoft*, 2010 BCSC 285 at paras. 24-28). It is notable that Dr. Brander was an expert for the plaintiff in that case. However, the trial judge accepted the methodologies proposed by the other expert for the plaintiff and therefore found it unnecessary to consider Dr. Brander's evidence, even though it largely conformed to the evidence of the other expert (at paras. 28 and 164). The question that remains is therefore whether the methods offer a realistic prospect of success in this specific case.

[260] The defendants marshal numerous arguments in support of their position that the loss-related issues are not common. These arguments can be grouped into various categories and I will deal with them in turn.

[261] The first such category contains the arguments that support the idea that Default Interchange Fees and the Network Rules are beneficial due to the nature of the credit card industry as a two-sided market. The defendants argue that there are indirect benefits that flow to merchants from Interchange Fees, chiefly greater sales, and that cardholder behaviour is controlled in a beneficial manner. Similarly, Dr.

Ware asserts that increases in Interchange Fees do not necessarily cause economic harm to merchants. Ultimately, the arguments in this category can be reduced to the argument that even if there is an overcharge in Interchange Fees that increases the *costs* paid by merchants, the end result is that there is no resulting common harm, because the *profits* of merchants actually improve, or at least do not suffer due to network effects. In any event, the defendants submit this is an individual inquiry given what would happen in a But For world. In the lexicon of this case, the defendants argue that an overcharge is not synonymous with the harm the plaintiff needs to prove to be entitled to damages.

[262] First and foremost, the question of whether Interchange Fees and the Network Rules are ultimately beneficial due to the feedback effects of a two-sided market is a factual finding for trial. The defendants acknowledge this and instead argue that Dr. Brander provided no evidence of *how* it could be analyzed at trial and whether an analysis could take place on a common basis.

[263] This argument does not challenge Dr. Brander's methods for determining whether an overcharge exists, but rather his ability to quantify any resulting harm imposed by any potential overcharge. Dr. Ware's comments on this issue in his first affidavit are enlightening (at paras. 56-58):

> 56. Second, there is no basis for the plaintiff's and Dr. Brander's assumption that lower Interchange rates would translate into merchants being better off. The lower Interchange rates postulated by the plaintiff in the absence of the alleged conspiracies would likely lead to a reduction in volume on the Visa and MasterCard networks due to a reduction in benefits (*e.g.*, rewards, credit limits, and insurance coverage) or increase in costs (*e.g.*, annual fees and interest rates) for cardholders, or both. The acceptance of credit cards increases customer traffic thereby likely resulting in additional sales for merchants that accept credit cards. Consumers use cards with rewards more frequently relative to other payment methods. This suggests that consumers value the benefits their credit cards provide and consider these benefits in their decisions to make purchases. If Interchange rates were lower in the but-for world, this would likely result in fewer benefits to cardholders and therefore reduced incentives for cardholders to use their credit cards, which would in turn result in lost sales and profits to merchants. In other words, merchants' volumes of transactions may decrease and their net incomes may decline in a but-for world with lower Interchange rates.

> 57. It is not appropriate to presume that Interchange rates were "overcharged" by X% and apply that percentage "overcharge" to the volume of transactions that occurred at the existing Interchange rate levels, as presumed by Dr. Brander. Even if there were a positive "overcharge" (*i.e.*, the amount by which the actual Interchange rate is above the but-for Interchange rate), this does not imply that the Class members were harmed. Unlike in a typical price-fixing case where higher prices from a conspiracy translate into harm to consumers, "overcharge" is not equivalent to harm in this instance due to the nature of Interchange and the two-sided nature of the market.
>
> 58. As explained in the previous section, one must consider the two-sided nature of the market because Interchange rates are set to balance the two sides. Even if, as posited by the plaintiff, Interchange rates would be lower in the but-for world, a reduction in Interchange rates would produce changes in the behaviour of all participants: merchants, cardholders, issuers, acquirers, and the Visa and MasterCard networks. The resulting networks would be very different than the Visa and MasterCard networks that exist today. Even if a merchant could claim that it would pay less in the but-for world, it would be paying less to participate in a significantly inferior network. Thus, unlike in a typical price-fixing case (*i.e.*, one involving a one-sided market), where higher prices from a conspiracy translate into harm to consumers, there is no reason to believe that lower Interchange rates would make Class members better off.
>
> [Emphasis added, citations omitted.]

[264] In his first affidavit, Dr. Brander does not expressly discuss how he would account for any benefits received by merchants as a result of higher Interchange Fees, to the extent there are any. In his second affidavit, Dr. Brander deposes that his view is that network externalities have not fully offset potential overcharges (at para. 114), but does not elaborate on how his methodology would account for this. In responding to Dr. Ware's criticism, Dr. Brander discusses two-sided networks and responds directly to most of Dr. Ware's points on this issue, but only responds generally to this point (at para. 63):

> 63. To determine what actually happens in a two-sided network requires careful analysis, including both the application of economic principles and empirical analysis. This is the work I propose to carry out if certification is successful. It is unreasonable to attempt to rule out on a priori theoretical grounds the possibility of overcharges without even looking at the empirical evidence. The presence of a two-sided market might affect the actual outcomes that occur in a marketplace. However, the two-sided market issues do not compromise the methods to be used to assess those outcomes. Nor do they somehow preclude the possibility of overcharges.

[265] In sum, the defendants submit, Dr. Brander was asked about overcharge and provided his opinion on overcharge, but this was the wrong question. An excerpt

from the cross-examination of Dr. Brander reveals this alleged distinction (QQ 823-837):

> Q: So from your perspective then you were asked to consider the kind of -- whether harm was visited on the merchants and not whether the merchants passed any of that downstream?
>
> A: My questions I don't believe contained the word "harm".
>
> Q: They don't. Overcharge.
>
> A: I was asked to consider the overcharge.
>
> Q: Let's pause there. We can agree there's a distinction between harm and overcharge, right?
>
> A: Yes.
>
> Q: And you were only asked to go so far as to address whether overcharge could be estimated on a class-wide basis, right?
>
> A: Yes, that's what the questions asked.
>
> Q: You were not asked to consider whether harm could be estimated on a class-wide basis?
>
> A: That is not contained in the questions.
>
> Q: And therefore, that is your understanding, you were not asked that, correct?
>
> A: Obviously harm is an issue and obviously harm is closely related to overcharge.
>
> Q: I didn't say it wasn't.
>
> A: We've seen the questions, the questions are in the record. If we just want to re-read the questions and ask me does the word harm appear, no. Does the word pass-through appear, no. But of course the potential role of pass-through is out there but they were not part of the questions I was asked.
>
> Q: You said before you are very literal minded about these things. I want to be able to understand how you approached this and what you understood your instructions to be. So you understood your instruction to be to consider whether the existence of overcharge could be assessed on a class-wide basis?
>
> A: Yes.
>
> Q: And then to consider whether the extent of overcharge could be assessed on a class-wide basis?
>
> A: Those are the questions, absolutely.
>
> Q: The same pair of questions for each of two parallel conspiracies?
>
> A: Those are the questions.

Q: And your take on that was that overcharge and harm are not strictly speaking synonyms, right?

A: That is correct.

Q: And you addressed the question of whether overcharge could be assessed, you did not assess the question of whether harm could be assessed, that not being the question you were asked.

A: I do have comments about harm in my affidavit so it's not true to say that I don't address it but it is true to say that's not in the questions.

Q: Ultimately your opinion at the end of your report --

[Plaintiff's Counsel]: Which report?

Q: The first report for starters at paragraph 80. The question of whether class members paid an overcharge could be assessed on a class-wide basis?

A: Yes.

Q: While it's true in paragraph 78, for example, and elsewhere the word "harm" is used in sentences, when you come back to your conclusion you go back to the word "overcharge"?

A: My conclusion is of course my response to the questions I was asked, all of which deal with overcharge.

[266] However this difference might be based on different understandings of the word “overcharge”, as demonstrated earlier in cross-examination (QQ 603-615):

Q: Because we can't assume that the simple difference in price is all overcharge if what one gets in return has changed?

A: I agree.

Q: In your first report you discussed quantifying harm and you said -- if you want the reference one place is your paragraph 78 and there's more than one place but this is a convenient place -- you say that the normal measure of aggregate harm for a class is the price overcharged multiplied by the volume.

A: Yes, that is the normal approach.

Q: Here you don't discuss the need to examine what the merchants or the class members are getting in return for the price as part of the analysis of harm, do you?

A: We might be talking at cross-purposes. We need to get the right price overcharge and we've just agreed that the overcharge does need to be adjusted for the range of services.

Q: Where in your report do you discuss the need to consider what a merchant gets in return for a card acceptance fee as part of the evaluation of whether there was an overcharge in the first place?

A: I don't -- to the best of my recollection I don't discuss that step explicitly but of course it's a step that would be part of the merits of the case. When we come to compare with Australia we look at the experience of the merchants and the cardholders.

Q: I'm going to come back and ask my question again. Where in your report do you actually discuss, and I mean discuss -- you understand what the word "discuss" means?

A: Finish your question.

Q: Where in your report do you actually discuss the need to consider what the merchants receive in return for their card acceptance fee in determining the level of overcharge?

A: I think I just answered that I think I said -- I forget my exact words but the basic point is that my affidavit does not go to that level of detail, but of course economists in constructing benchmarks or but-for worlds are concerned about the quality of the product as well as the price.

Q: So we'd agree then that the implementation of your methods would require a court to consider any changes in the value of what the merchants received in return for any different card acceptance fee in sorting out A, whether there was an overcharge, and B, if so, the extent of the overcharge?

A: As a substantive point I agree, that's part of the merits analysis.

Q: How that would be done is not discussed in your report?

A: Once again, I disagree. We can argue about level of detail but the idea that we would compare the Canadian experience with the experience in a benchmark case of course incorporates that. That's part of the comparison. I don't mention in detail every specific element of the comparison but that's the point of a benchmark.

Q: Are you comfortable that you understand the word "expressly"? If I asked you whether you expressly mentioned any of that in your report would you be comfortable in understanding that question and answering it?

A: I don't think I can write a blank cheque so why don't you try asking the question and I'll try answering it.

Q: Sure. You were concerned yesterday about some words having meanings you were uncomfortable with. I'll just try it then. Can you agree with me that you do not expressly comment on the need to consider changes, if any, in the value of what merchants receive in return for their card acceptance fee anywhere in your report?

A: I agree that I do not explicitly go to that level of detail.

Q: But you say it's implicit in the methods you propose?

A: Yes.

Q: I take it based on this discussion that going back to paragraph 78 of your first report, when you say the normal measure of aggregate harm is the overcharge times volume, you're not trying to tell us that that

would necessarily be the way that it would be calculated in this case because you'd need to check, first of all, to see whether the product that was sold was the same in the but-for world as the actual world?

A: Well, there are a couple of ways of proceeding and once we got into the analysis we'd have to assess what is best based on the available data, but one way of proceeding would be to get the price overcharge by correcting for service quality. So once again, to go back to your example, let's suppose that merchants used to get cars when they signed on to use a credit card and in the but-for world they don't get cars but they pay a lower interchange fee. We would subtract the value of the car from the interchange fee they pay and that would give us the net interchange fee and we compare that with the amount that was actually paid in the allegedly collusive environment. What we'd be doing there is we'd be taking account of the change in the service in calculating the overcharge and then once we had we'd have the net overcharge and then we just multiply the overcharge by the volume and that's how we get damage. Alternatively, we might get what we might call the gross overcharge and then subsequently adjust that for the change in service quality. We could do it either way depending on what looks best once we get into the actual data analysis. I couldn't commit myself at this point to which particular approach might be best and you might do both.

Q: Briefly, what do you mean when you say a gross overcharge? Is that the same as an aggregate overcharge? You tell me.

A: Let's suppose that we have -- just to keep things as simple as possible, I'm not saying that these numbers are correct or incorrect or anything like that, but let's suppose that we in Canada found that there was an aggregate average overcharge of 3 percent. Let's suppose in a benchmark, whether we construct the benchmark as another country or for that matter whether we use another industry or whatever, let's suppose that we conclude that the interchange fee is one and a half percent. That gives us a difference of one and a half percent. We say that's the gross overcharge. Then we say maybe the service is different. Maybe the service at the higher interchange fee is a more valuable service. Let's assess the value of that service and then we could add that on to the 1.5, and maybe we conclude that the value of the service was actually worth half a point. So then the net overcharge would be 3 minus 1.5 plus .5 so it would only be 1. So the net overcharge would be 1 even though the gross overcharge would be 1.5.

[Emphasis added.]

[267] Questioning in this vein continues for some time.

[268] What Dr. Brander is saying is that his methodologies, in particular, the benchmark method, implicitly take into account network effects in a two-sided

market. His answers later in cross-examination return to this theme (QQ 705-725; 735-748):

> Q: But I take it your report does not discuss the feedback effect or network effect that might arise if interchange was reduced and therefore benefits to cardholders were reduced and therefore the contribution, if you will, on the cardholder side of the market was changed?
>
> A: I assert at this stage that for the purposes of this affidavit for describing methods that I do not need to explicitly deal with the network issues that we've described. The network issues of course would come into the analysis at a later stage so they are part of the merits of the case but they're not in my view part of the method. The method implicitly includes consideration of network effects.
>
> Q: Let me take that in chunks. You said that your methods implicitly include consideration of these feedback effects?
>
> A: Right.
>
> Q: Your report does not expressly describe how those methods would take these feedback effects into account, correct?
>
> A: My report does not explicitly go into that.
>
> Q: You said that those effects would need to be examined at a later stage, right? That's what I wrote down.
>
> A: Yes.
>
> Q: When you say at later stage you mean at trial?
>
> A: Yes. I was going to avoid saying at trial since you claimed I used that term too often before.
>
> Q: Use it as often as you like. All I need to get straight is what you have told us now as opposed to what you are telling us you or somebody will explain to a judge at trial. So for today's purposes, for the purposes of your reports, you do not tell us how your methods will examine the feedback effect?
>
> A: I don't agree with that. I need to backtrack a little bit. For example, one method that I propose is to look at feedback -- to look at benchmark markets and one possible benchmark market which has been discussed a lot in this case is Australia. If we compare Canada with Australia and we see what's happening in Australia we will be evaluating the outcome of changes in the network structure. If, for example, a reduction in interchange fees causes the network to shrink we will see that. If it causes the network to expand we will see that. We inevitably will be examining the network effects by using the benchmark. Of course the network effects come into play because they are part of the benchmark.

Q: And you do not tell us in your reports how we are going to do any of that with these feedback or network effects. What you've told us is that these methods will deal with that later?

A: I haven't actually implemented the method.

Q: I didn't ask whether you had implemented it.

A: The method is to compare Canada with Australia. This market is a network, a two-sided network in Australia just as it is in Canada, so of course we will be taking it into account and incorporating the network effects. That's part of the benchmark.

Q: I haven't asked you whether you've actually done that work yet. All I'm trying to figure out for today's purposes is the degree to which you've told us how you will do that work. What I hear you saying is that, to use your Australia benchmark example, if one did an Australia benchmark approach at trial the network feedback issue would be addressed then?

A: It's part of the benchmark, absolutely.

Q: For today's purposes you have not told us how that will happen. You've just said today it will happen; is that fair?

A: I don't think that is fair. I think that the -- I've just told you how it would happen for example. So the concern about network effects, one concern, the concern that I believe your questions raise, is that if you readjust the pricing and lower the interchange fee perhaps you'll damage the network by reducing the readership which in this case would be the number of cardholders. That is the concern. That would be addressed very directly and I've just explained how. We would look at what has actually happened to the extent of cardholdership in Australia. It's very direct, it's right there. We look at it and we say has this change and interchange affected the extent of the network? It's very direct, it's right there. It's not some mystery. It's right in front of us.

Q: You would need to know, for example, if it had affected different parts of the network differently, like different sectors?

A: We could certainly look at different sectors.

Q: You could but you don't -- all I'm trying to get straight is you don't discuss any of what you just said in your reports. You're telling me though that it's implicit in looking at a place like Australia?

A: That's what a benchmark does.

Q: That benchmark is what you say we would dig into at trial?

A: Yes.

Q: That's the benchmark method. Your alternative method was -- and I'll be coming back to the methods in more detail in a minute or two -- but your alternative was the so-called mark-up method where you would calculate returns from other portions of the financial services sector?

A: That's correct.

Q: And that approach would not implicitly take into account this two-sided credit card market in the sense that you would be looking at other portions of the financial services industry which are not necessarily two-sided markets, correct?

A: The method is a correct method. It's not incomplete in some way. But with that method we're saying what should the returns be in the absence of collusion. So we looked at some closely related industry, in this case other parts of the financial sector.

Q: Those other parts of the financial sector are not two-sided markets?

A: Right. So for that type of analysis we don't need to look at the two-sided market issue.

Q: Because you would be indifferent to whether -- let's go back a step. In the end the application of that approach would be to estimate a return for the credit card companies based on the returns from other financial sectors?

A: That's right.

Q: And if that return was different than the current return, let's say lower for argument's sake, that would mean that there was less money in the system, so to speak, to fund, for example, benefits on the cardholder side, right?

A: That's a possibility.

Q: Then you would need to know what effect on the value to merchants of what they received for accepting cards and paying card acceptance fees would be of that change in benefit to cardholders, in other words, the feedback effect?

A: Yes. This is going back to our earlier conversation. If there's a significant change in the quality of service, in this case losing card members would be a significant change in the quality of service, that would have to be added into the analysis to adjust the overcharge.

Q: And you do not describe in your discussion of your mark-up method how that particular piece of analysis would be done?

A: No, I don't describe it here.

Q: In fact, you do not even identify in your description of the mark-up method that that piece of analysis would need to get done?

A: I don't identify it here. I would like to explain, say one more thing about these network effects. The crucial issue of course is how important are these network effects? Are they important or is this a footnote? In my judgment at this stage of the market based on what I have learned about the industry is that the credit cards have very high penetration. Network issues are all about expanding the network. In the early days of telephones, telephones were priced very cheaply so that more people would sign on because that made it more attractive to other people. In the early days of the credit card market the network expansion effects may have been important. Right now most merchants take credit cards and most consumers have credit cards.

That is not going to change. These are things that can be evaluated by evidence and in my preliminary look at say the Australia case suggests that this is true but the issue is are these network effects big enough to require a significant adjustment to the overcharge. At this stage -- I mean, I agree that is an empirical matter that has to be assessed but at this stage my feeling is that it's unlikely that these network effects are that big.

…

Q: In fact, you've already determined that it is highly likely that these network effects have not fully offset what would otherwise be overcharges, you've already formed that opinion?

A: That's not the way I put it. That is my preliminary view but of course I would do the analysis.

Q: Go to paragraph 114 of your second report, please.

A: Correct.

Q: And at 114 you say that you formed what you describe as a preliminary view and you go on to say that from an economic point of view your view is that the alleged problems are more than plausible and are highly likely, and what is highly likely follows I take it which is that network externalities have not fully mitigated or offset the overcharges that you discuss earlier in the sentence, right?

A: I say that's -- you described it as conclusion and I disagreed. I said it's a preliminary view. That's what it says here.

Q: So it's your preliminary view that this is highly likely?

A: Yes.

Q: And that's without having done the definitive analysis?

A: Yes.

Q: Ultimately though the analysis would need to get done?

A: Yes, it would.

Q: And in neither of your reports do you tell us how that will get done?

A: Well, as I've argued, as far as the benchmark analysis is concerned it's essentially automatic. In comparison with Australia automatically takes into account the network effects because this market in Australia is a network.

Q: Let's pause there. Let's say that reduced interchange in Australia has had effects on the cardholder side of the market which have resulted in feedback effects, right?

A: Yes.

Q: You have not told us anywhere in your report how you are going to take those -- how you're going to measure those feedback effects or how you're going to take them into account in determining the so-

called right price for merchants in Canada to effectively pay at the end of this lawsuit; you haven't told that yet, have you?

A: What haven't I told you?

Q: You haven't told us in your reports how we will figure out these network effects in Australia, nor how we will take any perceived effects in Australia and deal with them when considering what the but-for price in Canada would look like; you don't tell us the "how" of that in your reports?

A: I don't go through every detail step by step. With respect to this issue of network effects I think it's important just to get one fact on the table which is that that these network effects would be important if they reduce the size of the cardholder base. That's what we're talking about. We're saying if we reduce interchange then maybe that causes a problem for merchants because it reduces what you call the feedback effect, it reduces the consumer base. So we look at --

Q: It does two things. It reduces the number of people who take up cards and it would reduce the manner in which or the extent to which cardholders use their cards; there's two different effects?

A: You're right. So, the total volume effect. That's a relatively straightforward thing to address. My understanding is that in fact since the regulatory changes occurred in Australia the number of cardholders has gone up and the volume of transactions has gone up. This whole network issue just on that piece of data alone does not look like it is going to be a big issue but it will be in the analysis -- automatically in the Australian case.

Q: What I'm trying to get you to focus on is a pretty simple question --

A: But because of --

Q: Just a second. Let me ask it again. What I'm trying to get you to focus on is the following simple question. I hear you tell me that when you use the benchmark method these things will get dealt with. I'm focused on what your reports say and the words you have chosen to put in those reports and I want some if there is consensus to be had between us on the fact that your reports do not tell us how that will happen. I hear you say it will happen but your reports do not tell us how that will happen.

A: I think I already answered. I think I already agreed that my report does not contain that level of detail and then I went on to explain why.

Q: For the mark-up method, the other financial sector method, you simply don't discuss the network effects at all?

A: In my report, in my affidavit, I say that I considered network effects and I came to the conclusion that they are not significant and therefore for the purposes of my report, for the purposes of the method. The answer to the question is yes, I have not discussed them further in my affidavit but I have not ruled them out of the empirical analysis of course.

[Emphasis added.]

[269] The defendants seek to avoid a "battle of the experts" scenario on this application because they are alive to the jurisprudence which directs that in such an event it is inappropriate to resolve the dispute against the plaintiff on certification. But, in my view, Dr. Brander's evidence, including that given on cross-examination, demonstrates that on this issue of "net overcharge" or "harm" we very much have a "battle of the experts".

[270] The defendants argue that on the issue of harm, Dr. Brander was asked the wrong question. He discussed only "overcharge" which does not take into account network effects. Dr. Brander responds that his benchmark method implicitly takes these into account and that while the mark-up method results must be adjusted for these effects, this can be done and, in any event, he does not anticipate that they will be significant.

[271] The "battle" extends to include the defendants' second category, the "winners and losers" argument. That is, the submission that in any But For world, due to differences in bargaining power, some merchants will be winners, as the fees they pay will drop, and others will be losers, as their fees will rise. The defendants submit that as a result of this fact the question of harm is inherently individual.

[272] Dr. Brander, in his second affidavit, responds in part (at para. 15):

> 15. Any individual variation between merchants could be easily handled at the distribution phase. For example, presumably the compensation provided to any merchant would be based on the volume and characteristics of credit card fees paid by that merchant. My understanding is that such information would be made available through discovery at trial. The analysis carried out by Dr. LaCasse illustrates the existence and use of some such data.

[273] On his cross-examination, he expands his response (QQ 896-902):

> Q: Yes. In Dr. Ware's report, and you cite it, it's paragraph 14 (v) on page 7.
>
> A: Yes, I have it.
>
> Q: You quote him as saying: "...in the but-for world, interchange rates can be lower, higher or unchanged..." and what he says is: "In the but-

for world interchange rates could be lower, higher or unchanged depending on each class member's circumstances and characteristics."

A: Yes.

Q: You're satisfied that the partial quote that you used and the omission of the last part of his sentence fairly represented what you said?

A: In this case I am very comfortable with what I've done. Dr. Ware was basically making two points. Point number one, interchange rates can be higher, lower or unchanged. Point number two, he is asserting that individual class member's circumstances are relevant. I chose to comment on only on his first point. I see that as completely fair. The question of individual differences, obviously we can debate separately. The basic point, that interchange fees could be higher, lower or unchanged, I think is an important point. It's a point I happen to agree with and it suggests to me that we would need to actually do the empirical analysis to assess the situation.

Q: In that context you understood him to be referring to the interchange rates being higher, lower or unchanged in respect of each given merchant?

A: One logical possibility is that every merchant has a lower interchange rate or a higher one or an unchanged one. That's a logical possibility. I clearly do understand that Dr. Ware is asserting or suggesting that individual variation might be important in this case.

Q: To come back to my question, you understood Dr. Ware to be referring to interchange rates in the but-for world that could be lower, higher or unchanged on a class member by class member basis?

A: I understand that's what he is saying, yes.

Q: I just wanted to make sure we're talking the same language. That is the proposition that you say you agree with and then go on to comment on in your paper?

A: There are two propositions there in my opinion. My opinion is that, one, Dr. Ware is observing that interchange rates could logically be higher, lower or unchanged, those are logical possibilities. My view is that the suggestions about the importance of individual variation is a second point. I agree with the first point. I suspect that we disagree, Dr. Ware and I, on the importance of individual variation in this case.

Q: That's something one would have to examine in order to determine whether it turns out to be important or immaterial?

A: That's exactly my point. It would have to be examined on the evidence. It doesn't affect the method.

[Emphasis added.]

[274] As the cross-examination reveals, Dr. Brander acknowledges that fees could be higher or lower, but disagrees with Dr. Ware regarding the most likely alternative

to the rules imposing Default Interchange Fees; another "battle of the experts". As Dr. Brander states, the analysis is necessary to understand what the But For world looks like. If it turns out that such a world is hopelessly individual, this Court possess flexible powers under the *CPA*, including decertification, that will prevent this case from becoming unmanageable. However, giving effect to the defendants' winners and losers argument at this point would be premature.

[275] In my view, Dr. Brander's methodologies offer a plausible prospect of demonstrating net overcharge or harm on a class-wide basis. I am especially convinced that his benchmark method meets the criteria in *Microsoft*, but I do not rule out the mark-up method. Any individual characteristics of that harm can be addressed in the merits trial and proceedings arising out of that trial in the event the plaintiff succeeds.

[276] I also note that the defendants complain that Dr. Brander's methodologies do not address the issue of harm from the perspective of merchants passing on the overcharge to their customers. This complaint is relevant to the so-called "pass on" defence advanced in the face of direct purchasers' claims where there are claims of indirect purchasers. In light of *Microsoft*, it is not a defence which can be pressed in these matters.

[277] The third category of the defendants' argument contains the objections of Dr. LaCasse: increases in Default Interchange Fees do not correlate with increases in Merchant Discount Fees and Merchant Discount Fees are not correlated with Interchange Fees.

[278] As previously mentioned, Dr. LaCasse's work is only representative of Desjardins, a single defendant and is therefore of limited value. The use of any expert methodology at trial might reveal that Desjardins is unique among the defendants. However, on certification the only issue is the existence of a methodology, not its results (*Microsoft* at paras. 118-119). Dr. LaCasse's analysis is accordingly premature. If a methodology applies to a defendant and to the class as a whole, it meets the requirements from *Hollick* and *Microsoft*, regardless of whether

the result of applying that methodology to that defendant at trial produces a unique result, or an unfavorable result from the plaintiff's point of view.

[279] Further, as Dr. Brander points out in his second affidavit, an increase in Default Interchange Fees does not require a direct corresponding increase in Merchant Discount Fees. If the plaintiff's allegations are correct, it may be that the Acquirers are merely becoming less profitable even though the merchants are still being overcharged. Moreover, as the plaintiff points out, it may not be reasonably possible or practical for Acquirers to increase Merchant Discount Fees immediately following an increase in Default Interchange Fees; some lag is possible (at paras. 43-48).

[280] I agree with Dr. Brander and with the plaintiff that Dr. LaCasse's analysis indicates that the defendants have the data necessary to carry out any acceptable analysis at trial. This makes Dr. LaCasse's work more helpful to the plaintiff that to the defendants. I would reject the defendants' arguments based on her work; they are either premature or irrelevant.

[281] Finally, each of the parties in varying degrees attacks the credibility and reliability of the opposing expert(s) on the grounds of being argumentative, in the nature of advocacy and even as dramatically contrary to testimony given elsewhere. In my view, this application is not an appropriate forum within which to resolve these objections. I have the varying opinions of what all agree are recognized experts in their fields and that is enough at this point to conclude that we have on this application a so-called pitched "battle of the experts".

[282] In conclusion, I would certify issues 2, 8, 15, 17, and 20. I would certify issue 19, concerning punitive damages, following *Rumley v. British Columbia*, 2001 SCC 69, at para. 34; assessing the alleged conspiracy will involve our assessment of the defendants' conduct (and this would extend to issues 17 and 20, so far as they apply to punitive damages).

[283] The certification of a common issue relating to aggregate damages was also discussed at length in *Microsoft*. The Court overruled previous decisions in this province, such as *Infineon* and *Steele*, which permitted plaintiffs to rely on the aggregate damages provisions in the *CPA* in order to establish liability. The Court concluded that the aggregate damages provisions can only be invoked following a finding of liability. They are a procedural tool, albeit a powerful one, to assist in the distribution of damages (at paras. 130-133). Further, I do not read the Court's brief discussion of the aggregate damages provisions in *Wakelam* as in any way limiting their availability for a claim under the *Competition* Act (at paras. 93-95).

[284] On the issue of when it is now appropriate to certify aggregate damages as a common issue, the Court held (at para. 134):

> [134] The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge. Further, the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found.

[285] Based on the methodologies proposed by Dr. Brander, I have concluded that the plaintiff has a reasonable prospect of success of proving liability on a class-wide basis without relying on the aggregate damages provisions. Accordingly, issue 18, concerning aggregate damages, is appropriate for certification at this time. However, as the Court held in *Microsoft*, the ultimate decision in this area rests with the trial judge, regardless of whether the issue is certified.

[286] I turn briefly to the issues touching injunctive relief. These are issues 21 and 22. The defendants submit that as the *Competition Act* does not provide for injunctive relief (or for punitive damages), these issues should be struck on the basis of *Wakelam*. However, it is not necessary to decide this issue as other independent causes of action, which may result in injunctive relief, have survived s. 4(1)(a) scrutiny. Accordingly, these issues are suitable for certification.

3. Restitutionary Issues

[287] I now turn to consider issues 10, 11 and 12, which are related to the causes of action in waiver of tort and unjust enrichment. As I have described, the Amended Claim pleads waiver of tort and unjust enrichment and recovery under restitutionary principles as causes of action (which I have found survive s. 4(1)(a) scrutiny).

[288] It is necessary to delve into these claims in some depth so I reproduce the Amended Claim's treatment of "Unjust Enrichment, Constructive Trust and Waiver of Tort" (at paras. 65-69):

> 65. In the alternative, the plaintiff waives the tort and pleads that it and the other Visa and MasterCard Class Members are entitled to recover under restitutionary principles.
>
> 66. The defendants have each been unjustly enriched by the receipt of the Visa Overcharge or MasterCard Overcharge. Visa and MasterCard Class Members have suffered a deprivation in the amount of such Visa Overcharge or MasterCard Overcharge.
>
> 67. Since the Visa Overcharge or MasterCard Overcharge that was received by the defendants from the Visa and MasterCard Class Members resulted from the defendants' wrongful or unlawful acts, there is and can be no juridical reason justifying the defendants' retaining any part of such overcharge.
>
> 68. The defendants are constituted as constructive trustees in favour of the Visa and MasterCard Class Members for all of the Visa Overcharge or MasterCard Overcharge because, among other reasons:
>
> (a) the defendants were unjustly enriched by receipt of the Visa Overcharge or MasterCard Overcharge ;
>
> (b) the Class Members suffered a deprivation by paying the Visa Overcharge or MasterCard Overcharge;
>
> (c) the defendants engaged in inappropriate conduct and committed wrongful acts by engaging in the conspiracies alleged in this claim;
>
> (d) the Visa Overcharge or MasterCard Overcharge were acquired in such circumstances that the defendants may not in good conscience retain them;
>
> (e) justice and good conscience require the imposition of a constructive trust;
>
> (f) the integrity of the marketplace would be undermined if the court did not impose a constructive trust; and

> (g) there are no factors that would, in respect of the artificially induced overcharge, render the imposition of a constructive trust unjust.
>
> 69. The plaintiff pleads that equity and good conscience requires the defendants to hold the Visa Overcharge or MasterCard Overcharge in trust for the plaintiff and the other Visa and MasterCard Class Members and to disgorge those amounts to the plaintiff and the other Class Members.

[289] I note that the plaintiff here again speaks of the Visa Overcharge and the MasterCard Overcharge and I recall that the definition of these terms earlier in the Amended Claim at paragraph 62, that is, the amount by which the class member "paid more for credit card network services than they would have paid in the absence of the illegal agreements". The defendants say that this measure of the loss sought to be recovered on a restitutionary basis is defined in the same way as is the loss sought to be recovered in tort.

[290] This leads the defendants to submit that the assessment of "Overcharges" will be the same for both disgorgement (restitution) and damages (tort); that the feedback effects of the two-sided market will have to be analyzed here, as well. The defendants concluded (Defendants' Joint Submissions at para. 342):

> Thus, all the same individual issues arise if the case is recast from harm and damages to gain and disgorgement. A gains-based approach is not a panacea for the failures of the plaintiff's traditional harm-based claims.

[291] Because of the way the plaintiff has effectively defined the defendants' "gain" under the restitutionary claims, in a manner identical to the "Overcharges" for the purposes of the tort claims, the defendants' point takes on some force.

[292] The plaintiff appears to adopt a different definition of "Overcharge" in the common issues proposed for the restitutionary claims. I reproduce the proposed common issues under this head:

> 10. Have the Defendants, or any of them, been unjustly enriched during the Class Period by receipt of supracompetitive Merchant Discount Fees and in particular default Interchange Fees, or any component thereof?
>
> 11. Have the Visa or MasterCard Class Members suffered a corresponding deprivation by paying supracompetitive Merchant Discount

> Fees and in particular default Interchange Fees, or any component thereof, during the Class Period?
>
> 12. Is there any juristic reason justifying retention by the Defendants, or any of them, of some or all of the supracompetitive portion of Merchant Discount Fees and in particular default Interchange Fees or any component thereof (the "Overcharge") paid by the Visa or MasterCard Class Members?
>
> 13. Can the defendants be constituted as constructive trustees in favour of the Visa or MasterCard Class Members for the Overcharge?
>
> 14. Do equity and good conscience require that the Defendants, or any of them, hold the Overcharge in trust for the plaintiff and the other Visa or MasterCard Class Members and to disgorge that amount to the plaintiff or other Visa and MasterCard Class Members?

[293] Note that, here, the "Overcharge" is defined as "…the supracompetitive portion of Merchant Discount Fees and in particular Default Interchange Fees…".

[294] I take this definition to include only the defendants' gains from the alleged anti-competitive conduct. These gains are not affected by any set-off of alleged advantages accruing to the merchants by conduct induced on the other side of the market. This "Overcharge" would not be assessed in the same way as would be net overcharge in the tort claim or under the *Competition Act*. Contrary to the defendants' submission, the claims based in restitution may well be the panacea for any failures in the plaintiff's harm-based claims, if they can be proven without the foundation of the *Competition Act* per *Wakelam*.

[295] As discussed under the s. 4(1)(a) requirement, waiver of tort is a novel doctrine that allows a plaintiff to disgorge a defendant's gain from tortious conduct rather than recover his or her own loss.

[296] Justice Epstein, for the majority, discussed waiver of tort comprehensively in *Serhan (Estate) v. Johnson and Johnson* (2006), 85 O.R. (3d) 665 (Div. Ct.) (a decision cited with approval by our Court of Appeal in *Infineon* and *Steele*).

[297] As Justice Epstein notes (at para. 52), in restitution the plaintiff can avoid the necessity of having to prove the actual loss in tort. She writes (at para. 50):

> 50. …The practical purpose behind [waiver of tort] is that in certain situations, where a wrong has been committed, it may be to the plaintiff's

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

[298] As discussed in *Serhan*, the law of restitution is evolving (at para. 77):

> 77. In Canada, the legal response to the person who has obtained a benefit unjustly, has been to develop remedies through the law of restitution. The modern law of restitution provides various monetary and proprietary remedies for both unearned windfalls and for wrongful acquisitions of property and profits. What animates the law of restitution and what appeared to compel the motion judge toward certification is the principle against unjust enrichment.

[299] This has led to an extension of the law of restitution by the identification of the constructive trust as a remedy for unjust enrichment. The learned judge cites the Supreme Court of Canada's decision in *Pettkus v. Becker*, [1980] 2 S.C.R. 834. Justice Epstein then identifies the more recent extension of the constructive trust remedy in *Soulos v. Korkastzilas*, [1997] 2 S.C.R. 217 (at para. 81):

> 81. In the opening words of her judgment, McLachlin, J. (as she then was) said "this case stands for the proposition that a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff" (para. 1). Under the broad umbrella of the concept of good conscience, constructive trusts are recognized both to remedy unjust enrichment and corresponding deprivation, as well as to address wrongful acts like fraud.

[300] As noted above, with the decision in *Microsoft*, the pleading at bar to the extent that it seeks the remedy of a constructive trust for the alleged unjust enrichment of the defendants, cannot be sustained. As explained by Justice Rothstein, *Kerr v. Baranow*, 2011 SCC 10, is the controlling authority and it holds that in order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property (at para. 91 of *Microsoft*):

> 91 *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, is the relevant controlling authority on constructive trusts. In *Kerr*, Justice Cromwell explains that in order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property:
>
> > ... the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*,

> at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50).

[301] Justice Epstein in *Serhan* identifies an alternative to the remedy of constructive trust, the remedy of an accounting and disgorgement based on waiver of tort (at para. 111):

> [111] Drawing upon the work of earlier scholars, McCamus specifies two distinct types of benefits that the law of restitution seeks to have removed from the defendant and placed in the hands of the plaintiff: (1) benefits received by the defendant directly by the plaintiff (enrichment by subtraction), and (2) benefits acquired by the defendant through wrongful conduct (enrichment by wrong). It is the latter category of benefits that may be subject to disgorgement. In The Law of Restitution, supra, the learned authors refer to relief in the "disgorgement" measure as being "increasingly" used to describe "a form of relief that requires the defendant to hand over to the plaintiff the benefits acquired through wrongful conduct, whether or not the benefit has been acquired from the plaintiff in the subtraction sense". For McCamus, the remedy of disgorgement responds to a type of unjust enrichment; the finding of an underlying tortious conduct "provides the explanation for the wrongfulness of the defendant's conduct and…the reason why the enrichment is unjust". Other writers have subscribed to this view.
>
> [Citations omitted.]

[302] In addition to the constructive trust claim, it appears to me that the plaintiff has endeavored to plead the remedy of an accounting and disgorgement. However, the pleadings in paras. 65-69 of the Amended Claim could be significantly clearer in this regard.

[303] The attraction of these remedies from the plaintiff's perspective is that they focus on the defendants' gains as distinct from the harm or damages suffered by the plaintiff and the proposed classes. And the added attraction of the disgorgement remedy is that it requires the defendants to hand over to the plaintiff the benefits acquired through wrongful conduct whether or not the benefit has been acquired from the plaintiff in the "subtraction sense". But even in the case of the cause of action in unjust enrichment where the plaintiff, having demonstrated the defendants'

wrongful gain, must also demonstrate her corresponding depravation, it is her initial depravation, the direct or indirect payment of the supra-competitive price (here, the Merchant Discount Fees engorged by fixed Interchange Fees), not her ultimate tort loss that defines recovery.

[304] In my view, Dr. Brander's methodologies offer a very plausible prospect of establishing the defendants' unlawful gains on a class-wide basis and, thus, the clams in waiver of tort and unjust enrichment. The defendants' objections on the basis of the network effects are irrelevant for these claims. In addition to considering the need for minor (or technical) amendments to the Amended Claim to capture all aspects of the potential remedies addressing the waiver of tort and unjust enrichment claims, the plaintiff does not appear to clearly state the accounting and disgorgement remedy as a common issue separately from the constructive trust issue and this should be addressed.

[305] In closing on the issue of proving class-wide loss on a common basis (I will use "loss" as an alternative to "harm" or "net overcharge" to include the claims pursued in restitution), I note again the defendants constant refrain that commonality is completely lacking here; that the network effects of the two-sided market and the prospect of "winners and losers" makes the analysis hopelessly individualized. The argument essentially breaks down to one that suggests either that:

> We may have illegally inflated Default Interchange Fees, but the benefits you, the merchants, receive in the two-sided market in the result are to your advantage.

Or:

> We may have done wrong but it is impossible for you to prove the net result on a common basis and accordingly, we are immune from class action scrutiny.

[306] To the extent that the plaintiff can make out her case, such a plea is cynical and frustrating.

[307] I echo Justice Epstein's conclusion in *Serhan* (at paras. 146-147):

> [146] In (*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd*.), [1943] A.C. 32 (H.L.), at p. 61, Lord Wright said "any civilized system of law is

> bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep". Over half a century later, in *Peel (Regional Municipality) v. Canada,* [1992] 3 S.C.R. 762, [1992] S.C.J. No. 101, McLachlin J. (as she then was) said, at para. 42, "The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice." The suggestion is that like negligence, the categories of restitution may never be closed.
>
> [147] And then came *Soulos* and Carthy J.A.'s pronouncement in the Court of Appeal (1995), 25 O.R. (3d) 257, [1995] O.J. No. 2488, at p. 261 O.R., that "it is the moral quality of the defendant's conduct that forms the fundamental reason for the court's intervention" and that equity will "intervene with a proprietary remedy to sustain the integrity of the laws which it supervises". These words were substantially adopted by the majority of the Supreme Court at paras. 14-15 of McLachlin J.'s judgment, which held that the constructive trust may apply even without an established loss to condemn wrongful conduct and maintain the integrity of equitable relationships.

[308] On this point I also want to offer some further comments on the legal implications of two-sided markets and network effects. I have concluded that Dr. Brander's methods, especially the benchmark method, offer a reasonable prospect of success in quantifying the network effects in the credit card industry and establishing any resulting net harm from a strict economic perspective, as the defendants submit is necessary. However, given the novelty of two-sided markets in Canadian jurisprudence, I am not convinced that Dr. Brander or the plaintiff should be required to account for those network effects.

[309] The "pass on" defence has been definitively rejected in part because it is absurdly difficult to determine the ultimate location of the harm caused by any overcharge that might have been passed on (*Microsoft* at para. 23 citing *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1 at paras. 44 and 48). Similarly, in *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, Justice Binnie held that recognizing the "pass on" defence would require the Court to engage in the endless and futile exercise of following every transaction to its ultimate result (at para. 111, citing *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) at 534). The trial in this case, or in any case involving two-sided

markets, may reveal similar difficulties in proving net harm caused by an overcharge subject to network effects. In that event the law may respond as in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 "to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep" (at 61). This may prompt the court, for the same policy reasons that prompted the denial of the pass on defence, to deny defendants an offset for alleged benefits to plaintiffs by way of network effects. Or it may prompt that court to shift the burden of proving such offsets to the defendants, as at least one academic writer in the United States has suggested: Daniel M. Tracer, "Overcharge But Don't Overestimate: Calculating Damages for Antitrust Injuries in Two-Sided Markets" (2011) 33:2 Cardozo L. Rev. 807.

[310] Nothing I say here about the difficulties the plaintiff may face in proving her (and the classes') losses in tort should be taken to discourage the ingenuity of counsel in this novel and evolving area of damages.

D. Section 4(1)(d) and Section 4(2)

[311] I will turn first to each s. 4(2) factor. The defendants prefer a two-part analysis considering absolute and relative preferability. While grounded in the decision in *Hollick*, this approach appears to be more applicable in Ontario where there is no equivalent to s. 4(2) of the *CPA*. Accordingly, I prefer to review the relevant factors individually: *Rumley* at para. 35.

[312] I will do so against the backdrop of the defendants' two essential submissions on the preferability requirement. First, the defendants say that even if the action involves some certifiable common issues (Defendants' Joint Submissions at para. 396):

> 396. …the remaining highly individualized issues will inevitably overwhelm this litigation. This class action will collapse into a plethora of complex individual trials on many critical issues including (amongst others) the fact and extent of any alleged harm...

[313] Second, the defendants strongly assert that other avenues for addressing their alleged misconduct exist and that these totally skew the analysis against the preferability of a class proceeding (at paras. 397 and 398):

> 397. Moreover, the proposed class action is not the preferable procedure when compared to other available avenues for addressing the forward-looking aspects of her claim. Contrary to the plaintiff's assertion, the defendants' evidence shows that other procedures are better suited to respond to her complaints, including:
>
> (a) governmental regulatory oversight and review processes, such as those leading up to the Federal Government's Code of Conduct; and
>
> (b) specialized competition proceedings, such as those launched by the Commissioner of Competition in December 2010 and [referred to earlier in these reasons].
>
> 398. These options - in which many class members have, in fact, participated - are substantially preferable to court proceedings because they are better equipped to address the polycentric issues raised by the Amended Claim. The preferability of regulatory mechanisms is amplified because at least some class members will actually be *harmed* by the forward-looking injunctive relief claimed by the plaintiff. A class proceeding cannot possibly be preferable in these circumstances. Unlike the available regulatory mechanisms, class actions are not designed to separate winners from losers among class members.
>
> [Emphasis in original, citations omitted.]

1. Section 4(2) Factors

[314] Section 4(2)(a) provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

[315] The common issues which I have identified clearly go to the heart of the major issues in this case, namely, the fact and form of any anti-competitive behaviour, the existence of two distinct conspiracies in that regard, the harm or loss to the proposed class members, and the remedies available to them in that regard.

[316] In my view, contrary to the defendants' submissions, the common issues overwhelm the potential individual issues. While some of those individual issues may be challenging (although not overly so, according to Dr. Brander's evidence), I note our Court of Appeal's statement in *Infineon* (at para. 76):

> [76] I do not minimize the potential difficulties of proof arising out of the complexities involved in the marketing and distribution of DRAM. However, the *CPA* is a powerful procedural statute. It gives the case management judge flexible tools to deal with such complexities and if, despite this flexibility, it should turn out that a common issues trial is unmanageable, it gives the judge the power to decertify the action.

[317] The defendants, at paragraph 409 of their Joint Submissions, continue their submission that this proceeding is beset by highly individualized issues:

> 409. …Certifying this case would require the court to assess the highly idiosyncratic circumstance of *hundreds of thousands* of merchants who accepted credit cards over a ten-year period to determine whether any of them were harmed, and if so, to what extent…
>
> [Emphasis in original.]

[318] The defendants then set out at length some 18 issues that they say must be resolved in respect of "each and every merchant class member throughout the Class Period".

[319] These issues largely center on individualized harm enquiries. For the reasons set out above, I have accepted that there is a realistic prospect of resolving the loss-related issues on a class-wide basis as common issues. In my view, in light of these conclusions, the force of the defendants' submissions here, very much falls away. And that is strikingly so with respect to loss and the restitutionary remedies.

[320] Section 4(2)(b) provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

[321] There is no direct evidence that potential class members have a valid interest in controlling the prosecution of separate actions. It could be inferred that some merchants, who prefer the current system and who might be losers in the absence of the alleged collusion would prefer that the action not proceed, but this is different than wanting to prosecute a separate action. Moreover, as the Court said in *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (at para. 75):

> [75] …It may be that some customers of the defendant would prefer that it continue to have the right to break the criminal law (if it is doing so), in order to offer its customers some added advantages. In this sense, allowing the plaintiff to pursue a class proceeding may be seen as unfair to some of the customers. In an organized society however, I do not see this as the kind of fairness concern that should prevent a court from intervening. Rather, the concern should be whether the defendant is acting in accordance with the law…

[322] I note again the evidence of the Retail Council of Canada. In my view, a consideration of this factor favours the preferability of a class proceeding.

[323] Section 4(2)(c) provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

[324] Apart from proceedings in other provinces similar to this proceeding and prosecuted by the same counsel, there appears to be only one other proceeding extant in Canada, that is in Alberta, brought by the Merchant Law Group. It has been stayed by Associate Chief Justice Rooke pending the decision on this application.

[325] The defendants submit that some proposed class members will be forced to submit their claims to arbitration pursuant to dispute resolution provisions in their contracts with Acquirers.

[326] There is limited evidence before the Court on the extent of such clauses, and in the absence of a stay application I conclude that this factor still favours certification.

[327] Section 4(2)(d) provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (d) whether other means of resolving the claims are less practical or less efficient;

[328] The plaintiff submits that the only alternative to a class proceeding is individual litigation, which would be cost-prohibitive. The defendants argue that Competition Tribunal proceedings and government regulation offer preferable approaches given the significant policy issues that would arise from a dramatic change in the credit card industry. The plaintiff objects to these approaches as they are unlikely to result in an award of damages to the class even if they offer prospective remedies.

[329] The *Tribunal Decision* endorsed federal regulation (at paras. 393-401), but the Tribunal was considering whether to award a discretionary remedy. As the plaintiff points out, the primary remedies sought by the class are non-discretionary damages awards flowing from breaches of the *Competition Act* that would be awarded in the event of a successful claim by the plaintiff, regardless of whether or not she is representing a class at the time. It is not open to the Court to refuse to grant a remedy that flows from an illegal conspiracy because it would lead to the potential for subsequent economic harm to cardholders via excessive surcharging. If such a situation comes to pass, it would be up to Parliament to address it, but it does not follow that government regulation offers a more practical or efficient venue for the resolution of these *claims*. The Commissioner of Competition also announced that he would be pursuing a regulatory solution, an approach apparently endorsed by the Minister of Finance, but this does not affect my analysis.

[330] I observe in passing that government's acknowledged ability to comprehensively oversee Visa and MasterCard's default interchange, credit card acceptance fees, and Merchant Rules belies the suggestion that these issues are so individualized in their impacts on merchants that they defy generic analysis.

[331] Once again, however, in my view, the defendants' submission under this head has been overtaken by the Supreme Court of Canada's decision in *AIC Limited*.

[332] I note the defendants' submission at paragraph 417 of their Joint Submissions:

> 417. First, the Canadian Federal Government has comprehensively overseen - and continues to oversee - Visa and MasterCard's Default Interchange, credit card acceptance fees, and Merchant Rules. Since 2009, several government processes have extensively considered merchants' concerns about the costs of credit card acceptance, including Default Interchange rate and the effects of Visa and MasterCard's respective Honour All Cards and No Surcharge Rules. These processes have included:
>
> (a) Governmental study and investigations culminating in the Code of Conduct; and
>
> (b) Additional study and continued regulatory oversight through the Department of Finance's Payments Task Force and Payments Council and various Senate and Parliamentary committee hearings.
>
> [Citations omitted.]

[333] In *AIC Limited*, Justice Cromwell concluded that a class action will serve the goal of access to justice if there are access to justice concerns that a class action could address and these concerns remain when alternative avenues are considered (at para. 26).

[334] In pursuing this inquiry, the Court should address a series of questions (at paras. 26-38):

(1) What are the barriers to access to justice?

(2) What is the potential of the class proceeding to address those barriers?

(3) What are the alternatives to class proceedings?

(4) To what extent do the alternatives address the relevant barriers?

(5) How do the two proceedings compare?

[335] I have already noted the plaintiff's response to questions 1 and 2. In my view, these proceedings clearly address the barriers to access noted by the plaintiff.

[336] I have suggested my conclusion on questions 3, 4 and 5. As in *AIC Limited*, the plaintiff has pleaded viable causes of action calling for damages among other remedies. Like the Ontario Securities Commission proceedings in *AIC Limited*, regulation or Competition Tribunal proceedings will not address the losses which the class members make out in these proceedings. Indeed, in *AIC Limited*, there were OSC approved settlement agreements that paid investors "millions", nevertheless, the Court concluded "that substantive access to justice concerns still remain" (at para. 61).

[337] In the case at bar, the substantive access to justice concerns remain effectively completely unanswered. In my view, the alternative proceeding and regulatory enquiries suggested by the defendants do not offer a comparable alternative. The preferability analysis under this subsection favours certification.

[338] Section 4(2)(e) provides:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[339] This factor effectively overlaps with the three goals of class actions, specifically the goal of judicial economy, and I prefer to deal with it in that context.

2. The Three Goals of Class Actions

[340] In turn, much of the analysis pertaining to the goal of judicial economy overlaps with the analysis under s. 4(2)(a). As previously noted, the defendants' primary objection in this area is that any trial in this case will become a leviathan of inquiries into individual issues of liability and harm. As I have concluded that Dr. Brander's methods offer a reasonable prospect of success, this submission is unsustainable. Moreover, I have concluded that there are common issues related to the causes of action and common issues related to harm. Further, if all of the common issues are resolved they would be determinative of the defendants' liability.

Accordingly, administering this case as a class action should be more efficient than administering thousands of cases for individual merchants. As in *Microsoft* and *Infineon*, judicial economy is served by certification in this case.

[341] Similarly, my comments on s. 4(2)(d) and *AIC* above are applicable to the access to justice goal. Ms. Watson's first affidavit indicates that she appears to pay less than $200 per month in Merchant Discount Fees. She also deposes to her belief that she could not afford to bring an individual claim against the defendants. In this regard, her situation is undoubtedly typical of many class members. According to *AIC Limited* a "class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered" (at para. 26). As previously discussed, I am satisfied that access to justice concerns exist in this case. Moreover, having considered individual litigation, proceedings before the Competition Tribunal, and the possibility of federal regulation, I am of the view that those concerns remain.

[342] Behaviour modification is the third goal of the class action regime and I am satisfied that this case might cause the defendants and others involved in the credit card industry to modify their business practices if the plaintiff is successful. While federal regulation might also address this goal, there is no guarantee that the industry will be regulated, despite the *Tribunal Decision* and the subsequent comments of the Commissioner and the 2014 Economic Action Plan. In any event, merchants cannot effect behaviour modification via regulation in the same way that they can effect it through this case. Further, given the significant damages sought by the plaintiff, I am not satisfied that a broad promise of regulation is an alternative process capable of resolving the class members' claims within the meaning of *AIC* Limited (at para. 19). As a result, this goal also favors certification.

[343] None of which is to say that the plaintiff's claims will succeed at a trial of the common issues. There might not be a conspiracy. Dr. Ware's testimony might be preferred over Dr. Brander's. This case might even be decertified in line with the

defendants' submissions. However, the plaintiff does not need to prove that the goals of the class action regime will actually be met in this case, only that there is some basis in fact to conclude that a class action would the preferable method to resolve the claims. At this point I am satisfied that a trial of the common issues would be preferable having regard to the factors in s. 4(2) and the goals of the class action regime. The plaintiff has accordingly met this requirement.

E. Section 4(1)(e)

[344] I will again turn to each requirement in turn.

[345] Section 4(1)(e)(i) provides:

> 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:
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class

[346] The defendants argue that no single plaintiff, including Ms. Watson could fairly or adequately represent the diverse class of merchants in this proceeding. Specifically, they submit that Ms. Watson cannot represent the interests of large public companies like Walmart given their allegedly diverse interests. This argument is effectively a watered-down generic version of the argument that the plaintiff is in a conflict of interest with other merchants due to the possibility of winners and losers in the absence of Default Interchange Fees. It is appropriately considered under s. 4(1)(e)(iii), not (i), and I will address it there. The merchants in this case are not materially more diverse than the software purchasers in *Microsoft* for the purposes of fair and adequate representation. Whether they have diverse *interests* is a different question.

[347] When assessing Ms. Watson's adequacy for the task, this Court must consider her motivations, the competence of class counsel, and her ability to bear any necessary costs (*Dutton* at para. 41). Based on her first affidavit I accept that Ms. Watson is a capable plaintiff who is not acting for improper motives. She has

retained experienced and skilled counsel who have offered to fund all the expenses of this litigation. Further, Ms. Watson understands the role of a representative plaintiff and is sufficiently informed of the issues in this case.

[348] Ms. Watson does not need to be the best possible representative or even typical of the class. What matters is whether she will vigorously and capably prosecute the interests of the class (*Dutton* at para. 41). Again, temporarily leaving aside the issue of whether those interests are divergent, I conclude that Ms. Watson could and would vigorously prosecute any common interests shared by the class in a capable manner. She meets the requirements of s. 4(1)(e)(i).

[349] Section 4(1)(e)(ii) provides:

> 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:
>
> (e) there is a representative plaintiff who
>
> (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

[350] The proposed litigation plan is Exhibit Q to Ms. Watson's first affidavit. The defendants attack the adequacy of the plan on several grounds. The thrust of the defendants' arguments is that the plan is hopelessly generic and does not set out how a trial would unfold, beyond requesting 45 days of court time. The defendants also submit that it is inappropriate to leave individual issues of harm and liability in the hands of a third-party referee under s. 27 of the *CPA* as they are significant issues that go to the heart of the claim.

[351] As previously noted, the purpose of a litigation plan was set out in *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717 (at para. 77):

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize

> the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members…

[352] The detail of a plan should correspond to the complexity of the action. Further, less detail is required concerning individual issues that will need to be decided after the common issues trial, as discovery has not taken place (*White v. Canada (Attorney General)*, 2004 BCSC 99 at paras. 151-153).

[353] Regarding the specificity of the litigation plan, it is not materially less specific than the one in *Steele* (at paras. 83-85 and Appendix A). The litigation plan in *Steele* left the planning of the trial until after document discovery. As that plan was accepted by the Court of Appeal I would reject the specificity argument form the defendants in this case. Further, I have concluded that Dr. Brander's methodologies have a reasonable prospect of success, and thus there may be no need for individual determinations of liability.

[354] Finally, section 4(1)(e)(iii) provides:

> 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:
>
> (e) there is a representative plaintiff who
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[355] Based on their argument that some merchants would be better off in the absence of Default Interchange Fees and the Network Rules but that others would be worse off, the defendants argue that if the plaintiff would be better off (which the defendants dispute) then she is in an irreconcilable conflict with the merchants who would be worse off. The defendants also submit that as many merchants benefit from Default Interchange Fees, such as those with co-branding relationships with Issuers, and the plaintiff does not, another conflict of interest exists. Ultimately, the defendants argue that any class-wide or injunctive relief would harm some

defendants and benefit others such that no merchant on either side could represent the class without a conflict of interest.

[356] The plaintiff replies that there is no evidence before the Court of a single class member who does not want this action to be certified and further that several large merchants, such as Walmart, testified in the *Tribunal Decision* and that their testimony was generally opposed to high credit card acceptance fees and specifically Interchange Fees.

[357] The defendants also rely on various cases where a conflict of interest was found:

(a) In *Paron v. Alberta (Environmental Protection)*, 2006 ABQB 375, the representative plaintiff wanted to raise the water level in a lake. Other members of the class were explicitly opposed to this relief as it would have resulted in flooding affecting some members of the class, but not the representative plaintiff.

(b) In *MacDougal v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164, aff'd [2007] O.J. No. 573 (Div. Ct.), the representative plaintiff challenged amendments to a pension plan. The Court found that the amendments were beneficial to some members of the plan and harmful to others and that the proposed subclasses would be adverse in interest. *Public Service Alliance of Canada Pension Plan Members v. Public Service Alliance of Canada*, [2005] O.J. No. 2693 reached a similar conclusion.

(c) In *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120, the representative plaintiff sought an injunction shutting down a service that most of the class members relied upon, but that the representative plaintiff did not use.

(d) In *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790, a securities case, the plaintiff's claim was based on a series of allegedly fraudulent transactions in furtherance of a conspiracy. The Court found that class members who owned shares in different periods would be motivated to advance conflicting theories of the conspiracy.

[358] I do not find these cases persuasive in this instance. In all of these cases the conflicts were inherently obvious. In most of them some of the proposed class members actively opposed the relief sought. As the plaintiff points out, based on the evidence to date there is not one single merchant who opposes this litigation. The defendants rely on the testimony of Dr. Ware for their argument that some merchants would be worse off in the absence of Default Interchange Fees, but Dr. Ware's conclusion is that it requires an individualized analysis as the impact would differ from merchant to merchant. Dr. Ware offers the opinion that some merchants might be worse off, (first affidavit at para. 68), but Dr. Brander disagrees (second affidavit at para. 73) and, as previously stated, resolving this dispute is not appropriate at certification. I accordingly reject the defendants' primary submission on this evidence. Their submissions are speculative and there is ultimately no evidence that a conflict of interest exists. Even if one arises, this Court likely has the tools required to deal with it under the *CPA*.

[359] The more interesting argument put forth by the defendants is that without complicated economic analysis it will be impossible for individual merchants to know whether they have been harmed or helped by Default Interchange Fees and the Network Rules. The defendants submit that a class action should not be certified if class members cannot know whether the representative plaintiff represents their interests. However, the defendants provide no authority for that submission and the *CPA* only requires an absence of conflicts. I return to the Ontario Court of Appeal's statement in *Markson* (at para. 75):

> [75] …It may be that some customers of the defendant would prefer that it continue to have the right to break the criminal law (if it is doing so), in order to offer its customers some added advantages. In this sense, allowing the

> plaintiff to pursue a class proceeding may be seen as unfair to some of the customers. In an organized society however, I do not see this as the kind of fairness concern that should prevent a court from intervening. Rather, the concern should be whether the defendant is acting in accordance with the law…

[360] I find that reasoning more persuasive than the examples provided by the defendants. In the absence of a clear conflict of interest, based in the evidence, I would not refuse certification on this requirement. It can always be revoked later if conflicts arise. The plaintiff has met the requirements of s. 4(1)(e)(iii).

VI. CONCLUSION

[361] As I have intimated, I have concluded that the plaintiff has satisfied each of the requirements of s. 4(1) of the *CPA*. This action shall be certified as more particularly set out in these reasons. The plaintiff shall redraft the common issues in a manner consistent with these reasons and there will be a further case management conference to settle that aspect of the certification order. The plaintiff should also consider amendments to the Amended Claim in light of these reasons and the developing jurisprudence.

[362] In particular, the plaintiff shall:

(a) remove issues 6, 9, 13, 14, and 16 from the proposed list;

(b) add an issue dealing with the remedy of accounting and disgorgement for the waiver of tort claim;

(c) consider improving and clarifying the language of the remaining issues;

(d) remove any reference to a conspiracy to increase Merchant Discount Fees *per se* from the Amended Claim;

(e) remove any claim under s. 61 of the *Competition Act* from the Amended Claim;

(f) remove the claims in unlawful means conspiracy, unlawful interference with economic relations, and constructive trust from the Amended Claim;

(g) in light of *Wakelam*, distinguish between the *Competition Act* cause of action and the remaining causes of action in the Amended Claim;

(h) clarify the Amended Claim regarding any plea for the remedy of accounting and disgorgement in waiver of tort;

(i) revise the Class Period in the Amended Claim to reflect the absence of the constructive trust claim; and

(j) make other amendments as necessarily consistent with these reasons.

"The Honourable Chief Justice Bauman"

VII. APPENDIX A

PROPOSED COMMON ISSUES

COMPETITION ACT

1. Did the Defendants, the co-conspirator Acquirers or any of them, engage in conduct that is contrary to s 45 of the *Competition Act,* RSC 1985, c C-34 (the *"Competition* Act")? If so, what was the duration of this conduct?

2. If so, are the Defendants, or any of them, liable to pay damages to the Visa or MasterCard Class Members under s 36 of the *Competition Act,* including the costs of the investigation of the Defendants' misconduct?

CONSPIRACY

3. Did the Defendants, the co-conspirator Acquirers or any of them, conspire to impose and maintain the Networks' Rules, Merchant Discount Fees and in particular default Interchange Fees, or any component thereof during the Class Period?

4. Did the Defendants, the co-conspirator Acquirers or any of them, enter into unlawful agreements regarding Networks' Rules, Merchant Discount Fees and in particular default Interchange Fees, or any component thereof during the Class Period?

5. Did the Defendants, the co-conspirator Acquirers or any of them, conspire to harm the Visa or MasterCard Class Members?

6. Did the Defendants know, or should they have known, that the acts found in the determination of common issues 3, 4, or 5 (individually or collectively, the "Conspiracy Acts") were, in the circumstances, likely to cause injury to the Visa or MasterCard Class Members?

7. Was the predominant purpose of the Conspiracy Acts to injure Visa or MasterCard Class Members?

8. Are the Defendants, or any of them, liable to the Visa or MasterCard Class Members for the tort of civil conspiracy?

UNLAWFUL INTERFERENCE WITH ECONOMIC INTERESTS

9. Are the Defendants, or any of them, liable to the Visa or MasterCard Class Members for the tort of unlawful interference with economic interests as a result of the Conspiracy Acts?

UNJUST ENRICHMENT, CONSTRUCTIVE TRUST, WAIVER OF TORT

10. Have the Defendants, or any of them, been unjustly enriched during the Class Period by receipt of supracompetitive Merchant Discount Fees and in particular default Interchange Fees, or any component thereof?

11. Have the Visa or MasterCard Class Members suffered a corresponding deprivation by paying supracompetitive Merchant Discount Fees and in particular default Interchange Fees, or any component thereof, during the Class Period?

12. Is there any juristic reason justifying retention by the Defendants, or any of them, of some or all of the supracompetitive portion of Merchant Discount Fees and in particular default Interchange Fees or any component thereof (the "Overcharge") paid by the Visa or MasterCard Class Members?

13. Can the defendants be constituted as constructive trustees in favour of the Visa or MasterCard Class Members for the Overcharge?

14. Do equity and good conscience require that the Defendants, or any of them, hold the Overcharge in trust for the plaintiff and the other Visa or MasterCard Class Members and to disgorge that amount to the plaintiff or other Visa and MasterCard Class Members?

DAMAGES

15. Were the Merchant Discount Fees and in particular default Interchange Fees, or any component thereof, charged to Visa or MasterCard Class Members during the Class Period set at a supracompetitive rate? If so, what would the rate have been in a competitive environment?

16. Does the Defendants' conduct entitle the Visa or MasterCard Class Members to punitive damages?

17. Are the defendants jointly and severally liable for damages for their own conduct and that of the co-conspirator Acquirers?

18. Can an aggregate award of damages be made pursuant to s 24(1) of the *Class Proceedings Act?*

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

20. Are the Defendants, or any of them, liable to pay court ordered interest?

OTHER REMEDIES

21. Should the Court grant an injunction enjoining the Defendants from conspiring or agreeing with each other, the co-conspirator Acquirers or others, to raise, maintain, fix, and/or stabilize the rates of Merchant Discount Fees and in particular default Interchange Fees, or any component thereof?

22. Should the Court grant an injunction enjoining the Defendants from conspiring or agreeing with each other, the co-conspirator Acquirers or others, to impose the Networks' Rules, or any of them?