COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Watson v. Bank of America Corporation,* 2015 BCCA 362

Date: 20150819

Docket Nos.: CA41738; CA41749; CA41750; CA41751; CA41752; CA41754; CA41755; CA41756; CA41757; CA41758; CA41760; CA41761

Docket: CA41738

Between:

Mary Watson

Appellant
(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

Respondents
(Defendants)

- and -

Docket: CA41749

Between:

Mary Watson

Respondent
(Plaintiff)

And

MasterCard International Incorporated

Appellant
(Defendant)

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, National Bank of Canada Inc., Royal Bank of Canada, Toronto-Dominion Bank, and Visa Canada Corporation

Respondents
(Defendants)

- and -

Docket: CA41750

Between:

Mary Watson

Respondent
(Plaintiff)

And

Citigroup Inc.

Appellant
(Defendant)

And

**Bank of America Corporation, BMO Financial Group,
Bank of Nova Scotia, Canadian Imperial Bank of Commerce,
Capital One Bank (Canada Branch),
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**

Respondents
(Defendants)

- and -

Docket: CA41751

Between:

Mary Watson

Respondent
(Plaintiff)

And

BMO Financial Group

Appellant
(Defendant)

And

**Bank of America Corporation,
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**

Respondents
(Defendants)

- and -

Docket: CA41752

Between:

Mary Watson

Respondent
(Plaintiff)

And

National Bank of Canada Inc.

Appellant
(Defendant)

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,
Royal Bank of Canada, Toronto-Dominion Bank, and
Visa Canada Corporation**

Respondents
(Defendants)

- and -

Docket: CA41754

Between:

Mary Watson

Respondent
(Plaintiff)

And

Fédération des caisses Desjardins du Québec

Appellant
(Defendant)

And

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

Respondents
(Defendants)

- and -

Docket: CA41755

Between:

Mary Watson

Respondent
(Plaintiff)

And

The Bank of Nova Scotia

Appellant
(Defendant)

And

**Bank of America Corporation, BMO Financial Group,
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**

Respondents
(Defendants)

- and -

Docket: CA41756

Between:

Mary Watson

Respondent
(Plaintiff)

And

Capital One Bank (Canada Branch)

Appellant
(Defendant)

And

**Bank of America Corporation, BMO Financial Group,
Bank of Nova Scotia, Canadian Imperial Bank of Commerce,
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**

Respondents
(Defendants)

- and -

Docket: CA41757

Between:

Mary Watson

Respondent
(Plaintiff)

And

Royal Bank of Canada

Appellant
(Defendant)

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.,
Toronto-Dominion Bank, and Visa Canada Corporation**

Respondents
(Defendants)

- and -

Docket: CA41758

Between:

Mary Watson

Respondent
(Plaintiff)

And

Canadian Imperial Bank of Commerce

Appellant
(Defendant)

And

**Bank of America Corporation, BMO Financial Group,
Bank of Nova Scotia, 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**

Respondents
(Defendants)

- and -

Docket: CA41760

Between:

Mary Watson

Respondent
(Plaintiff)

And

Visa Canada Corporation

Appellant
(Defendant)

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, and Toronto-Dominion Bank**

Respondents
(Defendants)

- and -

Docket: CA41761

Between:

Mary Watson

Respondent
(Plaintiff)

And

The Toronto-Dominion Bank

Appellant
(Defendant)

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, and Visa Canada Corporation**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Saunders
The Honourable Madam Justice Neilson

On appeal from: An order of the Supreme Court of British Columbia, dated March 27, 2014 (*Watson v. Bank of America Corporation*, 2014 BCSC 532, Vancouver Registry No. S112003).

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Place and Date of Hearing:	Vancouver, British Columbia December 8, 9 and 10, 2014
Place and Date of Judgment:	Vancouver, British Columbia August 19, 2015

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Neilson

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Summary:

The plaintiff seeks certification of the action as a class proceeding brought on behalf of merchants who accept Visa and MasterCard credit cards. It is alleged that the credit card networks impose supra-competitive fees upon merchants, and mandate rules that restrict the merchants' ability to select their business practices in respect to credit cards. In the Supreme Court of British Columbia claims of unlawful means conspiracy based on breach of the Competition Act were struck. Claims based on breach of s. 45 of the Competition Act, common law conspiracy to injure, unjust enrichment and, if it exists as a claim, waiver of tort were allowed to proceed and common issues were identified. All parties appealed aspects of the order. Held: 1. The claim in unlawful means conspiracy is not bound to fail and the plaintiff's appeal is allowed in part. 2. The claim under s. 36 for breach of current s. 45 (but not former s. 45) is bound to fail and the defendants' appeals are allowed to the extent of striking that claim. The defendants' appeals from the order identifying common issues and holding the claim suitable as a class proceeding are otherwise dismissed, except as to the defendant Desjardins. 3. Desjardins's appeal of the order certifying the class action is allowed, the order against it set aside and the application for certification is remitted to the Supreme Court of British Columbia for fresh determination.

Reasons for Judgment of the Honourable Madam Justice Saunders:

INTRODUCTION

[1] This intended class action challenges, on behalf of merchants, the architecture of the Visa and MasterCard credit card networks in Canada. Mary Watson sought to represent two classes of merchants who accepted payment for goods and services by way of Visa or MasterCard credit cards, commencing March 28, 2001, and applied for certification of the action as a class action.

[2] As framed before the certification judge, the Further Amended Notice of Civil Claim alleges that most of the largest banks in Canada, with Visa and MasterCard, are liable in damages for breach of ss. 45 and 61 of the *Competition Act,* R.S.C. 1985, c. C-34, and for the torts of conspiracy to injure, unlawful means conspiracy, and unlawful interference with economic relations (now termed "unlawful means tort"). In the alternative, Mary Watson sought restitutionary relief based on unjust enrichment, waiver of tort, and constructive trust.

[3] All parties complain of portions of the order and support portions of the order. Chief Justice Bauman (now C.J.B.C.) struck the claims for breach of s. 61 of the *Competition Act*, unlawful means conspiracy, unlawful interference with economic interests, and constructive trust. Although the entered order does not say this expressly, the parties advanced the appeals as if the Chief Justice also disallowed claims relating to unjust enrichment and waiver of tort that rely upon breach of the *Competition Act.* Mary Watson appeals from the portions of the order striking the claim for unlawful means conspiracy, including in that her claim of unjust enrichment and waiver of tort as just described (CA041738).

[4] On the other hand, the Chief Justice certified the claim for simple breach of s. 45 of the *Competition Act* (i.e., a claim advanced under s. 36 of that *Act*) and conspiracy to injure. As well he certified claims in unjust enrichment and waiver of tort. I understand from the parties that these latter two claims derive only from the tort of conspiracy to injure and not from breach of the *Competition Act*. The banks, Visa, and MasterCard appeal from the certification order.

PROCEDURAL DETAILS

[5] At the same time as the order appealed, the Chief Justice ordered substitution of Mary Watson by Coburn and Watson's Metropolitan Home dba Metropolitan Home. The consequential change to the style of cause was not effected before the notices of appeal were filed, and these appeals have proceeded on the basis that Mary Watson is the named plaintiff/appellant/respondent. In these reasons I have referred for clarity to Mary Watson (or Coburn and Watson's Metropolitan Home dba Metropolitan Home), being sometimes an appellant and sometimes a respondent, as the plaintiff. (In the same way I have generally referred to the collective of banks, Visa, and MasterCard, also sometimes appellants and sometimes respondents, as the defendants.)

[6] Second, at the same time as the substitution order, the Chief Justice corrected the name of the defendant BMO Financial Group to Bank of Montreal.

That change, also, is not reflected in the notices of appeal and the appeals have proceeded on the basis of the uncorrected style of cause.

[7] Third, at the same time the Chief Justice made his orders in respect to the certification application he allowed amendments to the Amended Notice of Civil Claim and his reasons for judgment address that Further Amended Notice of Civil Claim. I have relied upon the Chief Justice's description of that pleading, and the language and numbering of the further amended version as replicated in his reasons for judgment.

DISCUSSION

[8] Certification of an action as a class proceeding requires the plaintiff to satisfy s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50:

> 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.

[9] The plaintiff contends (in CA041738) that the Chief Justice erred in finding the Further Amended Notice of Civil Claim did not satisfy s. 4(1)(a) in respect to some of the claims that were struck. The defendants in the eleven other appeals challenge the certification order. They contend the Chief Justice erred in finding the causes of

action that he did not strike were adequately pleaded, and in finding the plaintiff had established that the certified claims raise common issues (s. 4(1)(c)), that she would be an adequate representative plaintiff (s. 4(1)(e)), and that a class proceeding would be the preferable procedure to resolve the common issues (s. 4(1)(d)).

[10] The issue under s. 4(1)(a), whether the pleadings disclose a cause of action, is raised in all appeals. That criteria for certification tracks the analysis applied under Rule 9-5(1) of the *Supreme Court Civil Rules*, the rule applicable to striking pleadings for failure to disclose a "reasonable claim". The standard on this issue, not high, is whether it is "plain and obvious" that the pleadings disclose no reasonable cause of action and cannot succeed: *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, 35 B.C.L.R. (5th) 74, citing *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261. The application of s. 4(1)(a) must be analyzed on the pleadings alone. The other criteria for certification of an action as a class proceeding found in ss. 4(1)(c), (d), and (e) permit consideration of evidence.

[11] The Further Amended Notice of Civil Claim, in allegations accepted for the purposes of the application and these appeals, describes the two credit card networks, Visa and MasterCard, as each involving contracts amongst and between Visa or MasterCard, banks authorized to issue credit cards bearing the Visa or MasterCard trademark ("issuers"), financial institutions that function as payment processors to merchants ("acquirers"), and merchants. All of the defendant financial institutions in this case are issuers, and some, but not all, are acquirers.

[12] In general terms, the plaintiff alleges that the contracts between merchants and acquirers under which the merchant is paid for goods or services bought by a customer using a Visa or MasterCard credit card, invoke Visa rules and MasterCard rules requiring charges and imposing restrictions that infringe the *Competition Act*, are tortious, and offend principles of equity.

[13] The plaintiff alleges that the contracts between merchants and acquirers include standard terms and conditions imposed by the issuers, and Visa or MasterCard, through their contracts with the acquirers. The plaintiff alleges that each

time a customer uses a credit card to purchase goods or services, the merchant must pay a percentage of the sale price of the purchased goods or services. This is termed the "merchant discount fee". The merchant thus receives the purchase price less this fee. Certain credit cards, referred to as premium cards, are alleged to entail a greater merchant discount fee than do other cards.

[14] The merchant discount fee is described as comprising three components: an interchange fee paid to the issuer associated to the card; a service fee retained by the acquirer; and a network fee paid to either Visa or MasterCard. The plaintiff alleges the interchange fee takes the lion's share of the merchant discount fee.

[15] The plaintiff alleges that both the Visa rules and the MasterCard rules require the acquirers to impose a number of requirements on merchants: a restraint on merchants from encouraging customers to use lower-cost (to the merchant) methods of payment and from declining to accept certain Visa and MasterCard credit cards (the "No Discrimination Rule"); a requirement that merchants honour all credit cards of the same network (the "Honour All Cards Rule"); a restraint on merchants imposing a surcharge on purchases made using any credit card of the network (the "No Surcharge Rule"); and a rule allowing Visa and MasterCard to set default interchange fees (paid to the issuer). The plaintiff says these rules impede or restrain competition for credit card network services, allowing the defendants to maintain interchange fees at supra-competitive levels.

[16] The plaintiff pleads two civil conspiracies, one between the Visa network and its member banks – the issuers and acquirers in respect to Visa credit cards, and the other between the MasterCard network and its member banks – the issuers and acquirers in respect to MasterCard credit cards. She pleads that the acts described above breach s. 45 and s. 61 of the *Competition Act* and she seeks damages and investigative costs pursuant to s. 36, the civil remedy provision of the *Act*.

[17] In the alternative, the plaintiff pleads that the acts described amount to conspiracy to injure, unlawful means conspiracy, and unlawful interference with the economic interests of the proposed classes. The plaintiff claims damages in respect

to the merchant discount fees, in particular the interchange fees that are said to have been maintained or increased to a supra-competitive level, and damages for lessening of competition in the supply of credit card network services.

[18] In the further alternative, the plaintiff "waives the tort", that is, elects to pursue a remedy in equity rather than pursue the claim in law by a damages assessment, and seeks recovery under restitutionary principles.

[19] The Chief Justice replicated her entire prayer for relief:

> 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.

[20] The plaintiff applied to certify her action as a class proceeding, establishing as the common issues those set out in Appendix A to these reasons.

[21] With this general description, I turn first to the plaintiff's appeal and then I will discuss the appeals of the defendants

APPEAL CA41738 – MARY WATSON APPELLANT

[22] The plaintiff contends that the Chief Justice erred in striking the claim in unlawful means conspiracy along with the related claims in unjust enrichment and waiver of tort, and claims in unjust enrichment and waiver of tort based upon simple contravention of the *Competition Act*. In discussing this appeal I will refer to the claim for unjust enrichment and waiver of tort without always repeating the qualification that these issues, on this appeal, rely upon breach of the *Competition Act*; other claims in unjust enrichment and waiver of tort that were allowed by the Chief Justice as adjuncts to the claim of conspiracy to injure are discussed in the appeals of the defendants.

[23] The plaintiff contends further that the Chief Justice erred in concluding that *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins do Sante Inc.*, 2014 BCCA 36, leave to appeal ref'd [2014] 2 S.C.R x, settled the proposition that those pleadings do not disclose a reasonable claim, and in any event that *Wakelam* is wrongly decided. She observes that *Wakelam* did not consider *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335, [1990] 2 W.W.R. 42 (Man. C.A.) and cases following *Westfair*, and contends further that *Wakelam* is contrary to the recent decisions of the Supreme Court of Canada, *Pro-Sys v. Microsoft,* 2013 SCC 57, [2013] 3 S.C.R. 477 and *A.I. Enterprises v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177. She submits that we accordingly are at liberty to depart from *Wakelam* in the event we otherwise would conclude it is governing authority on these claims. Last, in the alternative, the plaintiff renews her request for a five

division which, according to our custom would not be bound by *stare decisis* in respect to cases of our court and so would be free to come to an independent conclusion on the *Wakelam* issue.

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

[25] I propose first to set out the provisions of the *Competition Act* engaged by the pleadings, next to move to the reasons for the order appealed, and then turn to general discussion including *Wakelam* and *Bram*.

[26] The provisions of the *Competition Act* said by the plaintiff to provide the unlawful means for the tort of unlawful means conspiracy and to negate a juristic reason for enrichment are s. 45 and s. 61, both within Part VI – OFFENCES IN RELATION TO COMPETITION.

[27] The class period bridges two different versions of s. 45. The present s. 45 provides:

> 45. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

[28] Prior to March 12, 2010, s. 45 provided:

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

[29] Section 61 of the *Competition Act* was repealed March 12, 2009. It provided:

> 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…

[30] Section 36 (found in Part IV – SPECIAL REMEDIES) provides:

> 36. (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> …
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> ...
>
> (4) No action may be brought under subsection (1),
>
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (i) a day on which the conduct was engaged in, or

> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> …

[31] The last section involved in this appeal is s. 62. Along with ss. 45 and 61, s. 62 is located in Part VI. It provides:

> 62. Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of any civil right of action.
>
> [Emphasis added.]

[32] In respect to the issues engaged by the plaintiff's appeal, the Chief Justice was required to determine the narrow point of whether the plaintiff can plead unlawful means conspiracy, unjust enrichment, and waiver of tort based on breach of ss. 45 and 61 of the *Competition Act*.

[33] The main issue in this appeal may be shortened to the question: can one sue for damages or equitable remedies, alleging a tort that requires proof of breach of the *Competition Act*? Another way of putting the question is whether the *Act* is such a complete code, providing all available remedies within its four corners, that it excludes an action in tort that requires proof of breach of the statute. The secondary issue is whether the claim for restitutionary remedies in lieu of a s. 36 claim for breach of the statute is available.

[34] The Chief Justice considered that this Court's decision in *Wakelam* answered this question. He said:

> [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.

[35] The Chief Justice went on to review decisions of other jurisdictions, observing that they allow a breach of the *Competition Act* to ground causes of action, but concluded that he was bound by *Wakelam*, and so made the order appealed, saying in respect to claims dependent on the *Competition Act*:

> [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.
>
> …
>
> [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.

[36] The plaintiff, setting aside *Wakelam* for the moment, says it is open to her to bring claims in tort and equity relying upon breach of the *Competition Act*. The plaintiff says that the history of the *Competition Act* favours the view she propounds and that the key is in appreciating that s. 36, which provides a civil remedy for conduct contrary to Part VI, was added to the scheme as part of the significant revision in 1975 of Canada's combines legislation. She says that prior to the revision, the common law tort of conspiracy to commit an unlawful act (now termed

unlawful means conspiracy) was available to a plaintiff, see *Cement LaFarge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385, as noted in *Bram*. She invokes the principle that legislation should not be taken to depart from prevailing law unless it does so clearly: *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161, citing *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.Ltd.*, [1956] S.C.R. 610. Although the revisions of 1975 added a civil remedy, she says the remedy and accompanying scheme are not incompatible with the tort she advances here, and that because the tort requires proof of more elements than does the s. 36 remedial provision, it is not inappropriate to allow complainants to sue for the tort of unlawful means conspiracy. She says all of this without invoking principles of constitutional law that potentially pit the right to sue at common law in tort against the rationale for the conclusion the 1975 revisions are constitutional, an issue that has been shelved thus far.

[37] It seems to me that the key to understanding whether the plaintiff can bring a claim in tort or equity relying on breach of the *Competition Act* is the constitutional history of the *Act*. Prior to 1975 the legislation, under the name of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, was purely penal in nature. In 1931, in *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.), the Privy Council upheld the constitutionality of the *Combines Investigation Act* as coming within the federal power in respect to criminal law found in s. 91 of the *Constitution Act*, 1867 (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. When, in 1975 (and subsequent amending statutes) the legislative scheme in respect to competition law was heavily revamped, the constitutional question arose again. In addition to the existing penal provisions of the *Combines Investigation Act*, the renamed *Competition Act* acquired a regulatory and civil enforcement scheme. As part of the changes, a civil remedy provision (s. 31.1, now s. 36) was enacted in Part IV. The question was asked: by creating a civil cause of action, had the federal government strayed from its s. 91 jurisdiction?

[38] In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255, the Supreme Court of Canada answered that question.

The Court upheld the legislation under the federal trade and commerce power. Chief Justice Dickson for the Court held that s. 31.1, although intruding on provincial power over civil rights, was functionally related to the legislative scheme and thus constitutionally valid. He observed at 673 that s. 31.1 (now s. 36) "is only a remedial provision", "is not in itself a substantive part of the Act", and "does not create a general cause of action; its application is carefully limited by the provisions of the Act". He described the *Act* as a "well-integrated scheme".

[39] The main question before us, to be answered considering this history, is whether a breach of the *Competition Act* can provide the "unlawful means" foundation for a civil action in conspiracy. I look at that question as having two parts. The first is whether breach of a statute may be the required "unlawful means", and the second is whether this statute's scheme allows for that result.

[40] The first question, whether breach of a statute may be the unlawful means needed for formation of the tort of unlawful means conspiracy, was addressed in *Gagnon v. Foundation Maritime Ltd.*, [1961] 3 S.C.R. 435, 28 D.L.R. (2d) 174. In *Gagnon*, Justice Ritchie for the majority concluded that a strike prohibited by statute could provide the unlawful means for the purposes of unlawful means conspiracy. This judgment grounded the claim in *LaFarge*, a case involving breach of the old *Combines Investigation Act*. While the Court concluded in *LaFarge* that the tort was not made out because there was no evidence that the unlawful conduct was directed towards the plaintiff and there was no causal connection between the unlawful acts and the plaintiff's loss, the Court appeared to accept that breach of the *Combines Investigation Act* would satisfy the "unlawful means" element of the unlawful means conspiracy tort. This interpretation of *LaFarge* was confirmed by Justice Cromwell in *Bram*, who in the course of explaining that "unlawful means" for the "unlawful means tort" is likely narrower than the "unlawful means" in "unlawful means conspiracy", referred to both *Gagnon* and *LaFarge* as determining that a breach of a statute may satisfy the element of "unlawful means".

[41] I consider it is clear that, conceptually, the requirement to establish unlawful means may be satisfied by establishing a breach of statute. This includes, on the statute considered in *LaFarge*, the *Combines Investigation Act*.

[42] The second question is whether breach of this statute, the *Competition Act*, permits the tort to be advanced. This is a different question than was presented in *LaFarge,* and its answer depends largely upon the effect of the civil remedy provisions of the *Act* added in the 1975 revamping.

[43] I will start with the line of authority applicable in circumstances of enactment, as an entire being, of a regulatory scheme providing rights and remedies. This starts, in modern times, with *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9, and *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. Applying this jurisprudence, this Court in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, 295 D.L.R. (4th) 358, and *Koubi* has considered the circumstances in which civil action may be taken to enforce statutorily conferred rights (*Macaraeg*), or to remedy a statutory breach (*Koubi*). In *Macaraeg*, a putative class action to enforce overtime provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, through a claim for breach of contract where the *Act* provided a scheme to enforce compliance, Mr. Justice Chiasson for the Court wrote:

> [45] ... In my view, the question is not whether the legislation takes away the right to bring a civil action, but whether it intended that civil action be available as an exception to the general rule that rights conferred by statute are to be enforced in the statutory regime (*Orpen v. Roberts*, [1925] S.C.R. 364). In my view, an important indicator of legislative intent is the enforcement regime in the legislation. Although the court in *Stewart* talked generally of the scheme of the legislation and the intention of the legislators, it also had this to say at p. 148:
>
> > An examination of the authorities makes it clear that in the determination of this question [whether in any given case an individual can sue in respect of a breach of statutory duty] it ought to be considered whether the action is brought in respect of the kind of harm which the statute was intended to prevent, if the person bringing the action is one of the class which the statute was designed to protect, and if the special remedy provided by the statute is adequate for the protection of the person injured.

…

> [73] The law is clear: the general rule is there is no cause of action at common law to enforce statutorily-conferred rights. The exception arises when, on a construction of the legislation as a whole, the court concludes the legislators intended that statutorily-conferred rights can be enforced by civil action. An examination of the cases suggests that the rights are not enforced per se, that is, standing alone, but are enforced in a recognized cause of action: *Orpen* – an alleged "negative easement (enforceable in the same manner as a restrictive covenant)"; *Waghorn v. Collison* (1922), 91 L.J.K.B. 735 – claim for wages as a debt; *Stewart* – breach of contract; *Kolodziejski* – breach of contract. In *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 222-223, the court stated that breach of a statute is evidence of negligence:
>
> > The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England.
>
> [74] In my view, in ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic. …

[44] In *Koubi*, Madam Justice Neilson took the question to a civil action for breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. She applied the above passages from *Macaraeg* and concluded:

> [63] I am satisfied the chambers judge erred in this cursory treatment of the *BPCPA*. A close examination of the statute's legislative objectives and provisions reveals a clear intent to provide an exhaustive code regulating consumer transactions, directed to both protection of consumers and fairness and consistency for all parties in the consumer marketplace. The Act has over 200 provisions that comprehensively establish, administer, and enforce statutory rights and obligations directed to the regulation of consumer transactions in a multitude of circumstances. It provides extensive powers and remedies to a statutory director and investigative staff to ensure compliance with its requirements. These include investigation, collection of evidence, and enforcement through undertakings, compliance orders, prohibition orders, court-appointed receivers or property freezing orders, in addition to recourse to court proceedings as set out in ss. 171 and 172. It also enacts a panoply of statutory sanctions for suppliers and other offenders who breach the statutory rights of consumers, including administrative penalties of up to $50,000 for a corporation, and offences with penal consequences that include fines of up to $100,000 for a corporate offender.

> [64] I discern nothing in the *BPCPA* to support the view that the legislature intended to augment its statutory remedies by permitting consumers to mount an action against a supplier for restitutionary relief based on the novel doctrine of waiver of tort. Such a conclusion is inconsistent with the express language of ss. 171, 172(3)(a) and 192, which clearly limit recovery for pecuniary loss to restoration of the consumer's own damages or loss arising from a deceptive act.
>
> [65] I conclude the chambers judge erred in failing to comprehensively address the objectives and provisions of the *BPCPA*. Had she done so, I am satisfied she would have recognized it represents a comprehensive and effective scheme for the administration and enforcement of the statutory rights and obligations it creates. In essence, it has occupied the field of consumer rights and remedies arising from deceptive acts by suppliers. Mazda's statutory wrongdoing under ss. 4 and 5 of the Act cannot therefore provide the predicate unlawful act required for a cause of action based on waiver of tort and restitutionary damages. Ms. Koubi is restricted to the remedies provided by the Act. I am satisfied Ms. Koubi's claim for restitutionary damages and disgorgement of profits arising from waiver of tort does not disclose a cause of action.

[45] The general question of statutory interpretation framed by these cases is whether the legislature intended that the tools of common law and equity could provide a basis for recovery for breach of statute.

[46] Now I observe that in neither of these cases, *Macaraeg* and *Koubi*, was the statutory regulatory scheme developed in two steps as was the *Competition Act,* in which the predecessor statute, as the first step, made no provision for civil redress. The only reference to civil action in the pre-1975 statute was now s. 62 providing simply that penal enforcement of the *Act* does not deprive a person of any civil right of action he or she may have. There was, therefore, a vacuum in the *Combines Investigation Act* in respect to civil redress that *LaFarge* allowed to be filled by a common law action for unlawful means conspiracy.

[47] The plaintiff says the combined effect of *LaFarge* and the two-step creation of the present *Competition Act* is engagement of the standard applied for negating an existing common law remedy as set out in *Rawluk* and *Goodyear Tire*. In *Bryan's Transfer Ltd. v. Trail (City)*, 2010 BCCA 531, Madam Justice Kirkpatrick discussed the principle of respect for the common law, saying at para. 45:

> It is an established principle of statutory interpretation that legislatures are presumed to respect the common law. It is further presumed "that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis, 2008) at 431. This presumption permits a court to insist on precise and explicit direction from the legislature before accepting any change. Halsbury describes the principle as follows (36 Hals 4th ed. (vol. 44(1)) 1436–1439:
>
> > 1436. ... It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not be taken as intending to change either common law or statute law otherwise than by measured and considered provisions. Where, therefore, the legal meaning of an enactment is doubtful, it will be presumed, other things being equal, that it was intended to effect the least alteration of the existing law.
> >
> > In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. ...
> >
> > ...
> >
> > 1438. ... It is a principle of legal policy that Acts should not be taken to limit common law rights, or otherwise alter the common law, unless they do so clearly and unambiguously but, if the language is clear, there is no reason why such Acts should be construed differently from others.
> >
> > [Footnotes omitted.]

[48] How, then, is the redesign of the combines legislation to a modern regulatory scheme complete with provision for civil redress to be considered – on the standard set out in *Macaraeg* and *Koubi*, or, as the plaintiff would have it, on the standard for negating an existing common law remedy.

[49] *Wakelam* does not advert to this question; it does not address the potential effect of the augmentation of the *Act* to include a process for civil redress, previously available only at common law under a *LaFarge* approach. Rather, it addresses directly the question posed most plainly in *Koubi*: is the statute a complete code evincing an intention that civil remedies for its breach are limited to those provided in the *Act*? This is likely because by the time *Wakelam* reached this Court, the only claim advanced under the *Competition Act* was a claim for compensation for breach of the statute. That is, of course, exactly what s. 36 addresses. As the case was

framed in *Wakelam*, there was no claim in tort, and certainly not the claim of unlawful means conspiracy entertained in *LaFarge*.

[50] Addressing the issue before her, and relying heavily upon the reasons for judgment of Chief Justice Dickson in *General Motors* describing the complete nature of the legislation, Madam Justice Newbury commented on the "well-integrated scheme":

> [89] Parliament has not seen fit to amend s. 36 since its predecessor was enacted, nor to provide additional private law remedies for contraventions of Part VI of the Act. We were not referred to anything that suggests the statutory remedies provided by that Part are "inadequate" (to use the term employed in *Macaraeg, supra*.) The statutory right of action remains "hedged about by restrictions" (to use the phrase of Glanville Williams in "The Effects of Penal Legislation on the Law of Tort" (1960) 23 *M.L.R.* 233, at 244), including the two-year limitation imposed by s. 36(4). The Court in *General Motors* was careful to emphasize that this right of action was part of the "well-integrated scheme" of the whole Act, and that it did not create a right of action "at large". Had it done so, it appears the constitutional verdict in *General Motors* might have been different.
>
> [Emphasis added.]

[51] She held that there is nothing in the statute to indicate that the statutory right of action provided by s. 36 should be augmented by a right to sue in tort or a right to seek restitutionary remedies for breach of Part VI. A case, however, only stands for a proposition in the context of the facts on which the decision was made: *Grabber and Janes v. Stewart*, 2000 BCCA 206, 185 D.L.R. (4th) 303 citing *Quinn v. Leathem*, [1901] A.C. 495; *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al.*, 2007 BCCA 22 rev'd on other grounds 2008 SCC 54. Madam Justice Newbury was not addressing the tort of unlawful means conspiracy – she was dealing with restitutionary claims based solely on breach of the statute and it is a misreading of her reasons for judgment, in my view, to take *Wakelam* that far. Indeed, by her description of the remedy created by the *Act* not being "at large" she presaged a claim of larger scope.

[52] Remedies may differ. Even economic torts have differences, as demonstrated by *Bram*, a case largely concerned with the tort of unlawful means but which helpfully explains that the unlawful means required for that tort has a narrower

compass than the unlawful means for the conspiracy tort we are addressing. Although *Bram* does not address the availability of these claims under the *Competition Act* and so does not consider whether the scheme of the *Competition Act* encompasses all remedies associated with breach of the *Act,* in drawing the distinction between unlawful means tort and unlawful means conspiracy, *Bram* demonstrates the variation that may be associated with claims in economic torts, and the full panoply of remedies available for alleged economic harms.

[53] The dividing point in this appeal on the tort issue turns on the lines of jurisprudence that govern. Does it call for a *Koubi/Macaraeg/Wakelam* approach, or does it engage the principle discussed in *Rawluk* and *Bryan's Transfer*?

[54] This answer is provided, in my view, by *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298. In *Gendron* the Court grappled with the availability of an action based on the common law duty of fair representation by a trade union, in the presence of labour legislation that codifies the common law. Justice L'Heureux-Dubé for the Court, observed at 1319:

> In view of the legislation we must consider here, the words of McLachlin J. in dissent in *Rawluk, supra,* are appropriate. To use her words in the context of this case, the common law duty of fair representation is neither "necessary or appropriate" in circumstances where the statutory duty applies. Parliament has codified the common law duty and provided a new and superior method of remedying a breach. It is therefore reasonable to conclude that while the legislation does not expressly oust the common law duty of fair representation, it does however effect this end by necessary implication or, to once again use the language in *Goodyear Tire, supra,* Parliament has, by the enactment of this particular legislative scheme, expressed its intentions with "irresistible clearness".
>
> [Emphasis in original.]

[55] The question may be framed as whether the *Competition Act* provides "a new and superior" method of remedying a breach of the statute. By looking at the question in this fashion, I find it easier to see whether the 1975 (and after) amendments to the combines legislation filled the role that the tort of unlawful means conspiracy, contemplated by *LaFarge*, occupied.

[56] The elements of unlawful means conspiracy are explained in *LaFarge* and in *Pro-Sys*: the conduct of the defendants is unlawful; the conduct is directed towards the plaintiff (alone or with others); the defendants should know that injury to the plaintiff is likely to result; and injury to the plaintiff does occur.

[57] This tort is not identical to the claim under s. 36. Indeed, by requiring proof of elements directed towards the plaintiff it is narrower than a claim under s. 36. Once proved, however, the range of damages and remedies is different and broader than is available under s. 36. The claim for unlawful means conspiracy admits of punitive damages: *Claiborne Industries Ltd. v. National Bank of Canada*, [1989] O.J. No. 1048, 59 D.L.R. (4th) 533 (Ont. C.A.); *ICBC v. Atwal*, 2010 BCSC 338, aff'd 2012 BCCA 12. Nor is the limitation period for a claim in tort as brief as that in s. 36.

[58] In my view, it cannot be said that the scheme for civil redress in s. 36 of the *Act* is a replacement for an action in common law for unlawful means conspiracy. This is the same conclusion as was reached by Madam Justice Helper in *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335, [1990] 2 W.W.R. 42 (Man. C.A.), although for somewhat different reasons. In particular I do not rely, as she did, upon *Stephens v. Gulf Oil Can. Ltd.* (1975), 11 O.R. (2d) 129, 65 D.L.R. (3d) 193 (C.A.). As in *Westfair*, I consider a claim for unlawful means conspiracy relying upon breach of the *Competition Act*, is a viable pleading. My conclusion extends to a claim in restitution and waiver of tort to the extent those claims derive from the tort of unlawful means conspiracy.

[59] I turn now to the secondary issue on this appeal, the claim for restitution for simple breach of the *Competition Act*. This is, indeed, the claim that was before the court in *Wakelam*. In my view *Wakelam* is dispositive of the issue. To the extent the claim derives from non-observance of the *Act* and nothing else, for the reasons given by Madam Justice Newbury, the remedy provided by the *Act* in s. 36 is the sole route to recovery.

[60] The plaintiff says that *Wakelam* was decided without the benefit of *Westfair*, *Pro-Sys*, and *Bram*, leaving it open to us to find *Wakelam* is wrongly decided. None

of these cases compels that conclusion in my view. *Westfair* was a claim for the tort of unlawful means conspiracy and not a bare claim in restitution for breach of the statute. *Bram* did not address remedies available under the *Competition Act*. It is said that *Pro-Sys*, however, is a case of a claim for restitution under the *Competition Act* that withstood the cutting scissors, and demonstrates the error of *Wakelam*. I do not consider that *Pro-Sys* contradicts *Wakelam*; the issues discussed in the two cases were different. Although the outcome of *Pro-Sys* is certification of a claim for restitution reliant on breach of the *Competition Act*, that claim was one of many advanced and the central issue in *Wakelam* was not taken in *Pro-Sys*. Instead the discussion on restitution in *Pro-Sys* addressed the potential for a claim by indirect purchasers who purchased from a direct purchaser said, in turn, to have been overcharged.

[61] I conclude that the claim for unlawful means conspiracy based upon ss. 45 and 61 of the *Act*, and claims in restitution and waiver of tort in relation to that tort disclose a reasonable claim, that is, it is not plain and obvious that it cannot succeed. Accordingly, it satisfies s. 4(1)(a) of the *Class Proceedings Act* in my respectful view. On the other hand, I conclude on the basis of *Wakelam* that claims in restitution for simple breach of the *Act* cannot succeed.

[62] On these conclusions I would allow the appeal by including in para. 10 of the order the words “unlawful means conspiracy” and by excising from para. 11 of the order the words “conspiracy to commit an unlawful act” and substituting “restitution in lieu of a claim under s. 36 for breach of ss. 45 and 61 of the *Act*.” Any consequent amendments to the pleadings should be resolved by the trial court along with certification issues that will arise.

APPEALS CA41749, CA41750, CA41751, CA41752, CA41754, CA41755, CA41756, CA41757, CA41758, CA41760, CA41761 – ALL DEFENDANTS

[63] I turn now to the appeals of the defendants.

[64] Earlier I described in general terms the credit card network architecture as pleaded in the Further Amended Notice of Civil Claim and the conspiracies alleged.

The Chief Justice concluded that some pleadings could stand, and that those pleadings raise common issues suitable for determination in a class proceeding: damages for breach of s. 45 pursuant to s. 36 of the *Competition Act*; common law conspiracy to injure; and restitution for unjust enrichment and waiver of tort in respect to conspiracy to injure.

[65] The defendants contend that the Chief Justice erred in refusing to strike certain pleadings and in certifying common issues for determination as class proceedings. Their appeals raise issues under s. 4(1)(a), (c), (d), and (e) of the *Class Proceedings Act*.

[66] Taken globally, these appeals raise issues of the adequacy of the pleadings of the causes of action the Chief Justice allowed to advance, the identification of issues as common, the preferability of advancing the claim as a class proceeding, and the suitability of the plaintiff to carry the action forward. Accordingly, I propose to address these issues collectively, and then to address separately the unique issues raised by Fédération des caisses Desjardins du Québec in its appeal.

Section 4(1)(a) of the Class Proceedings Act

[67] The defendants state their grounds of appeal somewhat differently. Setting aside for the moment the grounds of appeal of Fédération des caisses Desjardins du Québec, the defendants collectively contend that the pleadings do not adequately plead a s. 36 claim under the former or current s. 45 of the *Competition Act*, or conspiracy to injure under the common law and equity (not based on breach of the *Competition Act*). The defendants say the Chief Justice erred in finding s. 4(1)(a) of the *Class Proceedings Act* is satisfied in respect to those claims.

[68] In discussing s. 4(1)(a) of the *Class Proceedings Act* I shall first address the appeals as they relate to ss. 36 and 45, and then turn to the claims for common law and equitable remedies that are not based on breach of the *Competition Act*.

Claim Based on Sections 36 and 45 of the Competition Act

[69] I repeat for convenience the sections of the *Competition Act* engaged in the claim for damages for criminal conspiracy. Section 36 provides:

> 36. (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, …
>
> …
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> ...
>
> (4) No action may be brought under subsection (1),
>
> (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
>
> (i) a day on which the conduct was engaged in, or
>
> (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later, …

[70] Section 45, formerly and now, is within Part VI referred to in s. 36. Prior to March 12, 2010, s. 45 provided:

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

[71] Section 45 currently provides:

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

> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.
>
> …
>
> (8) The following definitions apply in this section.
>
> "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(*a*) to (*c*).
>
> "price" includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

[72] As a criminal conspiracy provision, s. 45 has elements of *actus reus* and *mens rea* that must be proved in order for a claim under it to succeed. In the context of a civil claim alleging breach of s. 45, material facts must be alleged that, where proved, will establish each element of the offence described in s. 45. In *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), Mr. Justice Smith described the requirements of a proper plea of a cause of action:

> [6] A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, *Handbook of Common Law Pleading*, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:
>
> > Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.
>
> If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the particulars should follow and should be identified as such: *Gittings v. Caneco Audio-Publishers Inc*. (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

[73] For the purposes of this case, the *actus reus* elements of former s. 45 are:

i) the defendant conspired, combined, agreed, or arranged with another person; and

ii) the agreement was to enhance unreasonably the price of a product, to lessen unduly the supply of a product, or to otherwise restrain or injure competition unduly.

[74] The *mens rea* element of former s. 45 as defined in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 659-660, 93 D.L.R. (4th) 36, requires:

i) the defendant had a subjective intention to agree and was aware of the agreement's terms; and

ii) the defendant had the required objective intention, that is, a reasonable business person would or should be aware that the likely effect of the agreement would be to lessen competition unduly.

[75] The *actus reus* elements of present s. 45 (looking to subsection (a)) relevant to these appeals are:

i) the defendant conspired, agreed, or arranged with a competitor in respect to a product; and

ii) the agreement was to fix, maintain, increase, or control the price for the supply of the product.

[76] Adapting the approach in *Nova Scotia Pharmaceutical Society* to current s. 45, I would take the *mens rea* required for proof of current s. 45 as including the subjective intent to agree knowing the terms, and the objective intention to fix, maintain, increase, or control the price for the supply of the product.

[77] Both versions of s. 45 use the words "conspires", "agrees", and "arranges". Former s. 45 includes as well "combines". In *R. v. Armeco Canada Ltd.* (1976), 70

D.L.R. (3d) 287 at 296, 13 O.R. (2d) 32 (C.A.), leave to appeal ref'd, 13 O.R. (2d) 32n, all these words are described as connoting a meeting of the minds or a mutual understanding. I agree with that approach and have read the pleadings with that description in mind.

[78] The defendants contend that the plea of a claim under s. 36 for breach of s. 45 does not meet the standard of stating all material facts, and say for that reason it is plain and obvious that the s. 36 claim cannot succeed. They submit, as they did in the Supreme Court of British Columbia, that the Further Amended Notice of Civil Claim fails to disclose a reasonable cause of action because it fails to state:

a) as to both versions of s. 45, the "product" said to be the subject of the alleged conspiracy;

b) as to both versions of s. 45, the agreement alleged to constitute the conspiracy;

c) as to both versions of s. 45, the necessary *mens rea*;

d) as to former s. 45, that the alleged agreement was to lessen "unduly" competition with respect to the product; and

e) as to current s. 45, that any agreements alleged are "with a competitor".

[79] Further, the defendants contend that the claim is bound to fail because it is brought outside the two-year limitation period established by s. 36(4).

[80] Although these issues require consideration of the two versions of s. 45, the Further Amended Notice of Civil Claim does not differentiate between the two provisions; it pleads one set of allegations said by the plaintiff to meet the requirements for a valid plea in respect to both versions of s. 45.

[81] I have concluded, respectfully, that the defendants are correct in respect to their point (e) above, and so as to the claim based upon current s. 45, I would order

it cannot proceed. I find it convenient, however, to address the issues just listed *seriatim*.

a) Pleading of the "Product"

[82] Both versions of s. 45 refer to the "product". Both former ss. 45(1)(b) and (c) require the agreement to be in respect to "a product"; former s. 45(1)(d) is not overtly directed to "a product" but in referring to "competition", it must refer to something in which competition is possible, that is, a "product". Likewise, current s. 45 requires an agreement in respect to the "product".

[83] The Chief Justice did not focus upon the term "product", but did say:

> [93] … 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.
>
> [Emphasis added.]

[84] I read this passage as a conclusion that the "product" in respect to which it is said there is a conspiracy is credit card network services. On my reading of the pleadings, this conclusion is amply supported. For example, the Further Amended Notice of Civil Claim pleads:

> 22. In essence, the Visa and MasterCard networks are organizations that facilitate credit and debit card transactions. They do so by setting standards for the exchange of transaction data and funds among merchants, Issuing Banks, and Acquirers. The networks also provide authorization, clearance and settlement services for all Visa and MasterCard-branded payment card transactions.
>
> …
>
> 32. … [T]he Visa network and MasterCard network have created agreements or arrangements that impose significant restrictions on the terms upon which credit card network services are provided to merchants …
>
> [Emphasis added.]

And, after alleging various agreements in respect to rules and fees:

> 58. Specifically, in committing the acts particularized in paragraphs 43-54, the defendants conspired to fix, maintain, increase or control the price for the supply of credit card network services to the Class.
>
> [Emphasis added.]

[85] The defendants are critical of the description of "product" as "the supply of credit card network services", saying this does not particularize the product, the supplier of the product, or the party to whom the product is supplied. They refer to the decision of the Competition Tribunal dismissing the Commissioner of Competition's price maintenance allegations against Visa and MasterCard on the basis that the networks and acquirers sell different products: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10. They complain that the pleading would not suffice for an indictment under former s. 45, and say the same would be the case under the current provision. Citing *R. v. Larche*, 2006 SCC 56, [2006] 2 S.C.R. 762 and *R. v. B.(G.)*, [1990] 2 S.C.R. 30, the defendants contend the pleadings are deficient by not lifting the general allegation to the particular allegation, and not allowing them to "factually … grasp the reproached circumstances" so as to permit them to know what might characterize the forbidden act. Based upon *Nova Scotia Pharmaceutical Society*, the defendants submit that the issue of undue lessening of competition engages a market structure enquiry, which in turn requires precision with respect to the product or services in which the competition is said to be wrongly reduced by the impugned behaviour. They hold up as an exemplar the pleadings in *Nova Scotia Pharmaceutical Society* particularizing the product as "prescription drugs and pharmacists' dispensing services" offered to beneficiaries of certain insurance plans in Nova Scotia.

[86] I would not accede to this submission.

[87] The pleadings, in my view, meet the basic requirement of identifying the product the claim concerns. It is to be remembered that this is a pleading, not an indictment, and is capable of amendment or further particularization. Further, contrary to submissions that the pleading does not define the supplier or the recipient of the product, the pleading describes the various parties' roles in the supply of credit cards to card holders for use with merchants, and the agreements between merchants and the acquirers. The scheme as pleaded is encompassed in the phrase in para. 58 replicated above, "supply of credit card network services to

the Class". In my view, the product is well described by the phrase in the pleadings, alluded to by the Chief Justice, supply of credit card network services to the class. I see no error by the Chief Justice in respect to this requirement of either version of s. 45.

b) Pleading of the Agreement

[88] Both versions of s. 45 require the defendants to have conspired, agreed, or arranged with the alleged co-conspirators. The defendants contend that the pleadings are deficient in that they are unclear and unspecific as to the agreements or arrangements in issue.

[89] In a related submission, the defendants complain that as to current s. 45, any agreements alleged are not between co-conspirators as required by the provision but rather are between entities whose agreement is not forbidden by that section, in other words, they say that in respect to current s. 45, the pleading is of a conspiracy that is not prohibited because the impugned arrangement is not with a competitor in respect to the product identified above. I will address this latter issue below under point (e).

[90] The Chief Justice described the Further Amended Notice of Civil Claim:

> [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.

[91] He concluded:

> [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. ...

[92] And:

> [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.

[93] I have generally described the alleged scheme above in paras. 11 to 15. The Chief Justice accurately observed that the Further Amended Notice of Civil Claim identifies interchange fees, merchant discount fees, and network rules, and alleges agreements and arrangements between the parties. For example, describing the alleged Visa conspiracy (an identical pleading is alleged concerning the alleged MasterCard conspiracy), the plaintiff alleges:

> [43] Various Issuing Banks, including the defendants CIBC, Desjardins, RBC, Scotiabank, and TD, along with other Issuing Banks not named as defendants, participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with Visa, each other, and other issuing Banks regarding the rates of Interchange Fees paid to Issuing Banks by Acquirers within the Visa credit card network. These agreements include, but are not limited to, the Visa Rules. Visa, CIBC, Desjardins, RBC, Scotiabank, and TD are jointly and severally liable for the actions of, and damages allocable to, Visa and the co-conspirator Issuing Banks.
>
> [44] Acquirers, including Acquirers not named as defendants or owned or controlled by defendants, participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with each other, Visa, and the Issuing Banks. These agreements include, but are not limited to the Visa Rues. Pursuant to these agreements,

> the Acquirers entered into merchant agreements with merchants across Canada, including the Visa Class Members, which imposed standard anti-competitive terms and conditions, including the Networks' Rules and the Merchant Restraints. The agreements resulted in the imposition of supracompetitive rates for Merchant Discount Fees, including Interchange Fees, paid by the Visa Class Members. . . .
>
> [Emphasis added.]

[94] Further paragraphs in the pleadings allege communications, conversations, and meetings through which the defendants conspired or agreed to impose the merchant discount fees and enforce adherence to the merchant restraints.

[95] In my view, the Further Amended Notice of Civil Claim amply supports the conclusion of the Chief Justice that an agreement or meeting of minds concerning the various components of the alleged wrongful scheme is pleaded.

[96] I see no basis on which to say the Chief Justice erred in finding that a mutual understanding, required for an offence under s. 45, is sufficiently pleaded.

c) Pleading the Mens Rea

[97] The defendants contend that the Chief Justice erred in respect to a plea of *mens rea* for both versions of s. 45. Again I do not agree.

[98] The Chief Justice said as to *mens rea*:

> [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.

[99] I have earlier described the *mens rea* of an offence under s. 45 of the *Competition Act*. This mental element is not neglected in the pleadings: these aspects are encompassed within s. 45 and the pleadings identify s. 45 as one foundation for the action:

> 57. … the acts particularized … were in breach of s. 45 … at the time the acts were committed …

[100] To the extent s. 45 establishes legal content of the mental element, the parties know from that paragraph that the defendants allege the mental element of the offence. This, in my view, is an entire answer to this ground of appeal.

[101] The defendants contend that the Chief Justice erred by saying both that a sentence in the pleadings on voluntariness and knowledge can be inferred and that the appropriate objective intention may be handled by inferences from the *actus reus* and the content of agreements. I do not agree. Pleading is an art, to be undertaken with knowledge of the ingredients of the cause of action but also with common sense as to what may be drawn from proof of the facts alleged, bearing in mind always that pleadings should not be redundant, prolix, or pedantic. While I would not suggest that a sentence may be inferred into the pleading, for the reason that all pleadings must be overt, the mental element need not always be pleaded; depending on the cause of action and the facts already pleaded, proof of an element may be by inference. So, for example, in a claim of battery, an intentional tort of trespass against the person, we do not always see a plea of intention such as "the defendant intended to strike the blow".

[102] In this case the Chief Justice approached the issue of the required mental element from the common sense view of the possible implications of the facts alleged. His observations are cogent. For this reason also, I would not interfere with his conclusions.

d) Former s. 45 – Pleading of "Undue Lessening of Competition"

[103] Breach of former s. 45 requires proof of unreasonable enhancement of the price of a product (s. 45(1)(b)), of undue lessening of supply of the product (s. 45(1)(c)), or of undue injury to competition (s. 45(1)(d)). Given that the product pleaded is credit card services to members of the class, it is difficult on the pleadings to apply the theory of the claim to s. 45(1)(c) which refers to a lessening of supply of the product. Thus, although some parties referred us to that section, I am setting it aside and will look instead to pleadings connected to s. 45(1)(b) and s. 45(1)(d).

[104] The Chief Justice said, as to the pleading addressing former s. 45 and the requirement of an undue effect:

> [95] ... 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. ...
>
> …
>
> [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.
>
> [Emphasis added.]

[105] In submitting that the pleading of undue impact is insufficient, the defendants refer to *Nova Scotia Pharmaceutical Society* and contend that "a proper plea of market structure and market power is … essential". They submit that the plaintiff's failure to plead these aspects is a fatal omission to a plea of breach of s. 45 and "[i]t is [that] plea … that permits the critical inquiry into the impact on competition."

[106] With respect, this submission confuses the required content of pleadings with the manner in which a claim is proved. I do not read *Nova Scotia Pharmaceutical Society* as authority on the essential content of pleading undue impact. Rather that case's discussion is addressed to the proof of undue competition. In any event, the Chief Justice stated he would give leave to amend the pleadings in the event he is persuaded that the litigation requires that step. Where a plea can be fixed by

amendment and is so recognized by the trial court, this court would not normally usurp the trial court's role by striking the plea.

[107] I would not accede to this submission.

e) Current s. 45 – Pleading of Co-Conspirators

[108] Former s. 45 and current s. 45 differ significantly in the description of the co-conspirators whose conspiracy engages the section. The defendants describe the current provision as prohibiting horizontal but not vertical conspiracies. That is, they say current s. 45 is narrower than former s. 45 and only concerns conspiracies between a person and a competitor with respect to a product. In the context of this case in which the product is credit card services offered to members of the class, they say it applies to conspiracies or agreements between acquirers, or between issuers, or even between the two credit card networks, but it does not apply to agreements between acquirers and issuers or any combination of acquirers/network/issuers.

[109] One way of looking at the meaning of competitor is to consider the nature of "the product" in respect to which the competitors compete. This is consistent with the definition of "competitor" in s. 45(8) replicated above, and is demonstrated for example in s. 45(1)(a). That section, again, provides "every person commits an offence who, with a competitor of that person with respect to a product [wrongly affects] the price for the supply of the product". On my reading, this section connects the competitor with the product in which the conspirators compete, to the price of that product.

[110] The Chief Justice rejected the submission that current s. 45 cannot apply to the conspiracy alleged:

> [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.
>
> [Emphasis added.]

[111] In my respectful view, this passage is not consonant with the language of s. 45 and that provision's requirement that the "product" as to which competition is impaired is a product in respect to which the co-conspirators compete.

[112] Looking at the statutory requirement in the light I have described, it is, I think, clear that the pleadings of conspiracy do not fit within s. 45(1) in respect to the product identified – credit card network services. For example, while agreement is alleged between the issuers, it is not alleged that credit card network services to merchants is the subject of competition between issuers, and it seems clear that the competition between them would be in respect to attracting credit card holders.

[113] In respect to the acquirers, it is perhaps possible to read portions of the Further Amended Notice of Civil Claim as alleging agreements in the nature of a conspiracy between the acquirers alone. On that reading there is alleged to be a conspiracy between acquirers concerning enforcement against merchants of the network rules and interchange fees, as part of provision of credit card services. However those rules and fees are alleged to be devised by Visa and MasterCard, and the lion's share of the fees in the form of interchange fees are alleged to flow to issuers. Thus this theory of a conspiracy by acquirers, who compete with each other

in providing credit card services to the class, would engage the other players in the scheme, being the networks and issuers. On that view, I suppose they could be aiders or abettors, as the plaintiff urged on us. The difficulty with that position is that there is no mention of aiding and abetting in the Further Amended Notice of Civil Claim and this possibility was advanced for the first time to us. In any event, that theory is contrary to the comprehensive theory of the pleadings which has the issuers, acquirers, and networks comprising an actionable conspiracy. As I indicated earlier, the Further Amended Notice of Civil Claim alleges for all causes of action the same two comprehensive conspiracies. For example, it is pleaded:

> 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).

[114] I conclude that this alternative theory of a conspiracy between acquirers is too far removed from the substance of the claim as pleaded. Indeed I conclude it is contrary to the conspiracy alleged. I thus conclude that however the Further Amended Notice of Civil Claim is read, there is a mismatch between the area of competition and the "product" affected by the alleged conspiracy that does not permit the current s. 45 to be engaged.

[115] On this understanding of the pleadings, I do not consider that the Further Amended Notice of Civil Claim sets out a reasonable cause of action under s. 45 of the current *Competition Act*, and it is plain and obvious that the claim under s. 36 in respect to current s. 45 cannot succeed.

[116] I would, accordingly, allow the appeal to the extent of striking the pleadings and setting aside the certification order as it relates to current s. 45 of the *Competition Act*.

f) The Limitation Provision in s. 36

[117] Section 36(4) of the *Competition Act* contains a two-year limitation period. The plaintiff has pleaded that the class period starts on March 28, 2001. Accordingly, say the defendants, the limitation period expired at the latest on March 28, 2003, long before this action was commenced on March 28, 2011, and so this action is statute barred. Alternatively, they say that reading the pleadings as alleging on-going illegal conspiratorial conduct by formation of successive agreements, claims arising before March 28, 2009 should have been struck. They say it is plain and obvious that much, or all, of the claim cannot succeed.

[118] The Chief Justice did not agree. He referred to authorities referred to by the defendants: *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, aff'd 2012 ONCA 867, leave to appeal ref'd [2013] 2 S.C.R. viii ("*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. Insurance Corporation of British Columbia*, [1988] B.C.J. No. 581 (S.C.), aff'd 2000 BCCA 463. He referred as well to authorities referred to by the plaintiff, *Pro-Sys Consultants v. Microsoft Corporation*, 2011 BCCA 186 and *Fuoco Estate v. British Columbia,* 2001 BCCA 325. The Chief Justice then said:

> [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.

…

[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.

[119] The defendants contend that the Chief Justice erred in his para. 119 in saying that a limitation defence must first be pleaded before the claim can be struck, and in concluding that it was premature to decide whether continuing conduct and successive offences are alleged throughout the period beginning in March 2001, on pleadings in which such a claim clearly was not pleaded.

[120] The first error contended for is not established on my reading of para. 119 of the reasons for judgment. Rather than the statement complained of having been the conclusion of the Chief Justice, it was simply a recitation of the plaintiff's submission which then was discussed and rejected by the Chief Justice.

[121] As to the second submission concerning the contents of the pleadings, it seems to me it was open to the Chief Justice to find prematurity in the limitations submission. The plaintiff pleaded for example:

> 45. During the Class Period, senior executives and employees of Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and other co-conspirators, acting in their capacities as agents for the defendants and co-conspirators, engaged in communications, conversations and attended meetings with each other. …
>
> 46. In furtherance of the conspiracy, during the Class Period, Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, their co-conspirators, and their servants and agents:
>
> …
>
> (c) communicated, in person, in writing, and by telephone, to discuss and fix the Default Interchange Fees in Canada, including British Columbia;
>
> (d) exchanged information regarding the rates for Interchange Fees and the volume of transactions using Visa credit cards for the purposes of monitoring and enforcing adherence to the agreed upon Merchant Restraints;
>
> …

> 51. During the Class Period, senior executives and employees of MasterCard, BMO, Capital One, CIBC, Citi, Desjardins, MBNA, National, RBC, TD, and their co-conspirators, acting in their capacities as agents for the defendants and co-conspirators, engaged in communications, conversations and attended meetings with each other. As a result of the communications, conversations and meetings, and through the imposition of the MasterCard Rules, MasterCard, BMO, Capital One, CIBC, Citi, Desjardins, MBNA, National, RBC, TD and their co-conspirators did and unlawfully conspired or agreed to:
>
> (a) impose the Default Interchange Rule, Merchant Restraints, and other restraints set out in the MasterCard Rules on merchants including the MasterCard Class Members and thereby unreasonably increase the rates of Merchant Discount Fees, including Interchange Fees, paid by merchants, including the MasterCard Class Members, for payments made using MasterCard credit cards in Canada including British Columbia;
>
> (b) fix, maintain, increase or control the rates of Interchange Fees in Canada including British Columbia; and
>
> (c) exchange information in order to monitor and enforce adherence to the agreed upon Merchant Restraints in Canada including British Columbia.
>
> 52. In furtherance of the conspiracy, during the Class Period, MasterCard, BMO, Capital One, CIBC, Citi, Desjardins, MBNA, National, RBC, TD, and their co-conspirators and their servants and agents:
>
> …
>
> (c) communicated, in person, in writing, and by telephone, to discuss and fix the Default Interchange Fees in Canada, including British Columbia;
>
> (d) exchanged information regarding the rates for Interchange Fees and the volume of transactions using MasterCard credit cards for the purposes of monitoring and enforcing adherence to the agreed upon Merchant Restraints;

[122] It seems to me it is open to consider these pleadings as a plea of on-going arranging of the prohibited kind. On that view, it is not plain and obvious that the limitation provision bars the claim. Nor is it plain and obvious that new members of the class, who could have had no complaint until they became a merchant agreeing to accept Visa or MasterCard credit cards in payment, would be foreclosed from a

claim because any "agreement" between the defendants was made more than two years before they became such merchants.

[123] It follows I would not accede to this submission.

Claims for Conspiracy to Injure

[124] The defendants contend that the Chief Justice erred in declining to strike the claims for conspiracy to injure and for restitution and waiver of tort based on that theory. It follows, they submit, that the common issues arising should not be certified in these class proceedings.

[125] The elements of tort of conspiracy to injure identified in *LaFarge*; *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156, 26 C.P.C. (3d) 395 (C.A.); and *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661, are:

(i) an agreement or concerted action between two or more persons;

(ii) with the predominant purpose of causing injury to the plaintiff; and

(iii) overt acts committed that cause damage to the plaintiff.

[126] The standard for pleading a conspiracy is well-recognized as strict. In *Can-Dive*, Chief Justice McEachern adopted the meticulous judgment of Mr. Justice Esson in *Thompson v. Coquitlam (District)* (1979), 15 B.C.L.R. 59 at 63 (C.A.):

> It is well settled that the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt acts causing damage.

[127] Chief Justice McEachern added:

> [8] 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 p. 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 …

[128] The defendants contend that the pleadings advanced by the plaintiffs:

a) fail to plead sufficient material facts of the identities of the parties to the conspiracies or other particulars of the conspiracies; and

b) fail to identify a predominant purpose other than maximizing profits.

[129] The Chief Justice addressed these submissions, saying:

> [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.
>
> …
>
> [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).
>
> …
>
> [136] … 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).
>
> …
>
> [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.
>
> …
>
> [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.
>
> …
>
> [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.

a) Failure to Plead Material Facts

[130] The defendants make the same arguments in respect to the pleading of the conspiracy as they did in respect to pleading the agreement for their allegation of

breach of s. 45 for purposes of s. 36, that is, they say the pleading of the conspiracy is bald and simply fails to meet the test of particulars spoken of in *Can-Dive*.

[131] The Chief Justice distinguished *Can-Dive* as a case addressing an order staying proceedings rather than an order striking pleadings, and termed the standard described in *Can-Dive* as an ideal.

[132] I agree with the defendants that the import of *Can-Dive*, based as it is in *Thompson* and Bullen, Leake & Jacob, extends beyond a stay to the requirements for pleading conspiracy to injure. I also agree that *Can-Dive* does more than describe an aspirational standard, it addresses the requirements of a valid pleading of conspiracy to injure. The standard, at the end, is the one stated by Chief Justice McEachern: "pleadings alleging conspiracy must be as specific as possible".

[133] Nonetheless, I do not consider the Chief Justice erred in principle in his conclusion on this issue. What may be pleaded by a plaintiff depends, of course, on the scope of information reasonably available to the plaintiff. *Can-Dive* does not contain much detail of the case, but it appears to address a narrow allegation of conspiracy that one could expect to be better particularized than a mere allegation of conspiring "lawfully or unlawfully".

[134] In contrast, the pleading in this case describes the relationship between the parties, in general terms the structure of credit card network service system, the fees charged to merchants, the persons who establish the fees, and the routing of the fees to the various defendants. It refers to original agreements and ongoing discussions, conversations, and arrangements that one expects would be beyond the ken of the merchants. It alleges that the allocation of the various fees is not set out in the statements sent to merchants.

[135] It seems to me that the complaint that the pleas of the tort of conspiracy to injure echoes the complaints made of the plea of a s. 45 conspiracy. For the same reasons I gave in addressing the s. 45 pleading on "agreement", I consider the Further Amended Notice of Civil Claim sufficiently pleads the conspiracy required for

the common law tort of conspiracy to injure: the parties to the conspiracy are identified; their impugned business arrangements are identified; the flow of monies is identified; the alleged harm to merchants is identified; and the start and end time in respect to which the claim is brought is identified. As the Chief Justice noted:

> [147] … 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.

b) Failure to Plead a Predominant Purpose

[136] It is clear that a pleading of this tort must allege a predominant purpose and that purpose must be to cause injury to the plaintiff: *LaFarge*, *Harris v. GlaxoSmithKline*.

[137] The Further Amended Notice of Civil Claim alleges:

> 47. Visa, CIBC, Desjardins, RBC, Scotiabank, TD, and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were to:
>
> (a) harm the plaintiff and other Visa Class Members by requiring them to pay supracompetitive rates for Merchant Discount Fees, including Interchange Fees; and
>
> (b) illegally increase their profits.
>
> …
>
> 53. MasterCard, BMO, Capital One, CIBC, Citi, Desjardins, MBNA, National, RBC, TD, and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were to:
>
> (a) harm the plaintiff and other MasterCard Class Members by requiring them to pay supracompetitive rates for Merchant Discount Fees, including Interchange Fees; and
>
> (b) illegally increase their profits.
>
> …
>
> 55. The acts particularized in paragraphs 43-54 were unlawful acts on the basis set out in paragraphs 56-58, which unlawful acts were directed towards the plaintiff and other Visa and MasterCard Class Members, which unlawful acts the defendants knew in the circumstances would likely cause injury to the Plaintiff and other Visa and MasterCard Class Members and, as such, the defendants are each liable for the tort of civil conspiracy. Further, or alternatively, the predominant purpose of the acts particularized in paragraphs 43-54 was to injure the plaintiff and the other Visa and

> MasterCard Class Members and the defendants are jointly and severally liable for the tort of civil conspiracy.
>
> [Emphasis added.]

[138] The defendants complain that paras. 47 and 53 just replicated refer to two paramount purposes and concerns, thus failing in the obligation to allege only one. They further complain that one of the two purposes and concerns referred to in those paragraphs – maximizing illegal profits – will not support the claim (see *Harris v. GlaxoSmithKline*). Third, they say the defendants have not saved this plea by electing, as was done before the Supreme Court of Canada in *Pro-Sys*, to pursue injury to the plaintiffs as the primary purpose.

[139] I would not interfere with the certification order on this basis. Paragraph 55, in my view, saves this pleading by clearly averring the predominant purpose of harm to merchants. While it might have been said that paras. 47 and 53 are inherently vague in the dualities "purposes" and "concerns", and "harm" and "increase their profits", para. 55 resolves any confusion of predominant purpose.

[140] Even had I found an impermissible dual purpose pleaded, I would have solved this issue as was done in *Pro-Sys*. There the claim was not struck at the preliminary stage, and opportunity was available for clarification. At the most this issue would justify an order requiring an amendment of the pleadings to ensure consistency with para. 55 replicated above, but given my view of the three paragraphs discussed, such an order is not necessary.

Section 4(1)(c) of the Class Proceedings Act

[141] Section 4(1)(c) of the *Class Proceedings Act* requires the plaintiff to establish that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members." This is an issue that may be resolved considering evidence adduced by the parties.

[142] The defendants contend that the Chief Justice erred in principle in finding many of the issues were common. To the extent the appeals raise issues of principle, our standard of review of the impugned order is correctness. Where the

appeals slip into the view taken, or which should be taken, from the evidence, we are bound to the deferential standard of review.

[143] The defendants do not challenge the conclusion that questions of the nature and scope of the alleged conspiracy raise common issues on liability. However, the claim is more than the allegations of conspiracy. In order to succeed the plaintiff must establish that the overt acts involved in the conspiracy caused injury to the members of the class. The Chief Justice found the issue of "injury" was a common issue appropriate for certification. The defendants say he was wrong in three ways:

a) success for the plaintiff will create both winners and losers in the class, thus defying the criteria of commonality discussed, for example, in *Vivendi Canada Inc. v. Dell'Aniello,* 2014 SCC 1, [2014] 1 S.C.R. 3;

b) there was no evidence that a plausible method exists for determining net harm to merchants, because there is no plausible method advanced to determine the correlative benefits that merchants enjoy from participation in the network; and

c) in respect to restitutionary claims for disgorgement of wrongful or unjust gains, the benefits referred to in (2) above accruing to class members from access to the networks must be considered in determining whether gains by the defendants are unjust, wrongful, and subject to disgorgement. The asserted lack of plausible evidence of a method to determine the benefits, they say, is a fatal hole in the plaintiff's application for certification.

[144] I will address the criteria for commonality and then turn to each of these three complaints.

Criteria for Commonality

[145] In *Pro-Sys*, Justice Rothstein for the court addressed the issue of commonality as it appears in this province's statute. In discussing the criteria for

certification other than s. 4(1)(a), he first observed that the class representative "must show some basis in fact for each of the certification requirements", citing *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158. This inquiry does not require an assessment of the merits of the claim but rather addresses the viability of the action going forward as a class proceeding. Justice Rothstein said:

> [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)).
>
> [Emphasis added.]

[146] Madam Justice Newbury helpfully noted in *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 25, 46 B.C.L.R. (4th) 234, that "the phrases "evidentiary basis" and "basis in fact" were used by the Supreme Court of Canada in *Hollick* … in such a manner as to be synonymous with "evidence"". Thus Justice Rothstein in *Pro-Sys* was speaking of evidence sufficient to satisfy the judge hearing the certification application that the case should be allowed to proceed.

[147] A great many cases have expounded on the essence of the requirement for commonality: notably *Western Canadian Shopping Centers Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 82 B.C.L.R. (3d) 1; *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260; and *Vivendi*. From this selection of cases, I would take four passages that explain, in my view, the essence of commonality.

[148] In *Harrington*, Madam Justice Huddart for the majority of a five-judge division of this court, wrote:

> [20] In the discussion before us and in the authorities as to what constitutes a common issue there appears to be some confounding of the question of whether a common issue of fact exists with the question of the significance of that common issue to the cause of action as a whole. This confusion seems to have developed from the well-accepted view that to be a "common issue" an issue of fact or law need not be one that is determinative of liability, but one that will "move the litigation forward." Such a determination should be relatively straight-forward. I think it would be rare for plaintiffs to state a question for consideration as a common issue that did not move the litigation forward in a legally material way.

[149] Recently, Justice Rothstein in *Pro-Sys* relied heavily upon *Dutton*:

> [108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (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.

[150] In *Rumley*, Chief Justice McLachlin addressed the scope of commonality as provided by this province's statute:

> [33] ... The British Columbia *Class Proceedings Act* explicitly states that the commonality requirement may be satisfied "whether or not [the] common issues predominate over issues affecting only individual members": s. 4(1)(c). (This distinguishes the British Columbia legislation from the corresponding Ontario legislation, which is silent as to whether predominance should be a factor in the commonality inquiry.) While the British Columbia *Class Proceedings Act* clearly contemplates that predominance will be a factor in the preferability inquiry (a point to which I will return below), it makes equally clear that predominance should not be a factor at the commonality stage. In my view the question at the commonality stage is, at least under the British Columbia *Class Proceedings Act*, quite narrow.
>
> [Emphasis added.]

[151] Last, in *Vivendi*, albeit a case from Quebec but in comments equally applicable to British Columbia, Justices LeBel and Wagner said as to the "common success" fifth factor from *Dutton* and replicated at para. 108 of *Pro-Sys*:

> [45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> [Emphasis added.]

[152] From these various cases reframing the term "common issue" I take it that a common issue need not be one that determines liability, but must be one encompassed by the litigation, and for which its answer will advance the ultimate determination of outcome. Moreover, commonality requires that the members of the class all have the same qualitative stake in the answer to the question, although the degree of importance to each member need not be the same. In other words, they cannot pull in opposite directions on the issue.

[153] I turn now to the issues raised by the defendants on the commonality requirement. In doing so I do not propose to refer to the common issues by numbers, but rather will approach the issues, as did the parties, in descriptive terms.

a) Winners and Losers are Both Included

[154] The defendants contend that the Chief Justice erred in certifying a class in which there will inevitably be both winners and losers from the impugned activity. That is, the defendants contend that the fact of harm is not a common issue susceptible of decision on a common basis.

[155] The defendants' submission rests upon the view that the expert witnesses on both sides agreed that if the plaintiff succeeds at trial some merchants in the class will be better off and some will be worse off. They complain that the Chief Justice failed to take into account the expert witnesses' agreement that the effect on interchange fees of the absence of the impugned conduct would vary among class members.

[156] The plaintiff does not agree with the defendants' interpretation of the evidence of their expert witness, Dr. Brander. She says the point on which Dr. Brander agreed with the defendants' expert witness, Dr. Ware, was a point of logic. She submits that the evidence the defendants refer to addressed what was termed the "But For" world, that is, a world absent the alleged illegal collusive conduct, and the question: could one measure the excess "between what merchants pay for credit card network services and what they would pay" absent that conduct. The plaintiff says that Dr. Brander agreed with Dr. Ware that in that world fees could be lower, higher, or unchanged, but did not agree with Dr. Ware's statement that individual class member's circumstances are relevant to which of those possibilities would result. The plaintiff points to this exchange:

> 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.

[157] The Chief Justice declined to find the expert witnesses agreed that competing interests in the class were inevitable on the evidence. He said:

> [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.
>
> …
>
> [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.

[158] On my reading of the evidence I cannot say the expert witnesses agreed there would be losers. It is clear on the authorities that varying effects on class members does not destroy commonality unless and until they are truly on the opposite sides of the "no effect" neutral line. The fact of variability itself is not fatal to certification of the issue; the question is at what point does variability put the class members opposite to each other in interest.

[159] It seems to me that the view of the evidence reflected in the reasons of the Chief Justice was open to him, and I would not interfere on that basis.

[160] The defendants also contend the Chief Justice erred in his para. 274 in saying the trial process could handle the disparate effects of the "But For" hypothesis on individuals. This submission, however, also hangs on a view of the evidence that it was agreed there would be losers, and whether the Chief Justice's view of the evidence was open to him.

[161] As I conclude it was open to the Chief Justice to decline to accept the hypothesis of inevitable losers, I would not accede to this complaint.

b) The Effect of Offsetting Benefits on Determination of Harm

[162] This and the following issue arise because the credit card network is described as a "two-sided market". This means consumers are on one side of a transaction and merchants are on the other, with both benefitting from the arrangement: credit cards are accepted by merchants because enough consumers have them and consumers wish to use credit cards because enough merchants accept them for payment. The parties agree that a change on one side can impact the other side, volume begets volume. The feedback is referred to as network effects. The Chief Justice commented on network effects:

> [241] … 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.
>
> …
>
> [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.

[163] The challenge for the plaintiff was to demonstrate that there is a methodology that can demonstrate net harm, that is, overcharging exceeds positive network effects. The Chief Justice summarized Dr. Brander's approach to this issue, saying:

> [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.

[164] He concluded, as replicated above in his para. 275, that there was a plausible method of demonstrating net harm "on a class-wide basis".

[165] The defendants contend that this approach incorporates two errors: first, they say Dr. Brander never addressed how his methodologies would deal with network effects. They contend his analysis was, at best, hypothetical and as such failed to meet the test for expert evidence. Second, they submit the evidence only addressed the issue on a class-wide or aggregate basis and thus could not bear on the issue of harm to class members as a common issue. This issue bears upon the same common issues noted above in the winners and losers submission.

[166] The defendants are correct that the evidence of Dr. Brander was not extensive on a method for establishing the extent of network effects, thereby to determine the harm occasioned by the impugned arrangement. However, he did say, in a passage quoted by the Chief Justice:

> 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.
>
> [Emphasis added.]

[167] There was, as the Chief Justice noted, much further examination in the same vein, including:

> 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.
>
> [Emphasis added.]

[168] The Chief Justice, after referring extensively to the evidence said:

> [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".
>
> [Emphasis added.]

[169] He said later:

> [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.
>
> [Emphasis added.]

[170] I consider the Chief Justice had an evidentiary base upon which to say there was a plausible methodology by which the harm can be shown and that the issue advanced was suitable for certification as a common issue.

[171] Second, the defendants contend that Dr. Brander's approach was on an aggregate basis, and not the class-wide basis that could be applied to individuals as is required by *Pro-Sys*, a case decided after Dr. Brander testified but before the Chief Justice, with submissions on *Pro-Sys*, published his reasons for judgment.

[172] In *Pro-Sys*, the Supreme Court of Canada, overturning a line of authority from this court addressing the aggregate damages provision, s. 29 of the *Class Proceedings Act*, held that s. 29 relates to remedy only and may not be considered in determining liability. Justice Rothstein said:

> [133] … Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.

[173] On my reading of the Chief Justice's reasons for judgment he did not invoke the aggregate claim provisions in determining there was a plausible route to establishing harm on a class-wide basis.

[174] It seems to me this submission as to the aggregate damages approach is circling back to the complaint that Dr. Brander did not propose a methodology that could establish harm on a common basis. That the case may then have to resort to individual assessments of damage in the event the plaintiff succeeds is a circumstance common to class proceedings and is not a barrier to certification. The issue is whether determination of the common issue will advance the claims of the class members. I would not interfere with the affirmative conclusion of the Chief Justice.

c) Network Effect and Disgorgement

[175] The defendants next contend that the Chief Justice erred on the question of harm by failing to consider the network benefits issue in assessing the viability of a claim for disgorgement for wrongful or unjust gains. They contend that the Chief Justice failed to determine whether the amount of benefit to merchants from the alleged overcharging could be determined, thereby to reduce the amount that should be disgorged as a restitutionary remedy in the event the plaintiff otherwise establishes a basis for restitution.

[176] The defendants refer to *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, in turn referring to this court's decision in *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26:

> [104] In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. I will briefly set out why, in my view, this approach is sound.
>
> [Emphasis added.]

[177] Based on this passage, the defendants contend that the benefits conferred on merchants must be considered as evidence of a juristic reason for the enrichment,

as part of the unjust enrichment analysis. They say it is relevant as an offsetting factor to reduce a remedy.

[178] I would not accede to these submissions.

[179] I am of the view the defendants overstate the import of the statements in *Wilson* and *Kerr*, both family law cases, on the potential consideration of mutual benefit at the "juristic reason" stage of analysis.

[180] The starting point in considering the juristic reason for an enrichment is the judgment of Justice Iacobucci in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. In *Garland*, Justice Iacobucci described a two-step process. The plaintiff claiming the unjust enrichment must demonstrate the absence of a juristic reason for the enrichment, such as contract, gift, or legal obligation. If this is established, the plaintiff will have established a *prima facie* case subject to rebuttal by the defendant. At the second stage the defendant may contend for retaining the benefit, considering such factors as reasonable expectations of the parties and public policy. In *Wilson*, Madam Justice Huddart explained that reciprocal or mutual benefits may bear on the reasonable expectation of the parties. Adapting this structure to the case at hand, it seems to me likely that the network effects benefits is a question for the second stage to be advanced by the defendants as a juristic reason to retain the amount. The burden for that analysis would lie with the defendants. More importantly, the first stage would not engage the enquiry the defendants say should defeat these common issues. Further, it is not entirely clear that a trial court, hearing all the evidence, would adopt that approach. It may be that the policy issues referred to by the Chief Justice in his para. 309, replicated above, would find traction with a trial judge. It is premature to consider the application of such reasoning.

[181] I conclude that the issues of benefit to the defendants, deprivation of the merchants, and absence of juristic reason are all matters of commonality, as the Chief Justice determined.

[182] Nor do I accept that these common issues should not proceed because the issue of network effects benefits may be relevant to a defence, not yet pleaded, or to the determination of quantum of remedy. While it may be open to the defendants to advance the defence of network effects benefits, or seek to reduce the amount claimed as overcharges by the amount of the benefits, those decisions are far down the road. They assume answers on issues of equity not yet pleaded by defence or reply.

[183] In conclusion, I find no error in the Chief Justice's approach to this issue.

Sections 4(1)(d) and (e) of the Class Proceedings Act

[184] The defendants contend the Chief Justice erred in considering preferability and wrap into this submission a challenge to the suitability of Ms. Watson as a representative plaintiff. On the issue of preferability, the Chief Justice referred to alternatives to class proceedings: individual actions, said by the plaintiff to be cost-prohibitive; and Competition Tribunal proceedings and government regulation, said by the defendants to be preferable considering the policy nature of the issues raised. The Chief Justice rejected the proposals, referring to the criteria of preferability described by Justice Cromwell in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949:

> [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.

[185] The Chief Justice concluded:

> [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.

[186] The defendants submit that the Chief Justice erred in respect to preferability because there are so many and such substantial individual issues that the balance does not favour certification. Second, they say, the Chief Justice erred in his view of the preferable alternatives they advanced. They say it is an error to consider, as the Chief Justice did, that this action is the only realistic route to damages for the class members.

[187] The assessment of preferability calls for judgment on the part of the certification judge who, steeped in the case, is best placed to determine the mode of trial that will suit the objectives of the courts. In my view, while individual issues may be significant, I see no basis upon which to interfere with the determination to certify the action as a class proceeding and I adopt the approach of Madam Justice Huddart in *Harrington*:

> [19] … [A] certification order is interlocutory and concerns case management, a task for which this court, as a court of error, is ill-equipped, either in authority or experience.

[188] Nor, in my view, should I take a different view of the alternatives and their potential for an effective remedy for these class members than was taken at the certification hearing. A proper foundation for the conclusion is established and no error of principle is demonstrated. I find no error in respect to s. 4(1)(d).

[189] Swept into the appeal but not pursued vigorously is a challenge to the identity of the representative plaintiff. The challenge turned on the proposition there may be both winners and losers. The Chief Justice was not persuaded this was the case.

Nor am I. In the event this prospect emerges, the *Class Proceedings Act* is sufficiently robust to allow for the changes necessary to eject the "losers" from a role in the proceedings.

APPEAL CA41754 – FÉDÉRATION DES CAISSES DESJARDINS DU QUÉBEC

[190] Last, I turn to Desjardins's appeal. I note that Desjardins has asserted confidentiality in respect to documents that in its view contain trade sensitive information. In consequence, these reasons are, necessarily, somewhat general in describing some of the business practices of Desjardins, and are consistent with the redacted documents before us.

[191] Desjardins contends that the Chief Justice erred as asserted by the other defendants and also erred in ways specific to it, particularly:

a) in finding the Further Amended Notice of Civil Claim pleaded overt acts necessary to establish the tort of conspiracy to injure, and in certifying that cause of action and the related claims in unjust enrichment and waiver of tort against Desjardins; and

b) in finding the plaintiff had established as against Desjardins some basis in fact for the proposed common issues.

[192] As a foundation for its submissions, Desjardins addressed the evidence it adduced to establish its model of business in the credit card industry differs from the model employed by the other defendant banks. It points to evidence that:

1) it is a financial services cooperative governed by the *Act Respecting Financial Services Cooperatives*, R.S.Q. c. C-67.3, not a bank governed by the *Bank Act*, R.S.C. 1991, c. 46;

2) unlike most of the other defendants (excluding Visa and MasterCard), it is both an issuer of credit cards and an acquirer;

3) as an issuer, Desjardins issues credit cards but has never issued "premium" credit cards that attract higher merchant discount fees;

4) Desjardins is an acquirer for merchants in respect to Visa and MasterCard pursuant to both standard and individually negotiated payment services agreements;

5) for each payment services agreement made with a merchant, merchant discount fees are established for the fees payable by its merchants. The fees are calculated on a monthly, not per transaction, basis for the credit card services and for other related services;

6) as an acquirer, when the credit card presented to its merchant is not one it issued, Desjardins pays an interchange fee to the issuer, a network fee, and a transaction fee;

7) as an acquirer, when the credit card presented to its merchant is one it issued, the transaction takes place on its own network and no interchange fee is paid;

8) merchants receive 100% of the value of credit card transactions; and

9) at the end of each month Desjardins charges its merchants the merchant discount fees established by the terms of the individual payment services agreement made with the merchant.

[193] Desjardins submits these business practices differ significantly from the key aspects of the credit card services industry alleged by the plaintiff in that:

1) most of its transactions are not processed and cleared over the Visa and MasterCard networks;

2) for most transactions it is issuer and acquirer, unlike most of the other defendants;

3) the model of fees addressed by Dr. Brander, a model in which the merchant discount fee comprises the interchange fee, the service fee, and the network fee, is not its model;

4) there are no premium cards with attendant higher fees in its model; and

5) Desjardins does not charge fees as a percentage of the transaction, contrary to the general setting of merchant discount fees by other defendants.

[194] Further, Desjardins submits that the statutory mandate it has and the role it fills results in a business that is not strictly profit-driven. Desjardins says it is bound to consider its members, clients, and broader communities, and that in setting its merchant discount fees it applies a blended formula that does not result in full, uniform, or inevitable cost recovery of the interchange fees it pays on some but not all of the transactions it acquires (that is, to other issuers).

a) Pleading and Certifying Causes of Action

[195] Desjardins contends the individual and distinct overt acts necessary to a valid plea against it of conspiracy to injure, and restitution and waiver of tort related thereto, are not pleaded. It complains that the same overt acts are alleged to have been performed by all defendants, regardless of the defendant's role in the credit card industry. It complains, for example, that para. 46 of the Further Amended Notice of Civil Claim alleges in the Visa pleading that in furtherance of the conspiracy, the defendants in the Visa network, all of whom except Visa itself are issuers, "disciplined any Acquirer which failed to impose the Default Interchange Rule or enforce the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints". As it is both an issuer and an acquirer, it says this pleading in respect to itself is nonsense – it would not conspire to discipline itself. The same would apply to the pleading in relation to the alleged MasterCard conspiracy.

[196] The Further Amended Notice of Civil Claim, as it must, pleads the identity of Desjardins, saying it is "an organization overseeing the Desjardins Group, including its caisses populaires and credit unions". It notes Desjardins is both an issuer and acquirer. It then pleads the various alleged agreements, arrangements, and conspiracies, including the vital connection to merchants, in the same terms as for other defendants who are alleged to be issuers and acquirers.

[197] In my view, there is nothing in respect to s. 4(1)(a), except as I note below, that would distinguish Desjardins from the other defendants and I generally would not accede to its submission that the causes of action against it in particular are not adequately pleaded. The only point of distinction between Desjardins and most other defendants is the apparent inconsistent pleading in para. 46 I have noted in respect to disciplining acquirers. This flaw is capable of clarification by amendment, and in my view not of a magnitude that would cause a court to reject the claim entirely. The attention it requires should be given at the trial level, and not in my view by this court.

b) Are the Common Issues Correctly Certified in Respect to Desjardins?

[198] Desjardins has framed its second ground of appeal in more particular terms than the heading above suggests. I take the gravamen of Desjardins's submissions on its second ground to be a complaint that whatever be the theory of commonality of issues in respect to the other defendants, that theory does not apply to it because its business model is distinct, as established by uncontroverted evidence. Desjardins says these differences put its merchants in a different situation than non-Desjardins merchants, thus fracturing the commonality. Desjardins says its distinct nature was given insufficient attention by the Chief Justice, and had he fully appreciated its business model, he would not have included it in the certification order.

[199] In response the plaintiff reminds us of the deference we must accord findings of fact by a trial court. She reviews the evidence and concludes the "business differences that Desjardins asserts are more imagined than real …. Dr. Brander's characterization of such differences as "details" is fair in light of the common facts which are far more important".

[200] The Chief Justice said with respect to Desjardins:

> [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.
>
> …
>
> [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.

[201] With respect, it does not appear to me that the reasons for judgment address Desjardins's basic propositions that its merchants are in such a different position than non-Desjardins merchants that one cannot say there is the requisite commonality amongst them, and that the other several differences identified take Desjardins as both issuer and acquirer out of the pool of commonality.

[202] Whether, on a full consideration, the common issues identified by the Chief Justice support certification for the class in respect to Desjardins, in my view, is something that must be determined by the trial court, and not by us. I would set aside the certification order in respect to Desjardins and remit the certification application in respect to it to the Supreme Court of British Columbia.

CONCLUSIONS

[203] This brings me to my summary of conclusions on these appeals.

[204] I would allow the plaintiff's appeal only to the extent of:

(i) adding "unlawful means conspiracy" to para. 10 of the order; and

(ii) striking the words "conspiracy to commit an unlawful act" and substituting "restitution in lieu of a claim under s. 36 for breach of ss. 45 and 61 of the *Act*" in para. 11 of the order.

[205] I would allow the defendants' appeal only, except as to Desjardins, to the extent of:

(i) striking the words "as amended from time to time" and substituting "prior to March 12, 2010" in para. 10(a) of the order; and

(ii) adding "breach of s. 45 of the *Competition Act* after March 12, 2010" to para. 11 of the order.

[206] In my view, consequent amendments to the common issues and the pleadings should be resolved by the Supreme Court of British Columbia to reflect the above result.

[207] Finally, in addition to the order in para. 205 above, I would further allow Desjardins's appeal by striking the order certifying the action against Desjardins, and remitting the certification application to the Supreme Court of British Columbia for fresh determination.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Madam Justice Neilson"

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?