COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ewert v. Nippon Yusen Kabushiki Kaisha,* 2019 BCCA 187

Date: 20190529
Docket: CA45021

Between:

Darren Ewert

Appellant
(Plaintiff)

And

Nippon Yusen Kabushiki Kaisha;
NYK Line (North America) Inc.; NYK Line (Canada), Inc.;
Mitsui O.S.K. Lines, Ltd.;
Mitsui O.S.K. Bulk Shipping (U.S.A.), Inc.;
Kawasaki Kisen Kaisha, Ltd.; "K" Line America, Inc.;
EUKOR Car Carriers, Inc.;
Wilh. Wilhelmsen Holding ASA; Wilh. Wilhelmsen ASA;
Wallenius Wilhelmsen Logistics Americas, LLC;
Wallenius Wilhelmsen Logistics AS;
Wallenius Lines AB; WWL Vehicle Services Canada Ltd.;
Toyofuji Shipping Co., Ltd.;
Compania Sud Americana De Vapores S.A.;
CSAV Agency North America, LLC;
Nissan Motor Car Carrier Co., Ltd.;
World Logistics Service (USA) Inc.;
Höegh Autoliners AS; Höegh Autoliners, Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated December 21, 2017 (*Ewert v. Nippon Yusen Kabushiki Kaisha,* 2017 BCSC 2357, Vancouver Docket No. S134895).

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Counsel for the Appellant:	D.G.A. Jones M.K. Andersen
Counsel for the Respondents Nippon Yusen Kabushiki Kaisha; NYK Line (North America) Inc.; NYK Line (Canada), Inc.:	K.L. Kay E.N. Kolers
Counsel for the Respondents Mitsui O.S.K. Lines, Ltd.; Mitsui O.S.K. Bulk Shipping (U.S.A.), Inc.; Nissan Motor Car Carrier Co., Ltd.; World Logistics Service (USA) Inc.:	R.E. Kwinter E.L. Kriaris R.L. Reinertson
Counsel for the Respondents, Kawasaki Kisen Kaisha, Ltd., "K" Line America, Inc.:	J.M. Young N. Campbell
Counsel for the Respondents EUKOR Car Carriers, Inc.; Wilh. Wilhelmsen Holding ASA; Wilh. Wilhelmsen ASA; Wallenius Wilhelmsen Logistics Americas, LLC; Wallenius Wilhelmsen Logistics AS; Wallenius Lines AB; WWL Vehicle Services Canada Ltd.:	J.K. Wright T.M. Shikaze E.J. Snow
Place and Date of Hearing:	Vancouver, British Columbia December 4, 2018
Place and Date of Judgment:	Vancouver, British Columbia May 29, 2019

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

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Summary:

This appellant filed an action against the respondents claiming compensation for an alleged price-fixing conspiracy, and sought to certify the action as a class proceeding under the Class Proceedings Act. The certification judge held that in presenting a methodology for assessing whether any overcharge had been passed through to indirect purchasers, the plaintiff's expert had failed to determine whether the data that would be needed for such methodology was in fact available. On that basis, he declined to certify the action. The appellant appeals. Held: appeal allowed in part. The certification judge erred in imposing a standard of identification of data that exceeded the statutory requirements for the determination of a common issue. A class proceeding was the preferable procedure for resolving the claims of the indirect purchasers, and those are certified as a class proceeding. However, the certification judge did not err in declining to certify the claims of the umbrella purchasers. It was open to the judge to conclude that the methodology proposed by the plaintiff to establish loss on a class-wide basis was not plausible in respect of the umbrella purchasers. In the absence of a common issue as to loss for the umbrella purchasers, individual interests would overwhelm the common issue, and a class proceeding was not the preferable procedure for resolving these claims.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] The appellant appeals the denial of certification of an action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. This appeal requires consideration of the requirement that to obtain certification as a class proceeding, a plaintiff must show some basis in fact that each of the statutory requirements has been met. The narrow issue concerns the standard to be met when seeking to determine whether indirect loss can be established on a class-wide basis.

Introduction

[2] At issue in the underlying litigation is an allegation of a price-fixing conspiracy of marine shippers who transport automobiles and other vehicles across oceans to Canada. The plaintiff alleges that the conspiracy resulted in higher costs to him and others who purchased vehicles in British Columbia. To succeed in the litigation, he will have to establish that the conspiracy existed, that it resulted in excess shipping charges, and that those charges were passed on to him and to others in a like position. He seeks to certify the action as a class action.

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[3] An action may proceed as a class action only if it is certified as such following a certification hearing. At the certification hearing in this case, the central issue was whether the plaintiff had a plausible methodology to prove that any excess charges were passed on to vehicle purchasers and not simply absorbed along the supply chain.

[4] The certification judge concluded that the plaintiff had not satisfied the burden of showing that there was some basis in fact to conclude that there was a credible or plausible methodology for establishing loss on a class-wide basis.

[5] In this appeal, the appellant submits that the certification judge did not correctly apply the test for determining the common issue requirement under the *CPA*. The appellant argues that the judge wrongly imposed a requirement to establish, at the certification stage, the existence of the data needed to prove its case. The respondents support the judge's conclusion, and urge this Court to apply deferential review of the certification decision.

[6] To the extent that the judge was addressing an issue of fact in assessing the plausibility of the proposed methodology, the judgment under appeal is entitled to deference from this Court. However, imposition on the plaintiff of a burden greater than required under the statute would be an error in principle to which deference would not be appropriate.

[7] In the case at bar, one of the common issues the plaintiff sought to certify was the amount of damages suffered by the proposed class as a result of the alleged conspiracy. To do so, it was necessary for the plaintiff to show a credible or plausible methodology that could be used to demonstrate that any excess charges arising from the alleged conspiracy were passed on to members of the proposed class. The test that the courts have developed to determine whether this requirement has been met is that there must be "some basis in fact" that the claims raise common issues. In assessing whether this standard has been met, the certification judge is not to be drawn into a battle of the experts or a consideration of the merits of the claim.

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[8] The requirement of “some basis in fact”, while rooted in the particular circumstances of each case, gives rise to a difficult question of principle in its application. How fully must the plaintiff substantiate his case at the certification stage, before any discovery procedures have taken place? Is it sufficient to show that there is a credible methodology to establish loss on a class-wide basis and that necessary data should be available to utilize the methodology effectively? Or is it necessary to identify the specific data that will be required in order for the proposed methodology to support a reliable conclusion?

[9] In my view, the jurisprudence of this Court and the Supreme Court of Canada establishes that the plaintiff must provide some evidence that the loss component of liability can be proven on a class-wide basis, but it is not necessary to identify the specific data that will be required in order for the proposed methodology to do so. In other words, at the certification stage, the methodology must be realistic but not compelling. To impose a higher standard of proof on the plaintiff at the certification stage would, in my view, be inconsistent with the objectives of the *CPA*.

[10] In the certification hearing at bar, the defendants vigorously disputed the validity of the plaintiff’s theory that a methodology existed to establish loss on a class-wide basis. The certification judge, in my view correctly, considered that it was not appropriate at the certification stage to resolve the battle of the experts on this question, and stated that the plaintiff’s expert had kept these issues “‘in play’ for trial”. I understand this to mean that he did not reject the expert’s strongly expressed opinion that the proposed methodology was capable of establishing loss on a class-wide basis.

[11] However, the certification judge went on to consider whether the plaintiff’s expert had sufficiently identified the sources for the data he would need to implement his methodology, and concluded that he had not done so. In my respectful opinion, it was an error in principle to require the plaintiff to prove at the certification stage the existence of all the facts the expert would need to utilize in implementing his proposed methodology. It was sufficient for the plaintiff to show

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some basis in fact that there was a credible or plausible methodology capable of establishing loss on a class-wide basis, which he did.

[12] The certification judge considered separately the position of “umbrella purchasers” of vehicles in British Columbia. The plaintiff proposed to include these umbrella purchasers on the theory that the defendants’ conspiracy had increased the price of all vehicles purchased in British Columbia that had been transported in a particular manner. The certification judge held that the plaintiff’s proposed methodology for proving loss on a class-wide basis was restricted to direct and indirect purchasers. The judge concluded, independent of the question of available data, that the plaintiff had not proposed a methodology capable of establishing loss to umbrella purchasers on a class-wide basis. This finding is entitled to deference. I would not disturb this conclusion.

[13] Accordingly, and for the reasons that follow, I would allow the appeal in part and certify the action as a class proceeding in respect of the direct and indirect purchasers of the vehicle carrier services provided by the defendants during the class period.

The Plaintiffs’ Claim

[14] The defendants are vehicle carriers who transport cars, trucks, and other equipment across oceans to Canada, including to Vancouver, British Columbia, using specialized cargo ships known as roll-on/roll-off vessels (or RoRo). The plaintiff asserts that in the period from February 1, 1997 to December 31, 2012, the defendants made illegal price-fixing agreements to artificially increase the price of transporting these vehicles.

[15] The plaintiff’s theory is that as a consequence of these price-fixing agreements, the cost of transporting these vehicles was artificially and unreasonably enhanced, and that the extra cost was passed on to purchasers of the vehicles resulting in an overcharge for those vehicles. He asserts that during the class period (the temporal period when the alleged misconduct occurred), he purchased a vehicle that had been transported by the defendants. He seeks to bring a class proceeding

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to recover for himself and other similarly situated persons the loss caused by the alleged conspiracy, or a proportionate share of the benefits realized by the defendants as a result of the alleged conspiracy.

[16] The plaintiff has led evidence that all of the defendants have pled guilty, sought amnesty or reached compromise agreements in the United States or Japan in respect of anti-competitive wrongs arising from agreements relating to international shipping services to North America.

[17] The services provided by the defendants that are the subject of the alleged price-fixing conspiracy are referred to in the evidence as Vehicle Carrier Services. I will adopt that terminology in this judgment.

The Proposed Class

[18] The class proposed by the plaintiff for certification is all British Columbia residents who during the class period of February 1, 1997 to December 31, 2012 purchased Vehicle Carrier Services from the defendants, or purchased or leased a new vehicle in British Columbia transported by RoRo.

[19] This definition is intended to include direct and indirect purchasers of the defendants' services, but also other persons known as umbrella purchasers who purchased or leased vehicles transported by carriers other than the defendants.

[20] The claim and the proposed class were summarized by the certification judge at paras. 3 to 5 of the judgment under appeal (indexed as 2017 BCSC 2357), in these terms:

> [3] The overseas vehicle manufacturers contract and pay for the shipping of the vehicles. The vehicles are sold or transferred to distributors who are wholly owned subsidiaries or divisions of the manufacturers. The distributors sell the vehicles to dealers, which in turn sell them to consumers, although some large fleet owners, for example rental car companies, buy direct from the distributors.
>
> [4] The proposed class does not include the manufacturers or their distributors. Rather, it encompasses the downstream purchasers, or "indirect purchasers". The claim alleges that the anti-competitive wrongs resulted in the manufacturers paying higher prices for the shipping than they would have

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> absent the wrongful conduct and that all or part of the increased costs were passed down the distribution chain to the ultimate consumer. The proposed class includes the dealers and the ultimate purchasers.
>
> [5] The class is also meant to capture "umbrella purchasers". These are people who bought vehicles that were not shipped by the defendants, but shipped by other operators. The economic theory for including them in the class is that competitors would have taken advantage of the higher market prices by also charging higher prices.

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[21] In this judgment, I will refer to those persons collectively whose claim is based on their purchase of services directly or indirectly from the defendants as "indirect purchasers". I will refer to those persons whose claim is based, not on the supply chain related to the defendants, but on the theory that the actions of the defendants raised the price of all vehicles purchased or leased in British Columbia during the class period as "umbrella purchasers".

[22] The plaintiff relies on several causes of action, including breach of the *Competition Act*, R.S.C. 1985, c. C-34, civil conspiracy, unlawful means tort, unjust enrichment and waiver of tort. He also claims punitive damages.

Common Issues Asserted

[23] The underlying premise behind a class proceeding is that there is a class of persons who have claims against one or more defendants, that there are issues common to all of these claims, and that a class proceeding is the preferable means to resolve these issues. In this case, the plaintiff has proposed 27 questions that he characterizes as common issues to be determined in this proceeding. These questions are set out in the Appendix to these reasons. For present purposes, it is sufficient to summarize the proposed common issues in this way:

> (i) Do the class members have a cause of action against the defendants or any of them?
>
> (ii) If so, did the actions of the defendants cause loss to the class members on a class-wide basis, or entitle the class members to restitution?

[24] Certification takes place at an early stage of the proceeding, before examination for discovery or discovery of documents has taken place. The requirements for certification are set out in s. 4(1) of the *CPA* as follows:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

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[25] Pursuant to s. 4(1) of the *CPA*, there are five separate requirements that must be met before certification as a class action will be granted. Whether the pleadings disclose a cause of action is reviewed by applying the rule that a pleading should not be struck unless it is plain and obvious that no claim exists. The remaining four certification requirements are reviewed by considering whether there is “some basis in fact” for each of the requirements: *Hollick v. Toronto (City)*, 2001 SCC 68 [*Hollick*], at para. 25. If the plaintiff discharges this burden, the action must be certified.

The Certification Hearing

[26] On August 28, 2017, the plaintiff filed an application for certification of the action as a class proceeding. In support of the application, the plaintiff filed his affidavit and also a 41 page affidavit made on May 15, 2015 by Dr. Marcel Boyer, who is Emeritus Professor of Economics at the Université de Montréal. Dr. Boyer was tendered as an expert economist with significant expertise in the assessment

and quantification of economic harm arising from anti-competitive practices. His mandate was to address the following questions:

> (a) Is it possible to assess, using class-wide methods, whether direct purchasers of Vehicle Carrier Services paid an overcharge due to cartel conduct?
>
> (b) Is it possible to quantify, using class-wide methods, the price overcharge arising from cartel conduct?
>
> (c) Is it possible to determine, using class-wide methods, whether any Vehicle Carrier Services price overcharge was passed through to indirect purchasers of Vehicle Carrier Services (i.e. to purchasers of Vehicle Carrier Services and to purchasers buying Vehicle Carrier Services from resellers)?
>
> (d) Is it possible to quantify, using class-wide methods, how much of any overcharge was passed through to indirect purchasers of Vehicle Carrier Services?
>
> (e) What is my preliminary opinion regarding whether class members were harmed by any price overcharge arising from cartel conduct?

Dr. Boyer's Evidence

[27] In his affidavit, Dr. Boyer first reviewed market information concerning Vehicle Carrier Services, and then turned to the topic of estimating damages on a pass-through basis. He characterized the tasks that would have to be done to estimate damages to class members, on the assumption that price-fixing agreements had been made:

> (a) estimate the extent of the overcharge resulting from the collusive behaviour; and
>
> (b) estimate the amount of the overcharge paid by the direct buyers of Vehicle Carrier Services that is passed through to the class members, that is, the indirect buyers of Vehicle Carrier Services, whether they are dealers or end consumers.

[28] Dr. Boyer then addressed the methodologies and data sources that he would use to reach an opinion on each of these two questions. To assess the existence and amount of price overcharges, he proposed using econometric techniques including a regression analysis to provide an estimate of the price that would have

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prevailed in the absence of cartel conduct. He addressed data availability in this way:

> 93. If the case were to proceed to trial I would need data regarding concentration and entry barriers. … The necessary data is basically the sales level of the larger individual firms as well as the overall size of the industry and some estimate of fixed and/or sunk costs and variable costs. The data are typically and likely available from statistical agencies and industry reports or analysts' reports.

[29] After explaining the regression analysis techniques he proposed using, Dr. Boyer returned to data availability and commented in part as follows:

> 99. Data sources would include statistical agencies, annual reports of companies, reports of financial analysts, industry studies, antitrust reports, court reports, and responses of companies to data requests at the discovery stage, etc.
>
> 100. As with all empirical analysis, the quality and quantity of the data available will influence the accuracy and reliability of the results. Regression analysis is a preferred method to quantify price overcharges if sufficient data is available. …
>
> 101. To build the econometric model that will be used to estimate p^r [the "but-for" or reference price] over the conspiracy period, I will need to obtain from the defendants the actual prices charged for vehicle carrier services over time including the allegedly collusive period, more generally during a non-collusive period and during the alleged conspiracy period or on markets not affected by collusive behaviour. …

[30] Dr. Boyer then specified an alternative method of quantifying price overcharges called the mark-up method that does not require price data from non-collusive periods. He also identified but did not discuss in detail a third method that could be used, "depending on the data available in this case", called the benchmark method.

[31] Next, Dr. Boyer addressed the second step in the analysis, which he described in this way:

> 105. Once the overcharge *O* is estimated, the second step consists in determining the proportion of this overcharge that is actually passed through to the class members or the group of plaintiffs. For this, given the relatively simple structure of the supply chain from the finished product before transportation to the final consumer, another econometric model may have to be built. The second econometric model will statistically explain changes in

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> prices of vehicles using changes in costs and other explanatory variables deemed influential of prices, including vehicle carrier costs.

[32] Dr. Boyer explained that the extent of the "pass-through" of the overcharge to the end user depended on factors such as the extent to which the downstream market was highly competitive, the elasticity of the supply curve and the slope of the demand curve. He explained how damages to indirect purchasers would be estimated using the second econometric model:

> 112. Keeping all other determinants of vehicle prices constant, the second econometric model will enable us to determine what proportion of an increase in transportation costs translates into an increase in vehicle prices to dealers and end consumers. This proportion, applied to the overcharge, will enable us to estimate the damages accruing to indirect purchasers namely the class members.

[33] Finally on this topic, Dr. Boyer addressed the data sources available for this second econometric model:

> 117. It should be possible to obtain a number of documents as well as a significant amount of data on the pricing and costing of Vehicle Carrier Services from the defendants themselves (contracts or records of sales), at the time of pre-trial discovery. Moreover, court documents, as part of plea bargaining by some defendants or of guilty sentencing, from the different competition authorities around the world (in particular in U.S., Japan and Europe) might be available and used to ascertain operational data on the price fixing conspiracy. Finally, data could be obtained from OEM as purchasers of Vehicle Carrier Services (contracts or records of purchases), through their respective decision process towards determining a MSRP (Manufacturers' Suggested Retail Price). These different data sources will allow us to characterize the extent of overcharges due to cartel activities as well as the extent of pass-through by OEM.

[34] Dr. Boyer then summarized his conclusions that:

> (a) it is possible to assess, using class-wide methods, whether direct purchasers of Vehicle Carrier Services paid an overcharge due to cartel conduct;
>
> (b) it is possible to quantify, using class-wide methods, the price overcharge arising from cartel conduct;

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(c) it is possible to determine, using class-wide methods, whether any Vehicle Carrier Services price overcharge was passed through to indirect purchasers of Vehicle Carrier Services (i.e., to purchasers of products incorporating Vehicle Carrier Services and to purchasers buying Vehicle Carrier Services from resellers); and

(d) it is possible to quantify, using class-wide methods, how much of any overcharge was passed through to indirect purchasers of Vehicle Carrier Services.

[35] Dr. Boyer also expressed a preliminary opinion that class members would have suffered economic harm as a result of Vehicle Carrier Services price overcharges if the allegations in the claim are true.

Dr. Israel's Affidavit

[36] One year later, the defendants filed a 51 page affidavit of Dr. Mark Israel taking issue with certain of Dr. Boyer's conclusions. Dr. Israel is a Senior Managing Director of an economic consulting firm and specializes in the economics of industrial organization, the study of competition in imperfectly competitive markets, including the study of antitrust and regulatory issues, as well as applied econometrics.

[37] Dr. Israel expressed the opinion that Dr. Boyer had not presented a valid class-wide methodology that can be used to determine whether and to what extent the alleged conspiracy injured purchasers of vehicles transported using Vehicle Carrier Services in British Columbia. Dr. Israel opined that it was not possible to reliably identify or estimate overcharges using a class-wide methodology (including whether there were overcharges, how large they were if they existed, and the extent to which any average overcharge applied to a particular buyer), nor reliably determine the existence or extent of pass-through without individualized inquiry into the specific circumstances of a given vehicle purchase.

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[38] Dr. Israel then critiqued the use of regression analysis in these circumstances, and also argued that the unreliability of Dr. Boyer's estimate of average overcharges will be exacerbated by the need for individualized analysis of whether and to what extent any particular direct purchaser was overcharged.

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[39] Although Dr. Israel did not base his opinion on issues relating to data availability, he did include one comment concerning data in a foot-note:

> It is my understanding that data before 1997, the beginning of the class period, are unlikely to be readily available; consequently a regression would have to rely on a "during-after" comparison. It is also my understanding that the extent to which historical data are available may vary significantly across defendants …

[40] Dr. Boyer did not agree with the criticisms of Dr. Israel, and filed a second affidavit responding to the comments. The experts were then cross-examined on their affidavits, and the full record was placed before the certification judge.

The Decision on Certification

[41] The certification judge considered that commonality of harm was the only issue in the certification hearing:

> [9] As with most competition class action cases, the main battleground in this case is with respect to the common issue requirement under s. 4(1)(c); that is, whether loss or harm can be established on a class-wide basis. (Harm is a constituent element of the non-restitutionary causes of action and detriment is a requirement of unjust enrichment.) Harm and damages to the class must be shown by economic expert evidence. Defence counsel made clear that their joint argument focussed on the commonality of harm. In fact, that is the only issue raised.
>
> [Emphasis in original.]

[42] The judge focussed primarily on whether loss to the indirect purchasers could be established on a class-wide basis, but also considered the question separately in relation to umbrella purchasers and in relation to what was termed "high and heavy equipment".

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Loss to Indirect Purchasers

[43] The certification judge began by reviewing the principles arising from the leading cases of *Hollick*, *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*] and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2009 BCCA 503 [*Infineon*] in this way:

> [10] In *Hollick v. Toronto (City),* 2001 SCC 68, the Supreme Court said that a plaintiff seeking certification must show "some basis in fact" for all of the certification requirements other than the existence of a cause of action (which is to be decided on a motion to strike standard). Where the issue of commonality hinges on an econometric model, it was uncertain how far a plaintiff need go to show it had a viable methodology, until the Supreme Court of Canada's decision in *Pro-Sys v Microsoft*, 2013 SCC 57. In *Microsoft*, Mr. Justice Rothstein, for the Court, established the threshold:
>
>> [118] In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.
>>
>> [119] However, resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification (see *Infineon*, at para. 68; *Irving*, at para. 143). The trial judge will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.[1]
>
> [11] It is worth setting out para. 68 from the Court of Appeal's judgment in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, to which Rothstein J. referred with approval, along with the preceding paragraph. This illustrates what should <u>not</u> be entertained at a certification hearing:
>
>> [67] The chambers judge subjected the evidence of Dr. Ross to rigorous scrutiny. He weighed it against the respondents' evidence and against Ms. Sanderson's evidence in particular. In so doing, he failed to take into account that the factual evidence upon which Ms. Sanderson's opinion was based came in part from the respondents and was untested. Further, he failed to adequately

[1] This quote is actually from para. 126 of Microsoft, not para. 119. Para. 119 begins "To hold the methodology to the robust or rigorous standard suggested by Microsoft, for instance to require the plaintiff to demonstrate actual harm, would be inappropriate at the certification stage. …"

> consider that Dr. Ross' opinion was necessarily preliminary since the appellant has not yet had access to the information Dr. Ross needs to perform his analysis. In my view, this approach was fundamentally unfair at this stage of the proceeding, when the appellant has not had discoveries and an adequate opportunity to marshal the evidence required by Dr. Ross for his analysis.
>
> [68] The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. Ms. Sanderson gave evidence that aggregate harm had been estimated by two experts in the U.S. litigation. As well, it appears from the U.S. plea agreements that the Department of Justice was prepared to prove that the agreed fines were justified as representing twice the gross gain or the gross loss resulting from the price-fixing conspiracy. The dispute here is over whether total gain or loss can be determined as a practical matter on the particular facts of this case. Those facts have not yet been fully developed and it was therefore premature of the chambers judge to reject Dr. Ross' opinion. The close examination to which he subjected it should have been left for the trial judge, whose task it will be to evaluate the conflicting expert opinions and to decide what weight to give them. In my view, Dr. Ross' evidence met the low threshold required to establish for purposes of certification that gain and its counterpart, damage, can be shown on common evidence.

[12] On the other hand, the certification hearing is meant to be a meaningful screening device. It is not what I will refer to as a "file, smile and certify" exercise. As stated by Rothstein J. in *Microsoft*:

> [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.

[Emphasis in para. 11 in original.]

[44] The certification judge then characterized the issue before him in this way:

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> [14] As I have indicated, the contentious issue to be addressed here is whether the plaintiff has demonstrated a credible and plausible economic methodology to prove harm on a class-wide basis.

[45] The judge addressed this question under the heading, “Is there a credible or plausible methodology to show harm to the direct purchasers which was then passed on to the indirect purchaser level?” and two sub-headings, “The proposed methodology” and “Available data”. Under the first sub-heading, he reviewed the debate between Dr. Boyer and Dr. Israel, and made an important observation that illustrates the difficulty facing a certification judge who is provided with over 100 pages of economic opinions on the plausibility of an econometric methodology for advancing a class proceeding:

> [33] As became clear when the above points were developed in oral argument, the dividing line between arguments going to the ultimate merits of the claim and what is relevant for certification was frequently blurred: many of the arguments [of the respondents] based on the structure and practices of the industry appeared to be directed to showing that no indirect purchaser *could* have suffered harm.
>
> [Emphasis in original.]

[46] The judge then reviewed the criticisms of Dr. Israel and the response of Dr. Boyer, and came to the following conclusion:

> [37] To dismiss Dr. Boyer’s points would be to engage in a battle of the experts at certification. I think Dr. Boyer’s responses keep these issues “in play” for trial.

[47] I take this comment that Dr. Boyer’s responses “keep these issues ‘in play’ for trial” to be confirmation that the plaintiff has met the requirement of presenting “a credible and plausible economic model to show harm to the prospective class members as a group”, which is the test set out by the judge at para. 34. Whether the model will ultimately be viewed as reliable is a matter for the common issues trial judge.

[48] However, the judge went on to consider the availability of data as a separate requirement for the plaintiff to meet, and concluded that the plaintiff had failed to meet that requirement. He referred to some of the statements about data availability

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that I have set out earlier in this judgment, and pointed out that Dr. Boyer did not identify specific data sources that he would be able to use. He regarded that failure as fatal to the certification application.

[49] The judge explained his decision not to certify the action in the following passage:

> [47] There is a difference between data that is expected to come from the defendants and other sources, particularly public ones. As the Court of Appeal in *Infineon* said, it cannot be expected that a plaintiff's expert be familiar with the defendants' own source documents because document discovery will not have taken place at the certification stage. Further, it would normally be safe to assume that defendant companies will be able to produce their sales and other financial data.
>
> [48] However, the matter is different for public and some other sources such as those that Dr. Boyer expects (or hopes) to be available. I think it follows from the passage in para. 118 from *Microsoft* (quoted above)[2] that the court should be given some identification of the other sources and not merely an expectation as to what they might be. Moreover, it is reasonable to expect that the expert would have had at least a cursory look at the data to ensure its potential applicability.
>
> [49] Put another way, the court needs to have *some* confidence that, as was said in *Microsoft*, there is a "realistic prospect" to develop a credible model. How can it have that when part of the data that is required for the model is only said to possibly exist? Nor do I think it sufficient to hope that studies may have been done or may be done for the purposes of regulatory proceedings, which may become available.
>
> [50] My decision does not hinge on this, but as noted by the defendants, Dr. Boyer did not make any attempt to ascertain the availability of documents regarding costing and pricing from the dealers, who are prospective class members, in spite of having said he requires information for every level of the sales chain.
>
> [51] I want to be clear as to what I am *not* saying here. First, I am not saying that the proposed model has to be developed for certification.
>
> [52] Second, I am not saying that if documents are identified that might require a court order to get access to them (such as documents from another litigation), that it is necessary to have obtained access to them before certification. That is a matter I need not decide and should be left to the appropriate case: here only the possibility of such documents was raised. Whether they exist is unknown.
>
> [53] Third, I am not weighing competing expert opinions, which the courts have cautioned against. I am considering Dr. Boyer's report itself. On any

[2] "There must be some evidence of the availability of the data to which the methodology is to be applied": Microsoft at para. 118

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> reasonable reading, he has said that data will be required from other than the discovery process and the sources he referred to in his report, but he has not made the effort to see whether they exist. This is not a matter of the mere wording used by Dr. Boyer and it is not a matter of subjecting his opinion to "rigorous scrutiny". It is subjecting it to some scrutiny. In the absence of providing some evidence of the data Dr. Boyer says is necessary his opinion is ultimately purely theoretical. This is not subjecting his report to "close scrutiny".
>
> [54] I do not think this meets the low threshold of the *Microsoft* standard. As was said in *Microsoft*, certification is meant to be more than symbolic scrutiny. To put the matter more colloquially, as I have said above, it is not a "file, smile and certify" exercise. Defendants—even major corporations—should not have to fly into the onerous discovery process in a complex class action on a "wing and prayer" that harm may be shown on a class-wide basis when the proper steps have not been taken to meet the low threshold required.
>
> [55] On that basis, I decline to certify the case.
>
> [Italics in original; underlined emphasis added.]

Loss to Umbrella Purchasers

[50] After addressing the issues relating to the proposed methodology generally, the judge considered separately the specific circumstances applying to umbrella purchasers. He stated that he would not certify the action as a class action in relation to umbrella purchasers in any event because Dr. Boyer had not addressed how harm to the umbrella purchasers could be assessed through the regression analysis he was proposing for the indirect purchasers.

[51] In effect, the judge was stating that even if Dr. Boyer's methodology met the standard necessary to show a realistic prospect of establishing pass-through loss on a class-wide basis, there was little if any evidence that this methodology could be applied to umbrella purchasers, whose claim has a different foundation.

Loss related to Purchase of High and Heavy Equipment

[52] The certification judge also considered the category of indirect purchasers of high and heavy equipment. He was not satisfied that Dr. Boyer's methodology applied to these purchases, and stated that he would not certify the claim for this part of the proposed class in any event.

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Issues on Appeal

[53] In my view, this appeal requires consideration of three issues.

[54] The central issue on appeal is whether the certification judge erred in principle by imposing on the plaintiff a more rigorous requirement concerning the availability of data to be used in the proposed methodology than required by either the statute or judicial interpretation of the statute. In other words, did the judge set the bar too high?

[55] If the certification judge did err in his consideration of the methodology to establish loss on a pass-through basis, a second issue arises as to the rejection of that methodology to umbrella purchasers for reasons independent of the availability of data.

[56] Finally, a third issue that arises throughout the judgment is whether the judge erred by dismissing the certification application without conducting a preferability analysis under s. 4(1)(d) of the *CPA* when the claims raised common issues as to the alleged wrongful acts of the defendants.

Standard of Review

[57] A decision by a certification judge is entitled to substantial deference, unless there are errors in principle which are directly relevant to the conclusion reached: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 65 [*Fischer*].

[58] The first issue concerns the standard to be applied when assessing whether a plaintiff has shown some basis in fact that there is a methodology capable of establishing loss on a class-wide basis. In my opinion, this is a question of principle to which review on a correctness basis is appropriate.

[59] The second issue concerning the umbrella purchasers was decided by the judge based on his assessment of the scope of the proposed methodology presented, rather than the availability of data for that methodology. This is primarily a

question of fact, to which deference applies. This Court should interfere only if the judge’s decision is unreasonable.

[60] The final issue concerns the decision of the judge to dismiss the certification application without a preferability analysis, although common issues as to wrongful acts existed. This also raises a question of law concerning the interpretation of s. 4(1) of the *CPA*. It is reviewable on a standard of correctness.

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The Application to Adduce New Evidence

[61] Before addressing the legal issues arising in this appeal, I will deal with the application of the appellant to admit new evidence for the appeal. The proposed new evidence consists of three documents:

(a) a press release issued by the United States Department of Justice relating to Höegh Autoliners AS, a defendant and respondent in this appeal, dated September 27, 2017 (part-way through the hearing of the certification application);

(b) a guilty plea entered into by Höegh Autoliners AS filed December 8, 2017 (after the hearing but before release of the judgment); and

(c) a press release issued by the European Commission on February 21, 2018 (after release of the judgment).

[62] Counsel have advised that the September 27 press release was referred to in court during the certification hearing, but the document itself was not filed as an exhibit.

[63] In my view, all of these documents should be treated as new evidence arising since the hearing that is the subject of the appeal, rather than fresh evidence that was available at the time of the hearing but was not tendered. New evidence will be admitted in this Court in rare cases. The evidence must be likely to affect the result in the appeal and its admission must clearly be in the interests of justice: *Animal*

Welfare International Inc. v. W3 International Media Ltd., 2015 BCCA 148 at para. 10; *Jiang v. Peoples Trust Company*, 2017 BCCA 119 [*Jiang*] at para. 39.

[64] The issues on this appeal relate to the test for determining whether the requirements of ss. 4(1)(c) and (d) have been met. Admission of the new evidence would not have any effect on the resolution of that question. The plaintiff filed evidence before the certification judge that a number of the defendants had been the subject of investigations in other jurisdictions for price-fixing, and that in several instances, determinations had been made, through guilty pleas or otherwise, that provided support for the plaintiff's position. More evidence to that effect would not affect the result in this Court.

[65] Accordingly, I would dismiss the application to admit new evidence.

The Statutory Requirements for Certification

[66] The certification judge identified the only issue raised by the defendants opposing certification as whether loss or harm can be established on a class-wide basis. He considered (at para. 9) that "[h]arm is a constituent element of the non-restitutionary causes of action and detriment is a requirement of unjust enrichment", and accordingly regarded proof of loss or harm was essential to the plaintiff's claims.

[67] With that in mind, the judge focussed his analysis on the question whether the plaintiff had provided a credible or plausible methodology to show harm to the direct purchasers, which was then passed on to the indirect purchaser level.

[68] I agree that the question posed by the judge is one that must be answered in the course of the certification analysis, but I find it helpful to review each of the statutory requirements to place this question in proper context, recognizing that the defendants have not put all of these requirements in issue.

Section 4(1)(a) – Viability of Causes of Action

[69] The plaintiff has pleaded both loss-based and benefit-based causes of action. The loss-based causes of action are for breach of s. 36 of the *Competition Act*, civil

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conspiracy and unlawful means tort. Each of these causes of action requires as an essential element proof of loss caused by the wrongful act. The methodology to prove loss is vital for these claims if they are to be certified as part of a class proceeding.

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[70] The benefit-based claims pleaded are unjust enrichment and waiver of tort. Both claims are based on restitution of benefits allegedly received by the defendants. The cause of action for unjust enrichment requires evidence of detriment to the plaintiff, and the plaintiff in this case has characterized the detriment as the payment of the overcharge resulting from the alleged conspiracy. Whether waiver of tort requires proof of loss, and indeed whether waiver of tort is even a recognized cause of action, are unsettled questions.

[71] The viability of a waiver of tort pleading in relation to s. 4(1)(a) of the *CPA* was discussed by the Supreme Court of Canada in *Microsoft*. The Court explained that the nature of a waiver of tort claim had not yet been determined and that it may not include a requirement to prove loss, but that the unsettled questions in relation to the claim should not be resolved at the certification stage. Rothstein J. began this part of the analysis by explaining what is meant by waiver of tort:

> [93] As an alternative to the causes of action in tort, Pro-Sys waives the tort and seeks to recover the unjust enrichment accruing to Microsoft. Waiver of tort occurs when the plaintiff gives up the right to sue in tort and elects instead to base its claim in restitution, “thereby seeking to recoup the benefits that the defendant has derived from the tortious conduct” (Maddaugh and McCamus (2013), at p. 24-1). Causes of action in tort and restitution are not mutually exclusive, but rather provide alternative remedies that may be pursued concurrently (*United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 (H.L.), at p. 18). Waiver of tort is based on the theory that “in certain situations, where a tort has been committed, it may be to the plaintiff’s advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages” (Maddaugh and McCamus, at pp. 24-1 and 24-2). An action in waiver of tort is considered by some to offer the plaintiff an advantage in that it may relieve them of the need to prove loss in tort, or in fact at all (Maddaugh and McCamus, at p. 24-4).
>
> [Emphasis added.]

[72] Justice Rothstein then reviewed and approved the comments of Epstein J. (as she then was) in *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (S.C.J. (Div. Ct.)) concerning the nature of waiver of tort:

> [95] … Her analysis found numerous authorities accepting the viability of waiver of tort as its own cause of action intended to disgorge a defendant's unjust enrichment gained through wrongdoing, as opposed to merely a remedy for unjust enrichment. These authorities differed, however, as to the question of whether the underlying tort needed to be established in order to sustain the action in waiver of tort.
>
> …
>
> [97] Epstein J. ultimately concluded that, given this contradictory law, "[c]learly, it cannot be said that an action based on waiver of tort is sure to fail" and that the questions "about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exist here, involv[e] matters of policy that should not be determined at the pleadings stage" (*Serhan*, at para. 68). I agree. In my view, this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.

[73] The defendants have not objected to the viability of a plea of waiver of tort as a cause of action (nor could such an objection be sustained in light of *Microsoft*), and I am satisfied, as all parties at the certification hearing appeared to be, that the causes of action disclosed by Third Amended Notice of Civil Claim meet the requirements of s. 4(1)(a) of the *CPA*.

[74] I note that the plea of waiver of tort as a cause of action may not require proof of loss or harm. The effect of this is that proof of loss, which will be essential in respect of the loss-based claims, may not be required for all of the restitutionary claims.

Section 4(1)(b) – Identifiable Class

[75] The class proposed by the plaintiff includes both British Columbia residents who purchased Vehicle Carrier Services directly or indirectly (i.e., from the defendants) and those who purchased or leased vehicles that were transported by RoRo by other carriers (umbrella purchasers).

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[76] Apart from the question relating to umbrella purchasers, no objection has been taken to this class definition. In my view, it meets the requirements of s. 4(1)(b) of the *CPA* as explained by this Court in *Jiang*, subject to consideration of the inclusion of umbrella purchasers. I will discuss this issue when I review the part of the judge's decision as it specifically affects umbrella purchasers.

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Section 4(1)(c) – Common Issues Raised by the Claims

[77] Although this appeal has been framed as turning on whether the plaintiff met the requirements of s. 4(1)(c) of the *CPA*, I am not satisfied that this is the correct analytical framework to review the decision of the certification judge and the appropriateness of this action proceeding as a class action.

[78] Section 4(1)(c) requires the plaintiff to show that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members. The common issues asserted by the plaintiff are set out in the form of questions in the Appendix to this judgment. These questions appear to be modelled after the common issues certified in *Microsoft*: see *Microsoft* at 541, "Appendix".

[79] The questions, or proposed common issues, can be divided into two broad categories, those that relate to the alleged wrongful acts and those that relate to the consequences of those acts (i.e., whether the acts caused harm or loss on a class-wide basis).

[80] It has not been disputed that the claims raise common issues concerning the alleged wrongful acts. Thus, questions (a), (e), (f), (g), (i), (m), (n) and (r) express common issues raised by the claims of the indirect purchasers within the meaning of s. 4(1)(c). It is the remaining questions, which deal with whether the claims raise common issues as to harm and loss, that are at issue.

[81] The ability to prove harm on a class basis is relevant to the certification analysis in two respects. First, it is relevant to the identification of the common issues under s. 4(1)(c). Even though the issues relating to the alleged wrongful acts

are sufficient to comply with s. 4(1)(c), it is necessary to determine whether the common issues also include liability for loss, in order to ascertain the scope of the common issues trial.

[82] Second, whether the common issues include loss on a class-wide basis is also crucially important to the preferability issue under s. 4(1)(d). The respondents explained in their factum their position on how the ability to prove harm on a class basis relates to the preferability analysis:

> 70. The respondents' position on certification was that, in the absence of a methodology which would be capable of establishing harm (and thus, liability) on a class-wide basis, individual issues would overwhelm any common issues and render the action unmanageable, thus failing to satisfy the "preferable procedure" requirement of section 4(1)(d) of the *CPA*.

[83] I agree with the analytical framework implicit in this submission. The issue under s. 4(1)(c) was whether the proposed issues relating to loss and harm were issues common to the class members. Under the jurisprudence relating to indirect purchaser claims, this required the plaintiff to present a plausible and credible methodology to show that any overcharge by the defendants was passed through to the class members so that liability could be assessed on a class-wide basis. If the plaintiff did so, the questions proposed by the plaintiff would be treated as common issues for the preferability analysis under s. 4(1)(d). If the plaintiff did not do so, it would still be necessary to conduct a preferability analysis, but the defendants could persuasively argue that the individual issues relating to loss would overwhelm the common issues relating to the wrongful acts, and certification should accordingly be denied.

[84] I emphasize this analytical framework because in my respectful opinion, the certification judge overstated the purpose of the methodology assessment when he said (at para. 9) that:

> the main battleground in this case is with respect to the common issue requirement under s. 4(1)(c); that is, whether loss or harm can be established on a class-wide basis …

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This statement elevates the loss question to a requirement under s. 4(1)(c), which it is not. The importance of establishing a methodology which would be capable of establishing harm on a class-wide basis is not that it is a requirement of s. 4(1)(c). Rather, as the defendants put it, in the absence of such a methodology, individual issues relating to loss may overwhelm the common issues concerning wrongful acts and render the action unmanageable as a class proceeding in an analysis under s. 4(1)(d).

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[85] Even if the plaintiff had failed to present an adequate methodology, a proposition I will address shortly, the claims raised some common issues that required a preferability analysis under s. 4(1)(d). While it may well be that the absence of common issues relating to loss would be fatal to the preferability analysis for the reasons asserted by the defendants, preferability also requires a comparative assessment, as pointed out in *Fischer*. That assessment was never done in this case.

[86] I turn to the question whether the certification judge applied the correct test for determining whether loss on a class-wide basis was a common issue in this case.

Determining Loss as a Common Issue

[87] The standard of proof required of a plaintiff asserting loss as a common issue in a price-fixing case presents significant challenges at the certification stage. The starting point is that, apart from the requirement that the pleadings disclose a cause of action, which is not at issue in this case, a plaintiff must show "some basis in fact" for each of the certification requirements set out in s. 4 of the *CPA*: *Hollick* at para. 25. What that means in the context of a price-fixing conspiracy was discussed by the Ontario Court of Appeal in *Chadha v. Bayer Inc*. (2003), 63 O.R. (3d) 22 [*Chadha*], a case relied upon by the defendants on this appeal.

[88] In *Chadha*, as here, the plaintiff alleged loss on a class-wide basis arising from a price-fixing conspiracy. *Chadha* was the first certification case decided in Ontario involving anti-trust law and claims under the Ontario *Class Proceedings Act*,

1992, S.O. 1992, c. 6. The certification judge in that case concluded that loss or damage was a common issue, and certified the action on the basis that a class action was the preferable procedure for resolving the common issues. A majority of the Divisional Court reversed that decision, and the case proceeded to the Ontario Court of Appeal on three issues: whether the issue of liability, including proof of loss, was a common issue; whether a class action was the preferable procedure for the conduct of the action and whether the class definition formulated by the certification judge was in error because it defines the class as persons who had suffered damages and not in objective terms.

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[89] The Ontario Court of Appeal characterized the first issue as turning on “the efficacy and method of proof of whether all indirect purchasers of the respondents’ product overpaid for their homes as a result, and thereby suffered damage” (at para. 3).

[90] After referencing the “some basis in fact” standard, Justice Feldman explained the basis for rejecting the certification judge’s conclusion that liability was a common issue:

> [30] In my view, with respect, the motion judge erred by relying on the expert evidence filed by the appellants as the basis for the certification order. <u>That evidence does not address the issue of what method could be used at a trial</u> to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents’ iron oxide pigment overpaid for the buildings as a result. Rather, the appellants’ expert effectively <u>assumes</u> that higher costs of products containing the respondents’ iron oxide pigment would have been passed on to end-users, reasoning that they would have been willing to pay the higher cost because the amounts in question were so minimal. … However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.
>
> [31] … The issue of whether there would be a price impact on all ultimate consumers of iron oxide coloured products, i.e., a pass-through to the class members of the inflated price charged by the respondents to their direct buyers, was <u>what the expert assumed</u>, <u>but he did not indicate a method for proving, or even testing that assumption</u>.
>
> [Emphasis added.]

[91] In the Court's conclusion concerning the common issue, the absence of any evidence as to a methodology to prove loss on a class basis is emphasized:

> [52] … The evidence of the appellants' expert assumes the pass-through of the illegal price increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time. …
>
> [Emphasis added.]

[92] The Court concluded that in the absence of any evidence as to a methodology for proving loss on a class-wide basis, proof of loss as a component of liability could not be a common issue.

[93] The Court then went on to consider the "preferable procedure" requirement, which is analogous to s. 4(1)(d) of the *CPA*. Feldman J.A. stated (at para. 56) that she "[did] not believe the motion judge would have certified the action as a class action had he not viewed liability as a common issue". She concluded that "the action cannot be certified as a class action because a class action is not the preferable procedure given the limited common issues" (at para. 71).

[94] In *Chadha*, the plaintiffs had been unsuccessful "because they did not present the evidentiary basis for a certifying court to be satisfied that loss as a component of liability could be proved on a class-wide basis": *Chadha* at para. 65. The nature of the evidentiary basis required of a plaintiff was taken up by this Court in *Infineon*.

[95] *Infineon* was also an action that sought to recover overcharges alleged to have occurred because of price-fixing agreements. The certification judge concluded that the damage claim could not be tried as a common issue. As a result, although the allegations of unlawful conduct could be determined as common issues, individual issues relating to loss and damage would predominate and a class action would not be the preferable procedure for resolution of the claims.

[96] This Court reversed the decision and certified the action as a class proceeding. The Court held (at para. 63) that in reviewing the evidence of methodology for proving loss, the certification judge had "set the bar for the [plaintiff]

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too high”. The standard of proof that had to be met by a plaintiff seeking to include liability for loss as a common issue was described in this way:

> [68] The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. …

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[97] This standard was approved by the Supreme Court of Canada in *Microsoft* in the Court’s discussion of expert evidence in indirect purchaser class actions at paras. 114–126. Paragraph 68 of *Infineon* was referred to with approval at paras. 116 and 126 of *Microsoft*, and the judgment of Rothstein J. summarized the standard to be met in this way:

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

[98] It was the last sentence of para. 118 that was of concern to the certification judge in the case at bar, which led him to conduct a close examination of Dr. Boyer’s evidence concerning the availability of the data he anticipated he would need for his regression analysis. The judge was not satisfied that Dr. Boyer had ascertained the existence of the evidence he anticipated being available. The question is whether, to use the phrase from *Infineon*, he set the bar for the plaintiff too high.

“Some Basis in Fact”

[99] I do not consider that the last sentence in para. 118 of *Microsoft* was intended to change the “some basis in fact” standard that has been applied since *Hollick* and was referred to in the earlier part of the same paragraph. The context of para. 118 was that Rothstein J. was rejecting the argument of Microsoft that the credible or plausible methodology standard articulated in *Infineon* was too permissive and

allowed for a claim to be founded on insufficient evidence. Microsoft argued that the parties should be required to file affidavits containing all material facts on which they intended to rely: *Microsoft* at para. 117. That "rigorous standard" was not accepted by the Court.

[100] The Supreme Court of Canada clarified the "some basis in fact" standard a few months later in *Fischer*. Under the heading "Evidentiary Considerations", Cromwell J. referred to the origins of the standard in *Hollick* and then made these comments about *Microsoft*:

> [40] This Court recently reaffirmed these principles in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, in the context of the similar British Columbia class actions regime. In his discussion of the standard of proof with regard to the commonality and preferability requirements (para. 101), Rothstein J. indicated that the "'some basis in fact' standard does not require that the court resolve conflicting facts and evidence at the certification stage" (para. 102). This reflects the fact that a certification court "is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight"…

[101] Cromwell J. added this:

> [41] Helpful elaboration of the "some basis in fact" standard may be found in the reasons of Winkler C.J.O. in *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745:
>
> > The "some basis in fact" principle is meant to address two concerns. First, there is a requirement that, for all but the cause of action criterion, an evidentiary foundation is needed to support a certification order.
> >
> > Second, in keeping with the procedural scheme of the [Ontario] *CPA*, the use of the word "some" conveys the meaning that the evidentiary record need not be exhaustive, and certainly not a record upon which the merits will be argued. This legislative intention is reflected in s. 2(3)(a) of the *CPA*, which — although honoured more often in the breach — requires the proposed representative plaintiff to bring a motion for certification within 90 days of the filing of, or the expiry of the time for filing of, a statement of defence or notice of intent. Thereafter, leave of the court is required to bring the motion: see s. 2(3)(b). [Emphasis added (by Cromwell J.); paras. 75-76.]

[102] I note that the *CPA* in British Columbia also requires that a motion for certification be filed within 90 days of the filing of, or expiry of the time for filing of, a response to the Notice of Civil Claim. This requirement (though seldom met) informs

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the legislative intention as to the extent of data identification that must be made at the certification stage.

[103] Cromwell J. then explained the judgment in *Chadha* as turning on the fact that there was no evidence of a methodology to prove loss on a class-wide basis:

> [43] The standard of proof on a motion for certification was at the heart of the appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal refused, [2003] 2 S.C.R. vi. The decision makes clear that at the certification stage, the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements. In *Chadha*, the court denied certification on the basis that there was *no* evidence that the loss component of liability could be proved on a class-wide basis (and thus that there was no common issue). It was not necessary to establish that there was a compelling method to prove such loss, but it was necessary to provide some basis in fact to think that there was *some* method to do so. The plaintiffs had failed to provide that basis. …
>
> [Emphasis in original.]

[104] I take from this that some basis in fact is to be contrasted with no basis in fact (as in *Chadha*). It is required that a plaintiff lead some evidence that there is a plausible and realistic methodology to establish loss on a class-wide basis, but where the methodology consists of an econometric model, it is not necessary to build the model or identify with precision what information will be used to populate the model, as long as there is some evidence that information will be available to do so.

Application to the Judgment under Appeal

[105] In the case at bar, the plaintiff led opinion evidence that an econometric model utilizing a regression analysis could be constructed to establish loss on a class-wide basis. Such a methodology has been accepted as sufficient by this Court in *Infineon* and by the Supreme Court of Canada in *Microsoft*. The certification judge appears to have concluded that Dr. Boyer's responses to the objections of Dr. Israel were sufficient to establish the plausibility of the model. However, he rejected the methodology because Dr. Boyer had not confirmed that the data he referred to in his affidavit was in fact available. In my opinion, this goes beyond what is required to

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raise a common issue, and sets the bar too high for a plaintiff at the very early certification stage of the litigation.

[106] Certification applications under the *CPA* are dealt with prior to the discovery process. Dr. Boyer referred to this data source in his first affidavit:

> 117. It should be possible to obtain a number of documents as well as a significant amount of data on the pricing and costing of Vehicle Carrier Services from the defendants themselves (contracts or records of sales), at the time of pre-trial discovery. …

[107] It is in my view reasonable that an economist requiring data to use in a model of the kind contemplated would not try to determine the availability of all the data required before ascertaining how much of the information can be obtained from the defendants. In his second affidavit, Dr. Boyer referred to the availability of data based on evidence filed by the defendants from Dennis DesRosiers, the president of a company that provides research and consulting services to the automotive industry:

> 6. Mr. Desrosiers' affidavit provides interesting elements of information on the structure of the automobile industry value chain as well as data on the automobile markets of interest. I understand from Mr. Desrosiers' affidavit that the automobile industry is a data rich, mature and well researched industry, regarding its manufacturing operations, its value chain structure, its product differentiation characteristics, and its pricing strategies. This is quite comforting to expect that this wealth of data will be available from the different sources at the discovery step of this class action. …

[108] The underlying issue is the extent to which a plaintiff must prepare the case at the time of the certification application. This issue arose in *Infineon*, where the plaintiff's expert had expressed a belief that the necessary data for his analysis would be available from various sources. This Court explained the issue in terms very similar to the circumstances at bar:

> [51] Turning to "pass-through", he [the plaintiff's expert] said, "[e]stimation of pass-through of cost increases is commonly done and well-established methods for estimating pass-through exist". Again, he said, he would rely on statistical regression analysis.
>
> [52] He said the necessary data for his analysis would be available from the respondents' business records, from the information available in the U.S. class actions and criminal proceedings, from industry trade associations, from

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> private information-vendors and consultants focusing on the electronics industry, and from import and export information collected by Statistics Canada.
>
> [53] The respondents led factual evidence from five witnesses, a market research consultant and four employees or former employees of respondents. In essence, their evidence was that the markets for DRAM are very complicated, that DRAM is used in different ways in many different products, that some DRAM emanates from manufacturers other than the respondents, that it is difficult to determine the origin of the DRAM in any given product, that not all respondents sold DRAM directly into British Columbia during the class period, and that the pricing of DRAM is influenced by a multitude of factors.
>
> [54] The appellant made no attempt to challenge this factual evidence with contrary evidence or by cross-examination of the deponents. As I understand him, counsel for the appellant considered any such attempt would be ineffective in the absence of a full factual investigation, aided by oral and documentary discovery, which he considered would not be economically viable at the pre-certification stage of the litigation and which, in any event, would be beyond the permissible scope of pre-certification discovery. In the latter regard, he referred to the fact that s. 2 of the *CPA* prescribes a short 90-day time limit for bringing a certification application, which implies that extensive pre-certification discovery is not contemplated …
>
> [55] The respondents' expert, Margaret F. Sanderson, based her opinion in part on the factual evidence provided by the other defence witnesses. She opined essentially that, while what Dr. Ross [the plaintiff's expert] proposed could be done in theory, it was not possible as a practical matter to assess harm on a class-wide basis given the complexities in the DRAM market described by the other defence witnesses. As for an assessment of aggregate gain or aggregate damages arising from the illegal conspiracy, she said the amount of data required for Dr. Ross' approach is "enormous" and much of it is not publicly available …
>
> [56] Dr. Ross responded that the assessment of the extent of pass-through would require simplifications and approximations but, he said, this is true of all economic analyses of markets. … He confirmed his belief that the necessary data would be available to him from the sources he identified.

[109] In *Infineon*, this Court went on to deal with this issue by articulating the "credible or plausible methodology standard" and pointing out (at para. 65) that the evidentiary burden necessary to show "some basis in fact" is "not an onerous one – it requires only a 'minimum evidentiary basis': *Hollick*, at paras. 21, 24–25". The expert's "belief that the necessary data would be available to him from the sources he identified" was sufficient: paras. 56, 67–68. The action was certified.

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[110] In *Microsoft*, Rothstein J. referred (at para. 124) to the evidence that regression analysis could be employed to establish loss at the indirect purchaser level and concluded that, "[i]mplicit in this evidence is that the data necessary to apply the methodologies in Canada is available". No further evidence of the availability of data was necessary. This conclusion is not consistent with the approach of the certification judge in this case that there are two separate requirements as reflected in his sub-headings, "[t]he proposed methodology" and "[a]vailable data", that must be met for certification purposes.

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[111] In my opinion, the certification judge erred in principle when he rejected the plaintiff's methodology on the ground that the plaintiff's expert had not ascertained whether the data he would need was in fact available. The plaintiff provided some basis in fact that there was a methodology that could demonstrate that overcharges had been passed through to the indirect purchasers. I do not consider the term "some evidence of the availability of the data to which the methodology is to be applied" to be a separate requirement from "some basis in fact" for the viability of the methodology, but if it is, the plaintiff has provided "some evidence" that the data his expert will need is available.

[112] I conclude that loss on a class-wide basis is a common issue within the meaning of s. 4(1)(c) for the claims of the indirect purchasers. The questions set out in the Appendix may be considered common issues for the purpose of the preferability analysis.

Remaining Issues

[113] Having determined that the appeal must be allowed and the order of the certification judge set aside, I have considered whether the case should be remitted to the Supreme Court for a preferability analysis, as was done in *Jiang*, or whether this Court should proceed to conduct the analysis under s. 4(1)(d) which will be decisive of certification, as occurred in *Infineon*.

[114] This action was commenced six years ago. The current version of the Notice of Civil Claim was filed four and a half years ago. At the certification hearing, the

judge indicated that the only issue at the certification hearing was whether liability for loss was a common issue. That issue having been resolved, this Court is in a position to, and should, make a determination on preferability.

Section 4(1)(d) – Preferability

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[115] Once the common issues have been determined, s. 4(1)(d) requires that the judge consider whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. Although the statute speaks of resolving the common issues, the preferability analysis must take into account the importance of the common issues in relation to the claim as a whole: *Hollick* at para. 30.

[116] Section 4(2) requires that in assessing this issue, the judge must consider all relevant matters, including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[117] Section 4(2)(a), requires a judge to consider whether questions arising from the common issues predominate over questions affecting only individual interests. It is in many respects a statutory reformulation of the *Hollick* principle that the judge must consider the importance of the common issues in relation to the claims as a whole. The concept of comparing the import of common issues in relation to individual issues has particular resonance in indirect purchaser cases. In these cases, there are normally some common issues relating to the cause of action, and some individual issues relating to the individual circumstances of the class members. Whether common issues predominate over individual issues will often

depend on whether loss on a class-wide basis can be considered a common issue, which would support certification, or whether loss will have to be established individually for the class members, which will likely make a class proceeding unmanageable.

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[118] In this case, a determination that loss on a class-wide basis is a common issue drives the conclusion that these common issues will predominate over the remaining individual issues. This circumstance arose in *Microsoft*, and the Court accepted (at para. 140) that since there were common issues relating to loss as well as to the existence of the causes of action, the common issues predominated over issues affecting only individual class members.

[119] Furthermore, in assessing the relationship between the resolution of common issues and the management of individual interests, it is important not to lose sight of the broad post-certification powers of the judge managing the case. These powers were referred to indirectly in *Infineon*, where the *CPA* was described as a "powerful procedural statute":

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

[120] More specific reference to these powers was made in *Jiang*, where (at para. 112) Bauman C.J.B.C. referred to ss. 12, 27 and 28 of the *CPA* as providing:

> … a wealth of judicial tools to address individual issues in a timely and practical manner and, importantly, in ways that promote the objectives of access to justice, judicial economy and behaviour modification that, at bottom, are what the CPA is all about encouraging …

[121] This Court in *Jiang* concluded (at para. 120) that in conducting the preferability analysis in a case where individual interests are likely to exist apart from the common issues, the preferability question should be considered "with a keen eye to the broad power under the *CPA* to effectively manage these [individual] issues".

[122] Finally, in addition to the statutory requirements in the *CPA*, the Supreme Court of Canada held in *Hollick* that:

> [27] … the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behavior modification. …

[123] The practical implication of these principles was discussed in *Fischer*, where Cromwell J. emphasized the comparative nature of the preferability analysis:

> [23] This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: "Our focus is not on the convenience or burden of a class action suit per se, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs": *Klay v. Humana*, Inc., 382 F.3d 1241 (11th Cir. 2004), at p. 1269, cited in Rubenstein, at § 4:85, fn. 2.

[124] Comparison with other methods to resolve the claims will often favour certification, although there may be instances where there are practical alternatives to class proceedings (see e.g., *Hollick* at paras. 32–33) or the nature of the individual interests overwhelm the common interests (see e.g., *Chadha*, para. 71). In this case, no practical alternative has been suggested. The comments of this Court in *Infineon* seem apt:

> [75] The chambers judge did not consider whether there were any other more practical or efficient means of resolving the appellant's claims and the respondents did not propose any. Thus, the only apparent alternative to a class action is no action at all. Therefore, if this action does not proceed as a class action there is the potential for an unconscionable result – that the respondents will be allowed to retain their unlawful gains. This potential unconscionability also weighs in favour of certifying this action as a class proceeding.

[125] Given the determination that loss on a class-wide basis is a common issue and the lack of any practical alternative to a class action in this case, it is evident that a class proceeding would be the preferable procedure for the fair and efficient

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resolution of the common issues arising from the claims of direct and indirect purchasers.

[126] I would add that my conclusion on preferable procedure should extend to all direct and indirect purchasers within the defendants' supply chain. That would include the purchasers of high and heavy equipment such as buses, trucks, agricultural and construction vehicles, that were transported by RoRo. The certification judge specifically rejected certification in relation to these purchasers, primarily on the basis that the evidence indicated that the high and heavy business was different than the one for new vehicles.

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[127] In my opinion, this approach strays too far into the merits of the claim. The plaintiff presented a methodology capable of proving that overcharges, if they existed, were passed through the supply chain to direct and indirect purchasers of vehicles transported by RoRo. It is for the judge in the common issues trial to decide on the merits whether the plaintiff's methodology does in fact establish pass-through loss for the various types of indirect purchasers who are part of the claim.

Section 4(1)(e) – Suitability of the Representative Plaintiff

[128] No issue was taken with the suitability of the representative plaintiff at the certification hearing, but for completeness, I have reviewed the draft litigation plan for the proceeding presented by the plaintiff to ensure that it sets out a workable method of advancing the proceeding within the meaning of s. 4(1)(e).

[129] In my view, the litigation plan meets the requirements of s. 4(1)(e). The plan provides for the notification of class members of the proceeding and provides a framework for the class proceeding that shows that the representative plaintiff and class counsel understand the complexities of the case, which are the basic requirements of a workable plan: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at paras. 252–255. It can be anticipated that the litigation plan will require amendment as the action proceeds, but this draft plan meets the requirements of the *CPA*.

[130] I wish to make clear that in holding that the draft plan meets the requirements of the statute, I am not commenting on the appropriateness of the plan proposed by the plaintiff. That will be a matter to be considered by the case management judge after submissions by the parties.

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[131] I note that the draft litigation plan contemplates that the common issues trial will determine the existence and scope of the alleged conspiracy and "may also" determine whether liability can be determined on a class-wide basis. The draft plan then states that "[i]f the common issues trial does not determine injury on a class-wide basis, liability and damages will be determined on an individual basis in a manageable process". Certification is being granted on the basis that the plaintiff has shown some basis in fact for the conclusion that loss can be established on a class-wide basis, and hence the common issues should predominate over the individual issues. If it transpires after the common issues trial that loss cannot be determined on a class-wide basis, it will be open to the defendants to seek whatever remedy under the *CPA* they consider appropriate, including decertification of the action. The post-certification powers in the *CPA* are available for all parties in the proceeding.

[132] For now, however, the statutory requirements for certification have been met, and when the statutory requirements have been met, the action must be certified. Subject to refinement of the class definition to deal with the umbrella purchasers, I would certify the action as a class proceeding.

The Umbrella Purchasers

Common Issues for Umbrella Purchasers

[133] The certification judge dealt with umbrella purchasers separately. He pointed out that the econometric model proposed by Dr. Boyer was designed to assess whether overcharges had been passed through to indirect purchasers, whereas the theory of the claim of umbrella purchasers was not based on charges being passed through, but rather the economic effect of higher prices on substitute products. The judge commented that the methodology as it might relate to umbrella purchasers was confined to one paragraph in which Dr. Boyer commented that "non-participants

may elect to imitate rather than fight the conspiracy members' behaviour …" (emphasis added).

[134] The judge then concluded as follows:

> [60] In effect, the plaintiff asks me to assume that the econometric model proposed by Dr. Boyer for the indirect purchasers can be applied to umbrella purchasers. In my view, this is a bridge too far. I see no reason to make that assumption in a complex case of this nature. Dr. Boyer was explicit in stating that his methodology was designed to show overcharges to direct purchases and pass-through to the indirect purchaser level. Moreover, Dr. Boyer said that much of his analysis would be based in part on information obtained from the defendants, particularly their sales invoices. By definition, the defendants' sales documents would not be applicable to the vehicles not transported by the defendants.
>
> [61] I would not be willing to certify this part of the case.

[135] This assessment is based on an interpretation of the scope of Dr. Boyer's methodology, not on the application of a standard relating to the availability of data. In my opinion, the judge's interpretation is reasonable and supported by a review of Dr. Boyer's evidence. Applying deferential review to the judge's assessment of the scope of the proposed methodology to establish loss, I would not disturb the judge's conclusion that the plaintiff has not established loss as a common issue for the umbrella purchasers.

[136] As I noted with respect to the judge's approach to the indirect purchasers, the conclusion that liability for loss is not a common issue does not end the inquiry. There is at least one common issue raised by the claims of the umbrella purchasers, namely whether the conduct of the defendants gives rise to a cause of action on behalf of the umbrella purchasers. That issue, while it is sufficient to satisfy the requirements of s. 4(1)(c), is considerably narrower than the wrongful act common issue of the indirect purchasers, because umbrella purchasers cannot claim restitutionary benefits, and are likely limited to a possible claim under the *Competition Act*: see *Godfrey* at paras. 187–247.

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Preferable Procedure for Umbrella Purchasers

[137] The single common issue raised by the umbrella purchasers' claims results in a different preferability analysis than is appropriate for the indirect purchasers, where liability for loss is a common issue. On the record before the certification judge, I conclude that individual issues will overwhelm the single common issue whether the umbrella purchasers can claim against the defendants under the *Competition Act*. The post-certification powers reviewed in *Jiang* would not be sufficient to overcome this imbalance.

[138] Accordingly, I conclude that the certification judge did not err in refusing to certify the claims of the umbrella purchasers.

Conclusion

[139] In my opinion, the certification judge erred in rejecting an otherwise plausible methodology for determining whether overcharges had been passed on to indirect purchasers on the basis that the plaintiff's expert had not ascertained at the time of the certification hearing whether the data he would need was in fact available. I would set aside the decision refusing certification of the claims of the indirect purchasers. Applying the principles relevant to s. 4(1)(d) of the *CPA*, I conclude that a class proceeding is the preferable procedure for resolving the claims of the direct and indirect purchasers, including the common issue of loss on a class-wide basis.

[140] However, the judge did not err in refusing to certify the claims of the umbrella purchasers. He concluded that the scope of the proposed methodology did not extend to umbrella purchasers. This was a decision open to the judge to make. It follows that loss is not a common issue for umbrella purchasers. Applying the principles for assessing preferability, I conclude that a class proceeding is not the preferable procedure for resolving the claims of the umbrella purchasers.

Disposition

[141] The application to adduce new evidence on this appeal is dismissed.

[142] The appeal is allowed in part and the action is certified as a class proceeding, with the common issues as set out in the Appendix to this judgment and with the exception of the claims of the umbrella purchasers.

[143] The action is remitted to the Supreme Court for settlement of the form and content of the notice of certification, the means by which the notice of certification will be given to the class members, and any other matters relating to the management of the action pursuant to the *CPA*.

[144] In accordance with s. 37(1) of the *CPA*, each party to this appeal will bear their own costs.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Groberman"

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APPENDIX – COMMON ISSUES

Breach of the Competition Act

(a) Did the defendants, or any of them, engage in conduct which is contrary to s. 45 of the *Competition Act*?

(b) What damages, if any, are payable by the defendants to the Class Members pursuant to s. 36 of the *Competition Act*?

(c) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

(d) Should the defendants, or any of them, pay the full costs, or any, of the investigation into this matter and of proceedings pursuant to s, 36 of the *Competition Act?*

Conspiracy

(e) Did the defendants, or any of them, conspire to harm the Class Members?

(f) Did the defendants, or any of them, act in furtherance of the conspiracy?

(g) Was the predominant purpose of the conspiracy to harm the Class Members?

(h) Did the conspiracy involve unlawful acts?

(i) Did the defendants, or any of them, know that the conspiracy would likely cause injury to the Class Members?

(j) Did the Class Members suffer economic loss?

(k) What damages, if any, are payable by the defendants, or any of them, to the Class Members?

(l) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unlawful Means Tort

(m) Did the defendants, or any of them, intend to injure the Class Members?

(n) Was the Defendants' conduct actionable by a third party or would have been actionable by a third party if the party had suffered losses as a result of it?

(o) Did the Class Members suffer economic loss as a result of the defendants' interference?

(p) What damages, if any, are payable by the defendants, or any of them, to the Class Members?

(q) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unjust Enrichment and Waiver of Tort

(r) Have the defendants, or any of them, been unjustly enriched by the receipt of overcharges on the sale of Vehicle Carrier Services?

(s) Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of Vehicle Carrier Services?

(t) Is there a juridical reason why the defendants, or any of them, should be entitled to retain the overcharges on the sale of Vehicle Carrier Services?

(u) What restitution, if any, is payable by the defendants, or any of them, to the Class Members based on unjust enrichment?

(v) What restitution, if any, is payable by the defendants to the Class Members based on the doctrine of waiver of tort?

(w) What restitution, if any, is payable by the defendants to the Class Members because of their unlawful conduct?

(x) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

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Punitive Damages

(y) Are the defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, what amount and to whom?

Interest

(z) What is the liability, if any, of the defendants, or any of them, for court order interest?

(aa) What is the appropriate distribution of damages and/or restitution to the class and who should pay for the cost of that distribution?

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