



SUPREME COURT OF CANADA

CITATION: Pioneer Corp. v. Godfrey, 2019 SCC
42

APPEALS HEARD: December 11, 2018
JUDGMENT RENDERED: September 20, 2019
DOCKETS: 37809, 37810

BETWEEN:

**Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA)
Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada
Inc.**
Appellants

and

Neil Godfrey
Respondent

AND BETWEEN:

**Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba
Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd., Toshiba
America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung
Electronics Canada Inc., Samsung Electronics America, Inc., Koninklijke
Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On
Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc.,
Philips Electronics Ltd., Panasonic Corporation, Panasonic Corporation of
North America, Panasonic Canada Inc., BENQ Corporation, BENQ America
Corporation and BENQ Canada Corp.**
Appellants

and

Neil Godfrey
Respondent

- and -

**Option consommateurs, Consumers Council of Canada, Canadian Chamber of
Commerce and Consumers' Association of Canada**

Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Brown J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Rowe and Martin JJ. concurring)
(paras. 1 to 123)

REASONS DISSENTING IN PART: Côté J.
(paras. 124 to 239)

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PIONEER CORP. v. GODFREY

**Pioneer Corporation,
Pioneer North America, Inc.,
Pioneer Electronics (USA) Inc.,
Pioneer High Fidelity Taiwan Co., Ltd. and
Pioneer Electronics of Canada Inc.**

Appellants

v.

Neil Godfrey

Respondent

- and -

Toshiba Corporation, Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, Toshiba of Canada Ltd., Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., Samsung Electronics America, Inc., Koninklijke Philips Electronics N.V., Lite-On IT Corporation of Taiwan, Philips & Lite-On Digital Solutions Corporation, Philips & Lite-On Digital Solutions USA, Inc., Philips Electronics Ltd., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., BENQ Corporation, BENQ America Corporation and BENQ Canada Corp.

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2019 SCC 42

File Nos.: 37809, 37810.

2018: December 11; 2019: September 20.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Class actions — Certification — Plaintiff alleging that defendants conspired to fix prices of optical disc drives and related products — Plaintiff's action certified as class proceeding — Class membership including direct purchasers, indirect purchasers and umbrella purchasers — Whether umbrella purchasers have cause of action under Competition Act — Whether Competition Act bars plaintiff from bringing common law or equitable claims — Whether plaintiff's proposed questions relating to loss suffered by class members meet standard for certification as common issues — Competition Act, R.S.C. 1985, c. C-34, s. 36(1) — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).

Limitation of actions — Competition Act setting out limitation period of two years from day on which conduct was engaged in — Action brought against some defendants more than two years after alleged conduct occurred — Whether action against those defendants barred by statutory limitation period — Whether discoverability rule or doctrine of fraudulent concealment applies to extend statutory limitation period — Competition Act, R.S.C. 1985, c. C-34, s. 36(4).

The proposed representative plaintiff applied for certification of a class proceeding under the British Columbia *Class Proceedings Act*. The plaintiff alleges that the defendants, who manufacture Optical Disc Drives (“ODDs”) and ODD products, conspired to fix prices of ODDs and ODD products between 2004 and 2010 (“class period”). He advances various causes of action based on that alleged conduct. They include a cause of action under s. 36(1)(a) of the *Competition Act*, which allows for the recovery of damages or loss that resulted from conduct contrary to Part VI of the *Competition Act*, as well as common law and equitable claims. The plaintiff seeks to bring the proposed class proceeding on behalf of all British Columbia residents who purchased an ODD or an ODD product during the class period. The proposed class consists of direct purchasers, indirect purchasers, and umbrella purchasers, that is, purchasers whose ODD or ODD product was manufactured and supplied by a non-defendant. Although the action against most of the defendants was filed within two years of the end of the class period, the action against a subset of the defendants (“Pioneer defendants”) was filed more than two years after the end of the class period.

The certification judge certified the action as a class proceeding, subject to certain exceptions and conditions. He was not satisfied that it was plain and obvious that the action against the Pioneer defendants was barred by the two-year limitation period set out in s. 36(4) of the *Competition Act*. He also held that the umbrella purchasers had a cause of action against the defendants under s. 36(1)(a) of the *Competition Act*, that a breach of the *Competition Act* could represent the unlawfulness element of the various causes of action advanced by the plaintiff, thereby affirming the availability of those common law and equitable actions, and that the plaintiff's proposed questions in relation to loss suffered by the class were certifiable as common questions. The Court of Appeal dismissed the appeals brought by the defendants.

Held (Côté J. dissenting in part): The appeals should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, **Brown**, Rowe and Martin JJ.: It is not plain and obvious that the plaintiff's claim against the Pioneer defendants will fail on the basis that it was commenced after the two-year limitation period in s. 36(4)(a)(i) of the *Competition Act* because the discoverability rule applies to extend the limitation period. As for the inclusion of umbrella purchasers, the pleadings against all the defendants disclose a cause of action for them under s. 36(1)(a) of the *Competition Act*, thereby satisfying the conditions under s. 4(1)(a) of the *Class Proceedings Act* for certification. Also, as s. 36(1) of the *Competition Act* does not bar common law or equitable claims, it is not plain and obvious that the plaintiff's other claims cannot succeed. Furthermore, the certification judge identified

the correct standard to certify commonality of loss as a common issue and there is no basis to interfere with his certification of these loss-related questions.

Where a limitation period is subject to the rule of discoverability, a cause of action will not accrue for the purposes of the running of the limitation period until the material facts on which the cause of action is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. The discoverability rule is not a universally applicable rule of limitations, but a rule of construction to aid in the interpretation of statutory limitation periods. It can therefore be displaced by clear legislative language. In determining whether discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from “the accrual of the cause of action”, discoverability applies if it is evident that the operation of a limitation period is conditioned upon accrual of a cause of action or knowledge of an injury. Discoverability will apply where the event triggering the limitation period is an element of the cause of action because, in such cases, the legislature has shown its intention that the limitation period be linked to the cause of action’s accrual.

The discoverability rule applies to extend the two-year limitation period in s. 36(4)(a)(i) of the *Competition Act*, such that it begins to run only when the material facts on which the cause of action granted by s. 36(1)(a) of the *Competition Act* is based are discovered or ought to have been discovered by the exercise of reasonable diligence. The event triggering this particular limitation period is the occurrence of an

element of the underlying cause of action — specifically, conduct contrary to Part VI of the *Competition Act*. Consideration of the rationales for limitation periods affirms the application of the discoverability rule to this provision.

Furthermore, it is not plain and obvious that the doctrine of fraudulent concealment could not delay the running of the limitation period. Fraudulent concealment is a form of equitable fraud that arises so as to delay the running of a limitation period when it would be, for any reason, unconscionable for the defendant to rely on the advantage gained by having concealed the existence of a cause of action. The inquiry is not into the relationship within which the conduct occurred, but into the unconscionability of the conduct itself. Its application is therefore not conditioned upon a special relationship between the parties.

Umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act*. Under the theory of umbrella pricing, the entire market for the subject product is affected because anti-competitive cartel activity causes non-cartel manufacturers to also raise their prices. The text of s. 36(1)(a), which provides a cause of action to “any person who has suffered loss or damage as a result of” conduct contrary to s. 45 of the *Competition Act*, supports the view that umbrella purchasers have a cause of action thereunder. Parliament’s use of the words “any person” empowers any claimant who can demonstrate that loss or damage was incurred as a result of a defendant’s conduct to bring a claim. Also, interpreting s. 36(1)(a) so as to permit umbrella purchaser actions furthers the purpose of the *Competition Act* set out

in s. 1.1, which is to “maintain and encourage competition in Canada” with a view to providing consumers with “competitive prices and product choices”. This interpretation also furthers two other objectives of the *Competition Act*: it furthers the objective of deterrence because it increases the potential liability falling upon those who engage in anti-competitive behaviour, and it furthers the objective of compensation because it affords umbrella purchasers recourse to recover from loss arising from what is assumed to have been anti-competitive conduct. Moreover, departmental and parliamentary statements fortify the view that Parliament intended that the cause of action in s. 36(1)(a) be broadly available to anyone who suffers a loss from anti-competitive behaviour.

Recognizing that umbrella purchasers have a cause of action under s. 36(1)(a) does not risk exposing defendants to indeterminate liability. Firstly, liability of defendants is limited by the class period, and by the specific products whose prices are alleged to have been fixed. Also, in order for cartel members to profit from a conspiracy, the entire market price has to increase — the umbrella effect is therefore an intended consequence of the anti-competitive behaviour. Intended results are not indeterminate, but rather pre-determined. Secondly, as s. 36(1)(a) limits recovery to only those purchasers who can show that they suffered a loss or damage “as a result of” a defendant’s conspiratorial conduct, recovery is limited to claimants with a loss that is not too remote from the conduct and umbrella purchasers will have to demonstrate that they suffered such loss or damage. Thirdly, the elements of the wrongful conduct outlined in the text of s. 45(1) in force at the relevant time limit the

reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct.

Section 36(1) of the *Competition Act* does not bar common law or equitable claims, such as claims in civil conspiracy. Prior to the enactment of the cause of action contained in what is now s. 36(1) of the *Competition Act*, a breach of s. 45(1) of the *Competition Act* was, as it still is, able to satisfy the “unlawful means” element of the tort of civil conspiracy. The enactment of the statutory cause of action in s. 36(1) of the *Competition Act* did not oust common law and equitable actions by its express terms or by necessary implication. Section 36(1) is not duplicative of the tort of civil conspiracy, it does not provide a new and superior remedy, nor does it represent a comprehensive and exclusive code regarding claims for anti-competitive conspiratorial conduct. In addition, s. 62 of the *Competition Act* contemplates the subsistence of common law and equitable rights of action. It is therefore not plain and obvious that the plaintiff is precluded from bringing common law and equitable causes of action alongside his s. 36(1)(a) claim.

In order for loss-related questions to be certified as common issues, a plaintiff’s expert’s methodology need only be sufficiently credible or plausible to establish that loss reached the requisite purchaser level. It is not necessary that it establish that each and every class member suffered a loss nor must it be able to identify those class members who suffered no loss so as to distinguish them from those who did. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3

S.C.R. 477, the Court directed that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more claimants at the purchaser level. For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge. Additionally, showing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability upon the defendants and will result in common success. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level, because a common issues trial will either determine liability or terminate the litigation, with either scenario advancing the litigation toward resolution.

Aggregate damages under s. 29(1)(b) of the *Class Proceedings Act* are purely remedial, and available only after all other common issues have been determined, including liability. Irrespective, then, of whether aggregate damages are certified as a common issue, it is for the trial judge to determine, following the common issues trial, whether the statutory criteria are met such that the aggregate damages provisions can be applied to award damages. Aggregate damages provisions cannot be used to establish liability. In order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has actually suffered a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the *Competition Act*). Whether a plaintiff's expert's methodology is sufficient

for the purposes of establishing a defendant's liability to all class members will depend on the findings of the trial judge.

Per Côté J. (dissenting in part): Both appeals should be allowed in part. The Pioneer defendants have not demonstrated that the plaintiff's claim for recovery under s. 36(1) of the *Competition Act* is time-barred by the limitation period in s. 36(4)(a)(i). While the discoverability rule does not apply to toll the limitation period, it is not plain and obvious that the fraudulent concealment doctrine has no application in this case. There is agreement with the majority, though for different reasons, that the existence of the statutory cause of action in s. 36(1) of the *Competition Act* does not preclude the plaintiff from advancing claims at common law or in equity based on the same conduct prohibited by Part VI. However, there is disagreement that the umbrella purchasers have a claim against the defendants under s. 36(1) of the *Competition Act*. There is also disagreement that the certification judge identified the correct standard for certifying loss as a common issue pursuant to s. 4(1)(c) of the *Class Proceedings Act* and therefore that the plaintiff's methodology met the correct standard in the present case.

The discoverability rule does not apply to toll the limitation period in s. 36(4)(a)(i) of the *Competition Act* that is applicable to the plaintiff's claim for recovery under s. 36(1) of that statute. Discoverability is a judge-made rule of statutory interpretation that assists in determining whether the event triggering the commencement of a limitation period depends upon the state of the plaintiff's

knowledge. This rule applies only where a legislature provides that the limitation period runs from the accrual of the cause of action (or wording to that effect) or from the occurrence of some event that is related to the state of the plaintiff's knowledge. Conversely, where a legislature provides that a limitation period is triggered by an event that occurs without regard to the plaintiff's state of mind, courts cannot apply the discoverability rule to postpone the commencement of the limitation period until such time as the plaintiff discovered that the event had taken place.

Statutory language referring to the occurrence of an element of the cause of action cannot be equated with language referring to the accrual or arising of the cause of action in its entirety such that the discoverability rule automatically applies in the former case. This would expand the scope of the discoverability rule in a manner that is neither consistent with precedent nor justifiable in principle and would create an arbitrary distinction between triggering events that are related to the cause of action and those that are not, even though both may occur independently of the plaintiff's state of mind. A preferable approach is instead one that considers each statutory limitation clause on its own terms, recognizing that a triggering event that relates to a cause of action can, but need not, be dependent on the plaintiff's state of mind.

The limitation period in s. 36(4)(a)(i) commences on the day on which the conduct contrary to Part VI of the *Competition Act* actually takes place and not the day on which a potential claimant discovers that it took place. There is simply no link between the triggering event and the plaintiff's state of mind. The provision does not

contain wording to the same effect as accrual of the s. 36 cause of action. Applying discoverability would make the limitation period chosen by Parliament virtually meaningless and create uncertainty around the likelihood and timing of significant litigation.

A special relationship between the parties — one that is based on trust and confidence — is not always a prerequisite or a necessary element for the operation of the doctrine of fraudulent concealment. This doctrine operates to prevent a limitation clause from being used as an instrument of injustice in circumstances where a defendant conceals the facts giving rise to a potential cause of action from a plaintiff. In such circumstances, equity suspends the running of the limitation clock until the injured party can reasonably discover the cause of action. Fraud in equity is broader than it is at common law and what constitutes unconscionable conduct will vary from case to case and depend in part on the connection between the parties. Based on this understanding of the fraudulent concealment doctrine, it is not plain and obvious that equity can intervene to toll the applicable limitation period in only cases where there exists a special relationship; it may be that it can also intervene in cases — at least in the commercial context, as here — where the plaintiff can demonstrate something commensurate with or tantamount to a special relationship. However, simply establishing the existence of the conspiracy will not suffice for the fraudulent concealment doctrine to toll the applicable limitation period.

It is plain and obvious that the claims by umbrella purchasers — those class members who purchased from a non-defendant a product that was not manufactured or supplied by a defendant — under s. 36(1)(a) of the *Competition Act* cannot succeed. While on its face, s. 36(1) appears to be worded broadly enough to capture umbrella purchaser claims, so long as they can prove that they suffered loss or damage as a result of the conduct specified in para. (a) or (b) of subsection (1), this statutory provision must be interpreted in a manner that is consistent with the principles of indeterminacy and remoteness that limit the extent of liability at common law. Indeterminacy is a policy consideration that negates the imposition of a duty of care in negligence where it would expose the defendant to liability in an indeterminate amount for an indeterminate time to an indeterminate class and remoteness limits the scope of liability in negligence where the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable. Although these principles relate primarily to liability in negligence, they can inform the analysis of claims under s. 36 for pure economic loss. Section 36(1) should not be interpreted in a manner that would permit claimants to recover from defendants for any losses that in some way flowed from the alleged price-fixing conspiracy as it would expose defendants to liability that is potentially limitless in scope for loss and damage that are too remote from any price-fixing that occurred. Consistent with the principles underlying indeterminacy and remoteness, the cause of action in s. 36(1) should be read as limiting the scope of liability of defendants to loss and damage flowing from their own pricing decisions, not those of third parties. Any overcharges the umbrella purchasers may have incurred in the present case were the direct result of pricing decisions made by non-defendant manufacturers and

suppliers of ODDs, regardless of whether those choices were influenced by broader market trends. The defendants have control over their own business decisions but not over those of third parties. For this reason, it would be unfair to hold the defendants liable to the umbrella purchasers where they had no control over such liability.

It is not plain and obvious that s. 36(1) bars a plaintiff from alleging common law and equitable causes of action in respect of conduct that breaches the prohibitions in Part VI of the *Competition Act*. The coexistence of statutory and common law or equitable claims arising from conduct contrary to Part VI of the *Competition Act* is contemplated by s. 62 of that statute. The inclusion of s. 62 in the statutory framework suggests that Parliament did not intend the provisions of the *Competition Act* to intrude upon the provinces' jurisdiction over civil rights and liberties. That s. 62 applies only to Part VI of the *Competition Act* is not consequential as the cause of action created by s. 36(1)(a) is expressly tied to conduct that would constitute an offence under that part. When the words of s. 62 are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the act and the intention of Parliament, this provision has the effect of preserving all civil rights of action that a claimant may have in respect of anti-competitive conduct contemplated under Part VI of that Act. Section 62 would be meaningless if s. 36(1) were interpreted as exhaustive in respect of civil claims for such conduct.

For questions to be certified as common issues under s. 4(1)(c) of the *Class Proceedings Act*, the representative plaintiff must show there is some basis in fact for the commonality requirement — that is, that the questions be capable of resolution on a class-wide basis. What the “some basis in fact” standard requires in any given case depends on what it is that the proposed questions ask; different questions will impose different requirements. In class actions where loss is an essential element of liability, loss-related questions can be certified as common issues only if the representative plaintiff’s expert methodology will be able to actually identify which class members suffered a loss at trial.

In the present case, in order for loss-related questions to be certified as common issues among indirect purchasers pursuant to s. 4(1)(c) of the *Class Proceedings Act*, the representative plaintiff’s proposed methodology must be capable of establishing at trial that at least some identifiable indirect purchasers actually suffered a loss. The plaintiff has not met the required standard in the present case because his methodology is only capable of establishing at trial that loss was occasioned somewhere at the indirect purchaser level of the distribution chain. Such a methodology will not enable the common issues trial judge to determine which class members actually suffered a loss — an essential element of the causes of action pleaded, and necessary for the purpose of making determinations as to liability. The proposed loss-related questions will therefore not be capable of resolution on a class-wide or common basis. What is required of the plaintiff in this case is a methodology capable of answering the loss-related questions on an individualized

basis, either by showing that all of the indirect purchasers suffered a loss or at least by identifying those who did and separating them from those who did not.

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By Brown J.

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By Côté J. (dissenting in part)

M. (K.) v. M. (H.), [1992] 3 S.C.R. 6; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621, 132

O.R. (3d) 81; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48; *Snow v. Kashyap* (1995), 125 Nfld & P.E.I.R. 182; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801; *CCS Corp. v. Secure Energy Services Inc.*, 2014 ABCA 96, 575 A.R. 1; *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825, 67 C.P.R. (4th) 241; *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996, 88 C.P.R. (4th) 7; *Eli Lilly and Co. v. Apotex Inc.*, 2009 FC 991, 80 C.P.R. (4th) 1; *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252; *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341; *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *First City Capital Ltd. v. B.C. Building Corp.* (1989), 43 B.L.R. 29; *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Ultramares Corp. v. Touche*, 174 N.E. 441 (1931); *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114; *Taylor v. 1103919 Alberta Ltd.*, 2015 ABCA 201, 602 A.R. 105; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983); *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87; *Shah v. LG Chem, Ltd.*, 2017 ONSC 2586, 413 D.L.R. (4th) 546; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42,

[2011] 3 S.C.R. 45; *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Shah v. LG Chem, Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721; *R. v. Proulx*, 2016 QCCA 1425; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545; *Pro-Sys v. Microsoft*, 2010 BCSC 285.

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Combines Investigation Act, R.S.C. 1970, c. C-23.

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APPEALS from a judgment of the British Columbia Court of Appeal (Newbury, Groberman and Savage JJ.A.), 2017 BCCA 302, 1 B.C.L.R. (6th) 319, [2017] 12 W.W.R. 448, [2017] B.C.J. No. 1618 (QL), 2017 CarswellBC 2245 (WL Can.), affirming a decision of Masuhara J., 2016 BCSC 844, [2016] B.C.J. No. 979 (QL), 2016 CarswellBC 1313 (WL Can.). Appeals dismissed, Côté J. dissenting in part.

W. Michael G. Osborne, Brigeeta Richdale and Jessica Lewis, for the appellants Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc.

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Maxime Nasr and Violette Leblanc, for the intervener Option consommateurs.

Jonathan J. Foreman, Jean-Marc Metrailler and Michael Sobkin, for the intervener the Consumers Council of Canada.

Sandra A. Forbes and Adam Fanaki, for the intervener the Canadian Chamber of Commerce.

Jean-Marc Leclerc and Mohsen Seddigh, for the intervener the Consumers' Association of Canada.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. was delivered by

BROWN J. —

I. Introduction

[1] The proposed representative plaintiff, Neil Godfrey, applied for certification of a class proceeding under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The defendants manufacture Optical Disc Drives (“ODDs” — a memory storage device that uses laser light or electromagnetic waves near the light spectrum to read and/or record data on optical discs), and ODD products (products that contain ODDs). Godfrey alleges that the defendants conspired to fix prices of ODDs and ODD products.

[2] The certification judge granted Godfrey’s application. Two sets of defendants — one led by Pioneer Corporation, and the other by Toshiba Corporation — each appealed from that decision, unsuccessfully, to the British Columbia Court of Appeal. At stake in these appeals is, principally, whether it is plain and obvious that the claim under s. 36(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34, of so-called “umbrella purchasers” who bought ODDs or ODD products manufactured and supplied by someone *other than* the defendants, but who allege that the defendants’ price-fixing conduct raised the market price of the product, cannot succeed. This depends on whether these umbrella purchasers have a cause of action under s. 36(1)(a). For the reasons that follow, I agree with the courts below that they do, and it therefore follows that it is not plain and obvious that their claim cannot succeed.

[3] These appeals also present an occasion to clarify the operation of the statutory limitation period for claims under s. 36(1)(a) of the *Competition Act*, to affirm the availability of common law and equitable actions in respect of claims also brought under s. 36(1)(a) of the *Competition Act*, and to reiterate the standard required to certify loss-related questions as common issues in class proceedings.

[4] As I will explain below, my disposition of all these matters would lead me to dismiss the appeals.

II. Background

[5] Godfrey applied for certification of a class proceeding against 42 defendants (collectively, “Toshiba”), alleging a conspiracy to raise, maintain, fix and/or stabilize the price of ODDs between January 1, 2004 and January 1, 2010 (“class period”). He deposed that he purchased ODD products during the class period, and that he seeks to bring the proposed class proceeding on behalf of all British Columbia residents who purchased an ODD or an ODD product during the class period. The proposed class consists of:

- (a) *direct purchasers*, whose ODD or ODD product was manufactured or supplied *by a defendant* and purchased *from that defendant*,
- (b) *indirect purchasers*, whose ODD or ODD product was manufactured or supplied *by a defendant* and purchased *from a non-defendant*; and
- (c) *umbrella purchasers*, whose ODD or ODD product was manufactured *and* supplied *by a non-defendant*.

III. Judicial History

A. *British Columbia Supreme Court, 2016 BCSC 844 — Masuhara J.*

[6] The certification judge certified the action as a class proceeding, subject to certain exceptions and conditions (para. 221 (CanLII)). One condition was that the class

definition be amended so as to satisfy s. 4(1)(b) of the *Class Proceedings Act*. The certification judge held that the class definition (“[a]ll persons resident in British Columbia who purchased [ODDs and ODD products] in [the class period]”) was insufficiently precise, as it was unclear which products were included (paras. 128-31).

[7] In his reasons, the certification judge resolved a number of matters, only two of which are relevant to these appeals: whether the pleadings disclose a cause of action, and whether Godfrey’s proposed questions relating to loss suffered by the class are certifiable as common questions.

(1) Do the Pleadings Disclose a Cause of Action?

[8] The certification judge first considered whether Godfrey’s pleadings satisfy s. 4(1)(a) of the *Class Proceedings Act*, which conditions certification upon the pleadings disclosing a cause of action.

(a) *The Pioneer Claim*

[9] A subset of the named defendants (“Pioneer”) opposed Godfrey’s certification application, arguing that the action was bound to fail because it was barred by the two-year limitation period in s. 36(4) of the *Competition Act* (although the action against the other defendants was filed on September 27, 2010, the action against Pioneer was not filed until August 16, 2013). The certification judge held, however, that this argument could not be considered at the certification stage (para. 46). Further,

it was not plain and obvious in any event that the limitation period could *not* be extended in this case by applying principles of discoverability or fraudulent concealment.

(b) *Umbrella Purchasers*

[10] Toshiba argued that the umbrella purchasers had no cause of action under s. 36(1)(a) of the *Competition Act*, because their inclusion would expose it to indeterminate liability. For four reasons, however, the certification judge held that the umbrella purchasers had a cause of action:

1. While “allowing umbrella claims is inconsistent with restitutionary law”, restitutionary law does not determine the scope of the *Competition Act* claims, since s. 36 exists to compensate for losses, not to restore wrongful gains (para. 73).
2. The possibility of indeterminate liability does not militate against affording umbrella purchasers a cause of action, since the defendants’ liability exposure, while significant, would not be indeterminate (paras. 75-76).
3. While umbrella claims expose the defendants to liability for the pricing decisions of non-defendants, the pricing decisions of non-

defendants, under the theory of umbrella effects, are not truly “independent” (para. 77).

4. The umbrella purchaser claims would further the goals of the *Competition Act*, including compensation and deterrence (para. 78).

(c) “*Unlawfulness*” Element

[11] The certification judge then considered Toshiba’s argument that a breach of the *Competition Act* could not constitute the “unlawful” element of civil causes of action, such as the tort of unlawful means conspiracy (para. 83). He held that he was bound by *Watson v. Bank of America Corp.*, 2015 BCCA 362, 79 B.C.L.R. (5th) 1, such that it could. While, for other reasons, the pleadings did not disclose a cause of action for the unlawful means tort, Godfrey was permitted to amend his pleadings (paras. 109-10). And, while finding that Godfrey’s pleadings *did* disclose a cause of action in civil conspiracy (both predominant purpose conspiracy and unlawful means conspiracy), unjust enrichment and waiver of tort (paras. 100, 102, 115 and 119), the certification judge also found that the umbrella purchasers’ claims in unjust enrichment and waiver of tort were bound to fail (paras. 116 and 120).

(2) Do the Claims Raise Common Issues?

[12] Godfrey sought to have 25 questions certified as common questions under s. 4(1)(c) of the *Class Proceedings Act* (several of which related to loss alleged to have been suffered by the proposed class (para. 143)). Godfrey's expert, Dr. Keith Reutter, opined that (1) all the proposed class members would have been impacted by Toshiba's alleged conspiracy, and (2) there are methods available to estimate any overcharge that resulted from the alleged conspiracy, as well as aggregate damages (paras. 151-52). Some of the defendants, however, retained their own expert, Dr. James Levinsohn, who opined that it would not be possible to determine the fact of injury for the proposed class members using common evidence and analysis (para. 153).

[13] After examining Dr. Reutter's opinion in detail, the certification judge concluded that his was a plausible methodology which satisfied the standard set in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, for evidence to support certifying loss as a common issue. Specifically, it could establish that overcharges were passed on to the indirect purchaser level (paras. 167 and 179).

[14] The certification judge therefore certified all of the common issues with respect to the direct purchasers and indirect purchasers, except those relating to the unlawful means tort (para. 199). With respect to the umbrella purchasers, he certified all of the common issues except those relating to the unlawful means tort, unjust enrichment, waiver of tort (para. 200) and aggregate damages (para. 188).

B. *British Columbia Court of Appeal, 2017 BCCA 302, 1 B.C.L.R. (6th) 319 — per Savage J.A.*

[15] Pioneer appealed, arguing the certification judge erred in holding: (1) that the limitation period defence cannot be considered at the certification stage; (2) that it is not plain and obvious that the discoverability rule never applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act*; and (3) that it is not plain and obvious that the doctrine of fraudulent concealment cannot toll the limitation period in this case (para. 45).

[16] Toshiba also appealed, arguing the certification judge erred by: (1) recasting the standard for certifying loss as a common issue; (2) holding that a breach of s. 45 of the *Competition Act* can furnish the “unlawfulness” element for common law actions; and (3) allowing the umbrella purchasers’ causes of action to proceed (para. 44).

[17] The Court of Appeal dismissed both sets of appeals.

(1) Pioneer’s Appeal

[18] Agreeing with the certification judge, the Court of Appeal held that limitations arguments should, generally, not be considered at the certification stage. Further, and that aside, the limitations issue in this case was “intimately connected with the facts of the alleged conspiracy” and should be reserved for trial (paras. 67-68). Alternatively, were discoverability properly considered at the certification stage, it would not be plain and obvious that discoverability does not apply to delay the running of the limitation period in s. 36(4)(a)(i) of the *Competition Act*. While recognizing that

some courts have declined to apply discoverability to s. 36(4)(a)(i) (at para. 72), the Court of Appeal read this Court's decision in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, as directing that discoverability applies where the limitation period is explicitly linked to the injured party's knowledge or the basis of the cause of action (para. 89).

[19] Further, the certification judge was correct, said the Court of Appeal, to conclude that it is not plain and obvious that the doctrine of fraudulent concealment could not apply (para. 110). Equitable fraud was sufficient to invoke the doctrine, and a purely commercial relationship could support the requirement for a "special relationship" (paras. 102-3) between the parties so as to toll the applicable limitation period. Accordingly, Godfrey's failure to plead a "special relationship" would not preclude the doctrine's application here (para. 104).

(2) Certifying Loss as a Common Issue

[20] Toshiba argued that, since Dr. Reutter's proposed methodology could neither demonstrate that loss was suffered by each class member nor identify the class members who did not suffer harm, the certification judge erred in certifying questions relating to harm as common questions (para. 113). It also saw error in the certification judge's reference (at para. 169) to the *Class Proceedings Act's* aggregate damages provisions as supporting the possibility of liability, even where some class members have not demonstrated actual loss.

[21] The Court of Appeal rejected these arguments, noting that *Microsoft* allows loss to be certified as a common issue if “the methodology [is] able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain” (para. 149, citing *Microsoft*, at para. 115). Certifying an issue as common does not create an ultimate right to recovery; it is merely a procedural step that does not change the substantive rights of the parties (para. 158). And, while the aggregate damages provisions in the *Class Proceedings Act* are applicable only once liability is established, they do indeed demonstrate that the statute contemplates recovery where certain class members have not proven that they suffered loss (paras. 160-61).

(3) Unlawfulness Element

[22] The Court of Appeal agreed with the certification judge that a breach of s. 45 of the *Competition Act* could represent the unlawfulness element of the various causes of action advanced by Godfrey (para. 186).

(4) The Umbrella Purchasers

[23] Here, too, the Court of Appeal found no error in the certification judge’s reasons. Umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* based on a breach of s. 45(1) (paras. 247-48). Toshiba’s arguments that the certification judge did not expressly consider whether the umbrella purchasers have claims at common law, and that the certification judge erred in his interpretation of s. 36, were rejected (paras. 188-89).

[24] Finally, the Court of Appeal agreed with the certification judge that Toshiba's concerns about indeterminate liability did not support denying certification of the umbrella purchasers' claims. An action under s. 36(1)(a) based on a breach of s. 45(1) is subject to internal limitations within ss. 36(1) and 45(1) which address indeterminacy such that it does not arise as a concern in this case (paras. 230-31). Further, Toshiba's additional potential liability to the umbrella purchasers would be significantly less, relative to its potential liability to non-umbrella purchasers (para. 236).

IV. Issues on Appeal

[25] Pioneer's appeal raises the issue of whether it is plain and obvious that the claim against it will not succeed because it is statute-barred by s. 36(4)(a)(i) of the *Competition Act*. In answering this question, we must decide:

1. whether the principle of discoverability applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act*; and
2. whether, for fraudulent concealment to toll the limitation period in s. 36(4)(a)(i) of the *Competition Act*, a special relationship between the parties must be established.

[26] The appeals, taken together, raise three common issues:

1. whether it is plain and obvious that the umbrella purchasers' claim under s. 36(1)(a) of the *Competition Act* cannot succeed;
2. whether it is plain and obvious that s. 36(1) of the *Competition Act* bars a plaintiff from bringing concurrent common law and equitable claims; and
3. the required standard to certify loss as a common issue, and whether Dr. Reutter's evidence satisfies that standard.

V. Analysis

[27] Section 4(1) of the *Class Proceedings Act* contains the requirements for certification of a class proceeding in British Columbia. At issue is whether Godfrey has satisfied s. 4(1)(a), which requires that the pleadings disclose a cause of action, and s. 4(1)(c), which requires that the claims of the class members raise common issues. The former requirement is satisfied unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25; *Microsoft*, at para. 63). The latter is satisfied where there is "some basis in fact" to support a common issue (*Hollick*, at para. 25; *Microsoft*, at paras. 99-100).

[28] Although at certification the plaintiff must satisfy s. 4(1)'s requirements that I have just described, the standard of review on appeal for each particular question depends on the nature of the question, and will be identified in turn.

A. *Pioneer's Appeal*

[29] Noting that the alleged conspiracy is said to have ended on January 1, 2010, and that the action against Pioneer was not commenced until August 16, 2013, Pioneer argues that Godfrey's claim is statute-barred, as it was commenced after the two-year limitation period in s. 36(4)(a)(i) of the *Competition Act* expired. As I will explain, I agree that the discoverability rule applies to extend the limitation period in s. 36(4)(a)(i). It is not plain and obvious that Godfrey's claim against Pioneer will fail on this basis. Although it is therefore unnecessary to opine on whether the doctrine of fraudulent concealment would apply, I take this opportunity to briefly discuss why its application is not conditioned upon a special relationship between the parties.

[30] Determining whether discoverability applies to the limitation period in s. 36(4)(a)(i) is a question of law subject to a standard of correctness, as is the question of whether fraudulent concealment requires a special relationship to be established between the parties. The applicability of either doctrine is, however (and as noted by the Court of Appeal), "bound up in the facts" and must be left to the trial judge to decide (C.A. reasons, at para. 68).

(1) Discoverability

(a) Limitation Periods Run From the Accrual or Knowledge of the Cause of Action

[31] This Court has recognized that limitation periods may be subject to a rule of discoverability, such that a cause of action will not accrue for the purposes of the running of a limitation period until “the material facts on which [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence” (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224; *Ryan*, at paras. 2 and 22).

[32] This discoverability rule does not apply automatically to every limitation period. While a “rule”, it is not a universally applicable rule of *limitations*, but a rule of *construction* to aid in the interpretation of statutory limitation periods (*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 37). It can therefore be displaced by clear legislative language (*Ermineskin Indian Band and Nation v. Canada*, 2006 FCA 415, [2007] 3 F.C.R. 245, at para. 333, *aff’d* 2009 SCC 9, [2009] 1 S.C.R. 222). In this regard, many provincial legislatures have chosen to enact statutory limitation periods that codify, limit or oust entirely discoverability’s application, particularly in connection with ultimate limitation periods (see e.g. *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 4-5 and 15; *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1), *Limitation Act*, S.B.C. 2012, c. 13, ss. 6-8 and 21; *The Limitations Act*, S.S. 2004, c. L-16.1, ss. 5-7, *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, s. 5, *Limitation of Actions Act*, S.N.S. 2014 c. 35, s. 8; see also *Bowes v. Edmonton (City)*, 2007 ABCA 347, 425 A.R. 123, at paras. 146-58).

[33] Further, absent legislative intervention, the discoverability rule applies only where the limitation period in question runs from the accrual of the cause of action, or from some other event that occurs when the plaintiff has knowledge of the injury sustained:

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from “the accrual of the cause of action” or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party’s knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at para. 22, cited in *Peixeiro*, at para. 37.)

[34] Two points flow from this statement. First, where the running of a limitation period is contingent upon the accrual of a cause of action or some other event that can occur only when the plaintiff has knowledge of his or her injury, the discoverability principle applies in order to ensure that the plaintiff had knowledge of the existence of his or her legal rights before such rights expire (*Peixeiro*, at para. 39).

[35] Secondly (and conversely), where a statutory limitation period runs from an event unrelated to the accrual of the cause of action or which does not require the plaintiff’s knowledge of his or her injury, the rule of discoverability will not apply. In *Ryan*, for example, this Court held that discoverability did not apply to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, which stated that an action against a

deceased could not be brought after one year from the date of death. As the Court explained (para. 24):

The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action. [Emphasis added; citation omitted.]

By tying, then, the limitation period to an event unrelated to the cause of action, and which did not necessitate the plaintiff's knowledge of an injury, the legislature had clearly displaced the discoverability rule (*Ryan*, at para. 27).

[36] In determining whether a limitation period runs from the accrual of a cause of action or knowledge of the injury, such that discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from “the accrual of the cause of action”, discoverability will apply if it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action or knowledge of an injury. Indeed, clear statutory text is necessary to oust its application. In *Peixeiro*, for example, this Court applied the discoverability rule to s. 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, which stated that an action must be commenced within two years of the time when “damages were sustained” (para. 2). The use of the phrase “damages were sustained” rather than “when the cause of action arose” was a “distinction without a difference”, as it was unlikely that the legislature intended that the limitation period should run without the plaintiff's knowledge (para. 38).

[37] It is therefore clear that the “the judge-made discoverability rule will apply when the requisite limitation statute indicates that time starts to run from when the cause of action arose (or other wording to that effect)” (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016), at p. 103, emphasis added). And, while my colleague Côté J. claims to disagree with my analysis, I am fortified by the endorsement in her reasons of this formulation of discoverability (paras. 140 and 149).

[38] The issue raised by this appeal is what constitutes sufficiently clear legislative expression in this regard, such that discoverability will apply. In my view, where the event triggering the limitation period is an element of the cause of action, the legislature has shown its intention that the limitation period be linked to the cause of action’s accrual, such that discoverability will apply. As this Court stated in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, the accrual of a cause of action is a “gradatio[n]” (p. 34). Where all the elements of a cause of action occur simultaneously, the cause of action accrues contemporaneously with the occurrence of each element (*M. (K.)*, at p. 34). Where, however, the occurrence of each element is separated in time, the accrual of the cause of action is a continuing (but not continual) process. That is, the cause of action will continue to accrue as each element of the cause of action occurs.

[39] This was what the Court in *Ryan* was referring to when it said that discoverability does not apply where the limitation period “is explicitly linked by the governing legislation to a fixed event unrelated to the injured party’s knowledge or the basis of the cause of action” (para. 24, emphasis added). In *Ryan*, discoverability did

not apply because the action was “complete in all its elements” before the operation of the event triggering the limitation period (para. 18). The limitation period was not dependent upon the accrual of the cause of action and thus the limitation period would begin to run independent of the accrual of the cause of action (see *Ryan*, at paras. 16, 18, 20, 29 and 32). Citing the trial judge with approval, the Court added this:

The fact of death is of no relevance to the cause of action in question. It is not an element of the cause of action and is not required to complete the cause of action. Whatever the nature of the cause of action, it is existing and complete before the *Survival of Actions Act* operates, in the case of a death, to maintain it and provide a limited time window within which it must be pursued. The fact of the death is irrelevant to the cause of action and serves only to provide a time from which the time within which to bring the action is to be calculated. [Emphasis added; para. 32.]

[40] Had, however, the event triggering the limitation period been an *element* of the cause of action, or had it been required to occur before the cause of action could accrue, discoverability *could* apply (*Ryan*, at paras. 29-30, citing *Burt v. LeLacheur*, 2000 NSCA 90, 189 D.L.R. (4th) 193). I do not see my colleague Côté J. as disagreeing on this point: she is quite right when she says that “the words ‘basis of the cause of action’ in para. 24 of *Ryan* should be understood as essentially synonymous with the ‘arising or accrual of the cause of action’” (para. 148). As this Court held in *Peixeiro*, where the limitation period is based on an event that can be construed as synonymous with the accrual of the cause of action, discoverability will apply (para. 38).

[41] From all this, it is evident that discoverability continues to apply where the legislature has shown its intent that a limitation period shall run from “when the cause

of action arose (or other wording to that effect)” or where the event triggering the limitation period requires the plaintiff’s knowledge of his or her injury (Mew et al., at p. 103). Conversely, discoverability does not apply where that triggering event does not depend on the plaintiff’s knowledge or is independent of the accrual of the cause of action. This is not, as my colleague suggests, a modified test for discoverability (para. 154), but rather is the product of this Court’s application of *Fehr* in *Peixeiro* (regarding when discoverability *does* apply) and *Ryan* (regarding when discoverability *does not* apply).

(b) The Statutory Scheme, and the Objects of Statutory Limitation Periods

[42] Bearing in mind that, as I have explained, the discoverability rule is a rule of *construction*, its application depends on an examination of the pertinent statutory text to assess what triggers the running of the limitation period in question, supplemented by consideration of the statutory scheme within which it operates, and of the legislature’s purpose in enacting limitation periods (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[43] Turning first to the statutory text, the relevant provisions of s. 36 of the *Competition Act* state:

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, . . .

. . .

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

...

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

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

whichever is the later

[44] The text of s. 36(4)(a)(i) provides that no action may be brought under s. 36(1)(a) after two years from a day *on which conduct contrary to Part VI* occurred. From this, it is clear that the event triggering this particular limitation period is an element of the underlying cause of action. That is, the limitation period in s. 36(4)(a)(i) is triggered by the occurrence of an element of the underlying cause of action — specifically, conduct contrary to Part VI of the *Competition Act*. Therefore, it is subject to discoverability (*Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81, at para. 18).

[45] The scheme of s. 36(4) also supports the view that discoverability was intended to apply to the limitation period in s. 36(4)(a)(i). Section 36(4)(a) sets out two

limitation periods — s. 36(4)(a)(i), which runs from the day on which the conduct occurred and s. 36(4)(a)(ii), which runs from the day on which criminal proceedings are disposed of. The applicable limitation period is whichever event occurs later. Pioneer argues that Parliament enacted s. 36(4)(a)(ii) to revive a cause of action where the limitation period has expired under s. 36(4)(a)(i), which revival would mitigate any unfairness created by the operation of the limitation period in s. 36(4)(a)(i) (A.F. (Pioneer), at para. 92). I do not view s. 36(4)(a)(ii)’s operation in this way. It is simply an example of a limitation period to which discoverability does not apply because, as the Court of Appeal for Ontario said in *Fanshawe*, the event triggering the limitation period under s. 36(4)(a)(ii) — the disposition of criminal proceedings — is “not connected to a plaintiff’s cause of action or knowledge” (para. 47). When s. 36(4)(a)(i) is contrasted with s. 36(4)(a)(ii), it is likely that Parliament intended that discoverability apply to the former limitation period and not the latter. Further, where criminal proceedings are *not* brought against a wrongdoer, the putative mitigating effect of s. 36(4)(a)(ii) would be of no assistance to plaintiffs whose right of action has expired by operation of s. 36(4)(a)(i).

[46] So much for the statutory text and scheme. I turn, then, to consider this limitation period’s relation to the overall object of the *Competition Act*, which is to “maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy . . . and in order to provide consumers with competitive prices and product choices” (*Competition Act*, s. 1.1). Anti-competitive agreements — which represent “conduct that is contrary to . . . Part VI” (s. 36(1)(a))

— are invariably conducted through secrecy and deception (*Fanshawe*, at para. 46; C.A. reasons, at para. 93), meaning that they are, by their very nature, *unknown* to s. 36(1)(a) claimants. Parliament would have known this when enacting the limitation provision contained in s. 36(4)(a)(i). It would therefore be absurd, and would render the cause of action granted by s. 36(1)(a) almost meaningless, to state that Parliament did not intend for discoverability to apply, such that the plaintiff’s right of action would expire prior to his or her acquiring knowledge of the anti-competitive behaviour. I agree with the Court of Appeal that “it cannot be said that Parliament intended to accord such little weight to the interests of injured plaintiffs in the context of alleged conspiracies so as to exclude the availability of the discoverability rule in s. 36(4)” (C.A. reasons, at para. 93).

[47] The application of discoverability to the limitation period in s. 36(4)(a)(i) is also supported by the object of statutory limitation periods. This Court has recognized that three rationales underlie limitation periods (*M. (K.)*, at pp. 29-31), which courts must consider in deciding whether the discoverability rule applies to a particular limitation period. The first is that limitation periods foster *certainty*, in that “[t]here comes a time . . . when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations” (*M. (K.)*, at p. 29). This concern must be balanced against the unfairness of allowing a wrongdoer to escape liability while the victim of injury continues to suffer the consequences (*M. (K.)*, at p. 29). The second rationale is *evidentiary*: limitation periods are intended to help prevent evidence from going stale, to the detriment of the plaintiff or the defendant

(*M. (K.)*, at p. 30). Finally, limitation periods serve to encourage *diligence* on the part of plaintiffs in pursuing their claims (*M. (K.)*, at p. 30).

[48] Consideration of these rationales for limitation periods affirms discoverability's application here. Even recognizing that shorter limitation periods indicate that Parliament put a premium on the certainty that comes with a limitation statute's function of repose (*Peixeiro*, at para. 34), balancing all of the competing interests underlying s. 36(4)(a)(i) weighs in favour of applying discoverability. The ability of plaintiffs to advance claims for loss arising from conduct contrary to Part VI of the *Competition Act* outweighs defendants' interests in barring them, especially where such conduct is, as I have already noted, concealed from plaintiffs (*Fanshawe*, at para. 46) (such that the evidentiary rationale — that is, the concern about evidence going “stale” — has no place in the analysis). To hold otherwise would create perverse incentives, encouraging continued concealment of anti-competitive behaviour until the two-year limitation period has elapsed. It would therefore not only bar plaintiffs from pursuing their claims, but reward concealment that has been “particularly effective” (*Fanshawe*, at para. 49).

[49] In contrast, applying discoverability to s. 36(4)(a)(i) would not unduly affect the defendant's interests, as discoverability does not excuse the plaintiff from moving matters along, such that the rationale of encouraging diligence is still served (*Peixeiro*, at para. 39). Where plaintiffs sleep on their rights or otherwise do not

diligently pursue their claims, discoverability will not operate to extend the limitation period (Mew et al., at p. 83).

[50] For all of these reasons, I find that the discoverability rule applies to the limitation period in s. 36(4)(a)(i), such that it begins to run only when the material facts on which Godfrey's claim is based were discovered by him or ought to have been discovered by him by the exercise of reasonable diligence.

(2) Fraudulent Concealment

[51] In light of my finding that discoverability applies to s. 36(4)(a)(i), it is, strictly speaking, unnecessary to consider the doctrine of fraudulent concealment. Given, however, the submissions and attention given to this issue at the courts below, I will comment briefly here on whether fraudulent concealment requires establishing a special relationship between the parties.

[52] Fraudulent concealment is an equitable doctrine that prevents limitation periods from being used "as an instrument of injustice" (*M. (K.)*, at pp. 58-59). Where the defendant fraudulently conceals the existence of a cause of action, the limitation period is suspended until the plaintiff discovers the fraud or ought reasonably to have discovered the fraud (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 390). It is a form of "equitable fraud" (*Guerin*, at p. 390; *M. (K.)*, at pp. 56-57), which is not confined to the parameters of the common law action for fraud (*M. (K.)*, at p. 57). As Lord

Evershed, M.R. explained in *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), at p. 249, cited in *M. (K.)*, at pp. 56-57:

It is now clear . . . that the word “fraud” in s. 26(b) of the *Limitation Act, 1939*, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added.]

[53] While it is therefore clear that equitable fraud *can* be established in cases where a special relationship subsists between the parties, Lord Evershed, M.R. did not limit its establishment to such circumstances, nor did he purport to define exhaustively the circumstances in which it would or would not apply (see *T.P. v. A.P.*, 1988 ABCA 352, 92 A.R. 122, at para. 10). Indeed, he expressly refused to do so: “[w]hat is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now” (*Kitchen*, at p. 249, emphasis added).

[54] When, then, does fraudulent concealment arise so as to delay the running of a limitation period? Recalling that it is a form of *equitable* fraud, it becomes readily apparent that what matters is *not* whether there is a *special relationship* between the parties, but whether it would be, for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed the existence of a cause of action.

This was the Court's point in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] S.C.R. 678, at para. 39:

[Equitable fraud] "... refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken" [Emphasis added.]

It follows that the concern which drives the application of the doctrine of equitable fraud is not limited to the unconscionability of taking advantage of a special relationship with the plaintiff. Nor is the doctrine's application limited, as my colleague suggests, to cases where there is something "tantamount to or commensurate with" a special relationship between the plaintiff and the defendant (paras. 171 and 173-74). While a special relationship is *a* means by which a defendant might conceal the existence of a cause of action, equitable fraud may also be established by pointing to other forms of unconscionable behaviour, such as (for example) "some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts" (*M. (K.)*, at p. 57, citing *Halsbury's Laws of England* (4th ed. 1979), vol. 28, para. 919). In short, the inquiry is not into the *relationship* within which the conduct occurred, but into the *unconscionability* of the conduct itself.

[55] The question of whether Pioneer's alleged conduct amounts to fraudulent concealment will, of course, fall to be decided by a trial judge. Nevertheless, I agree with the Court of Appeal and the certification judge that it is not "plain and obvious"

that fraudulent concealment could not delay the running of the limitation period in this case (C.A. reasons, at para. 110).

B. *Umbrella Purchasers' Cause of Action Under Section 36(1) of the Competition Act*

[56] Toshiba argues that the certification judge erred by certifying the umbrella purchasers' claims brought under s. 36(1)(a) of the *Competition Act*. For the following reasons, I disagree.

[57] Whether umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* is a question of law, reviewable on a standard of correctness. Since, as I explain below, I have concluded that umbrella purchasers *do* have a cause of action under s. 36(1)(a), it is *not* plain and obvious that their claim cannot succeed. Godfrey's pleadings disclose a cause of action for umbrella purchasers, thereby satisfying the conditions under s. 4(1)(a) of the *Class Proceedings Act* for certification.

[58] The theory behind holding price-fixers liable to umbrella purchasers — who, it will be recalled are in this case persons who purchased ODDs or ODD products neither manufactured nor supplied by the defendants — is that the defendants' anti-competitive cartel activity creates an “umbrella” of supra-competitive prices, causing non-cartel manufacturers to raise their prices (*Shah v. LG Chem Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87 (“*Shah (Ont. S.C.J.)*”), at para. 159). Additionally, the European

Court of Justice in *Kone AG and Others v. ÖBB-Infrastruktur AG*, C-557/12, ECLI:EU:C:2014:1317, explained umbrella pricing as:

Where a cartel manages to maintain artificially high prices for particular goods and certain conditions are met, relating, in particular, to the nature of the goods or the size of the market covered by that cartel, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of competition, that is, in the absence of that cartel. In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules. [Emphasis added; para. 29.]

[59] In short, a rising tide lifts all boats; under the theory of umbrella pricing, the entire market for the subject product is affected:

Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a substitution away from the cartels' products toward substitute products produced by cartel outsiders. . . . [T]he increase demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market . . . or in neighboring markets.

(R. Inderst, F. Maier-Rigaud & U. Schwalbe, "Umbrella Effects" (2014) 10 *J. Competition L. & Econ.* 739, at p. 740.)

[60] Several decisions of lower courts have certified umbrella purchaser actions brought under s. 36(1)(a) without expressly considering whether such purchasers had a cause of action (see: *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270; *Pro-Sys*

Consultants Ltd v. Infineon Technologies AG, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.); *Crosslink Technology Inc. v. BASF Canada*, 2014 ONSC 1682, 54 C.P.C. (7th) 111). Appellate decisions in British Columbia and Ontario have, however, expressly considered the issue and concluded that they *do* (see: C.A. reasons, at para. 247; *Shah v. LG Chem. Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721 (“*Shah (ONCA)*”), at para. 52).

[61] Whether umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* is a question of statutory interpretation. The text of s. 36(1)(a) must therefore be read in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme and objects of the *Competition Act*.

(1) Text of Section 36(1)

[62] As already noted, s. 36(1)(a) of the *Competition Act* creates a statutory cause of action which allows for the recovery of damages or loss that resulted from conduct contrary to Part VI. The relevant portion states:

Recovery of damages

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI . . .

may . . . sue for and recover from the person who engaged in the conduct . . . an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[63] Godfrey relies on “conduct that is contrary to . . . Part VI” (“Offences in Relation to Competition”), since he alleges that Toshiba acted contrary to ss. 45(1)(b), (c), and (d) of the *Competition Act*. During the class period¹, s. 45(1) stated:

Conspiracy

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

...

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

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

(d) to otherwise restrain or injure competition unduly,

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

[64] The text of s. 36(1)(a) supports the view that umbrella purchasers have a cause of action thereunder for conduct contrary to s. 45(1) of the *Competition Act*. Section 36(1)(a) provides a cause of action to *any person* who has *suffered loss or damage* as a result of conduct contrary to s. 45. Significantly, Parliament’s use of “any person” does not narrow the realm of possible claimants. Rather, it empowers *any* claimant who can demonstrate that loss or damage was incurred as a result of the

¹ Section 45(1) was amended by the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 410. The amendments are not material to these reasons for judgment.

defendant's conduct to bring a claim. On this point, the following paragraph from the Court of Appeal for Ontario's decision in *Shah (ONCA)* (at para. 34) is apposite, and I adopt it as mine:

On a plain reading, if the umbrella purchasers can prove loss resulting from a proven conspiracy under s. 45, s. 36(1) grants those purchasers a statutory means by which to recover those losses. Taking the language at face value, the umbrella purchasers' right of recovery is limited only by their ability to demonstrate two things: (1) that the respondents conspired within the meaning of s. 45; and (2) that the losses or damages suffered by the appellants resulted from that conspiracy.

(2) Purpose of the *Competition Act*

[65] As I have already recounted, the purpose of the *Competition Act* is to “maintain and encourage competition in Canada” with a view to providing consumers with “competitive prices and product choices” (s. 1.1). A conspiracy to price-fix is the “very antithesis of the *Competition Act*'s objective” (*Shah (ONCA)*, at para. 38). Monetary sanctions for such anti-competitive conduct therefore further the *Competition Act*'s purpose. This Court has also recognized two other objectives of the *Competition Act* of particular relevance here, being deterrence of anti-competitive behaviour, and compensation for the victims of such behaviour (*Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600 (“*Infineon*”), at para. 111; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545 (“*Sun-Rype*”), at paras. 24-27; *Microsoft*, at paras. 46-49). Interpreting s. 36(1)(a) so as to permit umbrella purchaser actions furthers both of these objectives.

[66] Allowing umbrella purchaser actions furthers deterrence because it increases the potential liability falling upon those who engage in anti-competitive behaviour (*Shah (ONCA)*, at para. 38). Here, Godfrey alleges that four of the named defendants controlled 94% of the global ODD market (A.R., vol. II, at para. 70). While this means that Toshiba's potential liability to the umbrella purchasers would only marginally increase its existing liability to non-umbrella purchasers, I accept that any increase in potential liability will likely carry a correspondingly deterrent effect.

[67] The objective of compensation is also furthered by allowing umbrella purchaser actions, because doing so affords umbrella purchasers recourse to recover from loss arising from what, for the purposes of these appeals, is assumed to have been anti-competitive conduct. Barring a class of purchasers who were, on the theory pleaded, intended by the defendants to pay higher prices as a result of their price-fixing is inconsistent with the compensatory goal of the *Competition Act*.

[68] Relatedly, and while far from determinative, departmental and parliamentary statements fortify my view that Parliament intended that the cause of action in s. 36(1)(a) be broadly available, such that anyone who suffers a loss from anti-competitive behaviour could bring a private action. The briefing document accompanying the first stage of the modernization amendments (which introduced the original civil remedies provision) stated:

Under the existing law there is no civil recourse under the Act for persons injured by reason of the fact that others have participated in violation of the Combines Investigation Act. The provision dealing with

civil damages, although it is expected to be of particular value to small businessmen who have been hurt by conduct contrary to the Act, will be equally available to consumers and to any other members of the public who have been so damaged.

The amendment provides that anyone who has suffered loss or damage because of such a violation . . . may . . . sue for and be awarded damages equal to the actual loss incurred [Emphasis added.]

(Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada* (1973), at pp. 48-49)

This is further supported by parliamentary committee discussions on the introduction of a private cause of action. In committee, the responsible minister explicitly stated that there was no reason to limit consumers' recourse under the private cause of action to direct loss or damage (House of Commons, Standing Committee on Finance, Trade and Economic Affairs, *Minutes of Proceedings and Evidence*, 1st Sess., 50th Parl., May 8 1975, at p. 45:18).

(3) Indeterminate Liability

[69] Toshiba argues that recognizing the umbrella purchasers as having a cause of action would expose Toshiba to a “potentially limitless scope of liability” (A.F. (Toshiba), at para. 97). This raises the question, first of all, of whether indeterminate liability is relevant *at all* to deciding the scope of possible s. 36(1)(a) claimants for conduct contrary to s. 45(1) of the *Competition Act*. On this point, the Court of Appeal considered that it might be relevant (on the express assumption that concerns about indeterminate liability might properly be considered outside the context of a negligence action) (C.A. reasons, at para. 227). I note, parenthetically, that whether that

assumption is valid — that is, whether indeterminate liability might properly be considered *at all* in the context of a claim under s. 36(1)(a) of the *Competition Act* — I am content to leave for another day since, for the reasons that follow, I am of the view that indeterminate liability would not arise in this case in any event.

[70] Toshiba argues that indeterminate liability is a relevant consideration here because the umbrella purchasers seek to recover for pure economic loss. Toshiba relies upon this Court’s statement in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, that “[t]he risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss” (para. 100). In *Imperial Tobacco*, a class proceeding was brought against Imperial Tobacco by persons who purchased “light” or “mild” cigarettes. Imperial Tobacco issued third-party notices to the Government of Canada, alleging it was liable to tobacco companies for, *inter alia*, negligent misrepresentation. This Court held that “the prospect of indeterminate liability is fatal to the tobacco companies’ claims of negligent misrepresentation”, since “Canada had no control over the number of people who smoked light cigarettes” (para. 99). Similarly, Toshiba argues that it had no control over the quantity of ODDs sold to the umbrella purchasers by non-defendant manufacturers or the number of purchasers to whom it may be liable, such that the extent of its liability is indeterminate (A.F. (Toshiba), at para. 102).

[71] Several features of this case, however, lead me to the view that recognizing the umbrella purchasers' cause of action under s. 36(1)(a) does not risk exposing Toshiba to indeterminate liability.

[72] First, Toshiba's liability is limited by the class period, and by the specific products whose prices are alleged to have been fixed. Whereas in *Imperial Tobacco, Canada* had no control over who smoked light cigarettes (para. 99), the theory of umbrella effects links the pricing decisions of the non-defendant manufacturers to Toshiba's anti-competitive behaviour (C.A. reasons, at para. 239). I have already noted that Godfrey's pleadings allege that, during the class period, four of the named defendants collectively controlled 94% of the global ODD market. Godfrey also alleges that Toshiba intended to raise prices across that market (A.R., vol. II, at pp. 21-22). This allegation is rooted in the theory that, in order for Toshiba to profit from the conspiracy, the entire market price for ODDs had to increase. Otherwise, Toshiba would have lost market share to non-defendant manufacturers (Transcript, at pp. 56-57, A.R., vol. III, at p. 166).

[73] This supports the submission made before us by Godfrey's counsel that umbrella effects are "not just a known and foreseeable consequence of what the defendants are doing, it's an intended consequence" (Transcript, at p. 61). The point is that the results of Toshiba's alleged anti-competitive behaviour are not indeterminate. Intended results are *not indeterminate*, but *pre-determined*. I therefore agree with the Court of Appeal that there is "no reason why defendants who intend to inflict damage

on umbrella purchasers should be exonerated from liability on the basis that they exercised no control over their liability” (C.A. reasons, at para. 241).

[74] Secondly, and as I have already recounted, s. 36(1)(a) limits recovery to only those purchasers who can show that they suffered a loss or damage “as a result of” the defendants’ conspiratorial conduct. In order to recover under s. 36(1)(a), then, the umbrella purchasers will have to demonstrate that Toshiba engaged in anti-competitive behaviour, that the umbrella purchasers suffered “loss or damage”, and that such loss or damage was “as a result of” such behaviour. The statutory text “as a result of” imports both factual and legal causation into s. 36(1). Recovery under s. 36(1) is therefore limited to claimants with a loss that is not too remote from the conduct.

[75] Thirdly, the text of s. 45(1) in force during the class period is instructive. The elements of the wrongful conduct outlined therein were described by the British Columbia Court of Appeal in *Watson* (at paras. 73-74):

[T]he *actus reus* elements of former s. 45 are:

- i) the defendant conspired, combined, agreed, or arranged with another person; and
- ii) the agreement was to enhance unreasonably the price of a product, to lessen unduly the supply of a product, or to otherwise restrain or injure competition unduly.

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

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

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

See also: *Shah (ONCA)*, at para. 50; *R. c. Proulx*, 2016 QCCA 1425, at para. 20.

While the subjective *mens rea* does not require that the defendants' conduct be directed specifically towards the claimant, s. 45(1) "limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct" (*Shah (ONCA)*, at para. 51).

[76] Taken together, these features of ss. 36(1)(a) and 45(1) of the *Competition Act* limit the availability of this cause of action to those claimants who can demonstrate: (1) a causal link between the loss suffered and the conspiratorial conduct; and (2) that the defendants' conduct satisfies the *actus reus* and *mens rea* elements of s. 45(1) of the *Competition Act*.

[77] This is not to say that umbrella purchasers' actions will not be complex or otherwise difficult to pursue. Marshalling and presenting evidence to satisfy the conditions placed by Parliament on recovery under ss. 36(1)(a) and 45(1) — showing a causal link between loss and conspiratorial conduct, and proving the *actus reus* and *mens rea* of s. 45(1) — represents a significant burden. That said, this Court's statement in *Microsoft* (at paras. 44-45) regarding indirect purchaser claims is, in my view, equally applicable to claims brought by umbrella purchasers:

Indirect purchaser actions, especially in the antitrust context, will often involve large amounts of evidence, complex economic theories and multiple parties in a chain of distribution, making the tracing of the overcharges to their ultimate end an unenviable task. However, . . . these same concerns can be raised in most antitrust cases, and should not stand in the way of allowing indirect purchasers an opportunity to make their case

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

And, of course, in this case it will be for the trial judge to determine whether the umbrella purchaser claimants have presented sufficient evidence to establish that, in the circumstances of the case and in the relevant market, Toshiba caused umbrella pricing.

[78] In view of the foregoing, it is not plain and obvious that the umbrella purchasers' cause of action under s. 36(1)(a) of the *Competition Act* cannot succeed, and I would reject this ground of appeal.

C. *Section 36(1) of the Competition Act Does Not Bar Common Law or Equitable Claims*

[79] In addition to his statutory claims under the *Competition Act*, Godfrey advances claims in, *inter alia*, civil conspiracy.

[80] Toshiba argues that the courts below erred in two respects concerning the relationship between a statutory claim under the *Competition Act* and the tort of civil conspiracy. First, it says that the tort of civil conspiracy based on a breach of the predecessor statute to the *Competition Act* (the *Combines Investigation Act*, R.S.C. 1970, c. C-23) was never available to plaintiffs prior to the enactment in 1975 of the private right of action. Secondly, and in any event, the courts below failed to recognize that, by legislating ss. 36(1) and 45(1) of the *Competition Act*, Parliament intended to oust the common law tort of civil conspiracy (A.F. (Toshiba), at para. 119).

[81] These arguments raise questions of law, and are therefore reviewed on a standard of correctness. For the reasons below, I reject both arguments, and it is therefore not plain and obvious that Godfrey's common law and equitable claims cannot succeed, except as was otherwise held by the certification judge².

(1) The Tort of Civil Conspiracy Based on the Breach of a Statute Existed Prior to the Enactment of the Statutory Cause of Action

[82] To be clear, I do not dispute Toshiba's submission that the 1975 amendments were significant. The predecessor to the *Competition Act* (the *Combines Investigation Act*) was exclusively penal — indeed, its constitutionality as an exercise of Parliament's legislative authority over the criminal law was upheld in *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.). In

² As recounted at para. 11, the certification judge held that the pleadings did not disclose a cause of action for unlawful means tort, or (in respect of the umbrella purchasers) for unjust enrichment and waiver of tort.

1975, Parliament supplemented this penal function with regulatory and civil enforcement provisions, including a civil remedy provision (now s. 36(1)) (*Watson*, at para. 36).

[83] All this said, our law had recognized the tort of civil conspiracy based on the breach of a statute long before Parliament legislated a civil right of action in 1975. In *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265, and *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, this Court imposed liability on trade unions for unlawful means conspiracy for conduct prohibited by statute (*Therien*, at p. 280; *Gagnon*, at p. 446). And, in *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, which was decided on the basis of the *Combines Investigation Act*, this Court affirmed not only the existence of the tort of civil conspiracy, but also that a breach of the *Combines Investigation Act* could satisfy the “unlawful” element of unlawful means conspiracy (pp. 471-72). Any question on this point was settled when *LaFarge* was cited in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 64, for the same proposition — that a breach of statute could satisfy the “unlawful means” component of the tort of unlawful means conspiracy.

[84] The law admits of no ambiguity on this point. Prior to the enactment of the cause of action contained in what is now s. 36(1) of the *Competition Act*, a breach of s. 45(1) of the *Competition Act* was, as it still is, able to satisfy the “unlawful means” element of the tort of civil conspiracy.

(2) The Enactment of the Statutory Cause of Action Did Not Oust Common Law and Equitable Actions

[85] Turning to Toshiba's other argument, the starting point in deciding whether a common law right of action has been legislatively ousted is the presumption that Parliament does not intend to abrogate common law rights (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 538). While s. 36(1) does not by its express terms oust common law causes of action, legislation may rebut this presumption by ousting the common law either expressly or by necessary implication (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1315-16).

[86] In *Gendron*, this Court held, for three reasons, that the *Canada Labour Code*, R.S.C. 1970, c. L-1 (as amended by S.C. 1972, c. 18; S.C. 1977-78, c. 27) ousted the common law duty of fair representation by necessary implication. First, the content of the duty in the *Canada Labour Code* was co-extensive with the common law duty such that "[t]he common law duty is . . . not in any sense additive; it is merely duplicative" (p. 1316). Secondly, in enacting the *Canada Labour Code*, Parliament enacted a comprehensive and exclusive code, which indicated an intention for the *Canada Labour Code* to "occupy the whole field in terms of a determination of whether or not a union has acted fairly" (p. 1317). Finally, the *Canada Labour Code* provided a "new and superior method of remedying a breach" of the duty of fair representation (p. 1319).

[87] None of these considerations apply to s. 36(1) of the *Competition Act*, relative to the common law tort of civil conspiracy. Section 36(1) is neither duplicative of the tort of civil conspiracy nor does it provide a “new and superior” remedy. Claims under s. 36(1) are subject to the limitation period stated in s. 36(4), whereas the tort of civil conspiracy is subject to provincial limitations statutes. Additionally, the tort of civil conspiracy allows for a broader range of remedies than is available under s. 36(1), such as punitive damages (*Watson*, at para. 57).

[88] Nor does s. 36(1) represent a comprehensive and exclusive code regarding claims for anti-competitive conspiratorial conduct. That this is so is made plain by s. 62 of the *Competition Act* (“Civil rights not affected”) which contemplates the subsistence of common law and equitable rights of action by providing that “nothing in this Part [which includes s. 45(1), in respect of which s. 36(1) creates a statutory right of action] shall be construed as depriving any person of any civil right of action.” This is also consistent with this Court’s conclusion in *Infineon* (at para. 95) that it was open for a plaintiff to proceed with its claim under art. 1457 of the *Civil Code of Québec* (“*C.C.Q.*”) for the alleged violation of s. 45(1) of the *Competition Act*. Were s. 36(1) a complete and exclusive code, no such claim under the *C.C.Q.* would have been possible.

[89] I therefore would reject this ground of appeal. The courts below correctly decided that it is not plain and obvious that Godfrey is precluded from bringing common law and equitable causes of action alongside his s. 36(1)(a) claim.

Additionally, a breach of s. 45(1) of the *Competition Act* can supply the “unlawful” element of the tort of civil conspiracy. I see nothing in my colleague’s reasons (at paras. 193-203) that deviates in any respect from my own on this point.

D. *Certifying Loss as a Common Issue*

[90] Toshiba’s final ground of appeal relates to the requirement in s. 4(1)(c) of the *Class Proceedings Act* that class members’ claims raise common issues.

[91] Godfrey sought to certify several loss-related questions as common issues, principally whether the class members suffered economic loss. (Sup. Ct. reasons, at para. 143). These questions were stated broadly enough that they could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss. And, because they could be taken in two different ways they might, following the common issues trial, be answered in different ways.

[92] The certification judge certified the common issues relating to loss on the basis that the standard outlined in *Microsoft* requires that a plaintiff’s expert methodology need only establish loss at the indirect-purchaser level (Sup. Ct. reasons, at paras. 167 and 179). The questions, therefore, of whether *any* class members suffered loss and of whether *all* class members suffered loss, fulfill the requirements of a common question. Toshiba says that he erred, and argues that *Microsoft* requires, for loss to be certified as a common issue, that a plaintiff’s expert’s methodology be capable either of showing loss to *each and every class member*, or of distinguishing

between those class members who suffered loss from those who did not (A.F. (Toshiba), at para. 63). Dr. Reutter's methodology, Toshiba says, does not meet this standard (A.F. (Toshiba), at para. 76).

[93] Godfrey responds that the courts below correctly held that *Microsoft* requires, as a condition of certifying loss as a common issue, only a methodology capable of establishing that overcharges were passed on to the indirect-purchaser level (R.F. (Toshiba Appeal), at para. 93). This standard is consistent with the principles underlying the commonality requirement, since a single answer to whether loss reached the indirect-purchaser level significantly advances the litigation. Dr. Reutter's methodology meets this standard (R.F. (Toshiba Appeal), at para. 94).

[94] The appropriate standard for certifying loss as a common issue at the certification stage is a question of law, to be reviewed on appeal for correctness. If I conclude that the certification judge identified the correct standard, then the certification judge's decision to certify the issues as common may not be disturbed absent a palpable and overriding error.

(1) Dr. Reutter's Methodology

[95] Application of the *Microsoft* standard here requires some review of Dr. Reutter's report. In that report, he drew two conclusions:

1. All members of the proposed Class would have been impacted by the actions of defendants as alleged in the *Amended Notice of Civil Claim*, and
2. There are acceptable methods available to estimate any overcharge and aggregate damages that resulted from the alleged wrongdoing using evidence common to the proposed Class.

(A.R., vol. III, at p. 119).

[96] These conclusions were based on the presence of four economic factors during the period of the alleged conspiracy that suggest that the ODD industry was vulnerable to collusive conduct (A.R., vol. III, at pp. 122-23 and 136). These factors are:

1. ODDs are commodity-like and manufactured to conform to industry standards;
2. During the proposed Class period [the] defendants accounted for a majority of all ODDs manufactured worldwide;
3. There are no economic substitutes for ODDs, and;
4. The manufacture of ODDs exhibits barriers to entry.

(A.R., vol. III, at pp. 119-20).

Because of the presence of these four factors, and the laws of supply and demand, Dr. Reutter concluded that “any conspiratorial overcharge would have been absorbed in part and passed-through in part at each level of the distribution chain, thus impacting all members of the proposed Class” (A.R., vol. III, at pp. 120 and 148).

[97] In order to estimate overcharges and aggregate damages arising from the alleged price-fixing, Dr. Reutter developed a methodology to estimate the “but-for” price of the products subject to the anticompetitive conduct (A.R., vol. III, at p. 150). This involves use of mainstream and accepted economic methodologies based on multiple regression (Sup. Ct. reasons, at para. 158). In particular, it entails three steps:

First, for the matter at hand, an economic model describing the interaction of the supply of and demand for [ODDs] must be developed. Second, based on the economic model, data will need to be collected from various sources, including defendants (when available), as well as public and third party vendors. Third, standard statistical and econometric techniques are used to determine the extent to which the alleged conspiracy resulted in supra-competitive prices for [ODDs].

(A.R., vol. III, at p. 150).

[98] In order to quantify the aggregate damages suffered by the proposed class, Dr. Reutter proposes to quantify the damages suffered by direct and indirect purchasers in the proposed class, which quantification can occur on a class-wide basis, using accepted economic and statistical methods (Sup. Ct. reasons, at para. 159). Overcharge, once estimated, can then be allocated among the class members (A.R., vol. III, at p. 167). Both aggregate damages and overcharge can be estimated using defendant transaction data, supplemented with data collected from public and private sources (A.R., vol. III, at p. 120).

[99] The question of whether a plaintiff’s methodology must show loss at the indirect purchaser level or loss to each and every class member appears to be moot, since Dr. Reutter opines that all class members were impacted by Toshiba’s anti-

competitive behaviour; his methodology therefore satisfies either standard. Toshiba, however, points to its cross-examination of Dr. Reutter at the certification hearing as obtaining the concession that his methodology cannot demonstrate that all class members suffered a loss (A.F. (Toshiba), at paras. 86-87). At the hearing before this Court, counsel for Godfrey argued that Toshiba's counsel mischaracterized what emerged from that cross-examination (Transcript, at p. 59). Because of this dispute, it is important to examine what actually occurred.

[100] After confirming that Dr. Reutter would use an average selling price across the ODD market to estimate overcharge, the following exchange took place:

399 Q. And implicit in the average is the fact that some class members may not have suffered any loss, but they would be compensated by the amount of the average overcharge in relation to the purchase that they made?

A. It's an empirical question and I don't want to sound flippant, but it depends. There may be some -- there may be some small subset or subset, I don't want to put an adjective in front of it. There may be some subset that were not impacted. I don't, from an economic standpoint, understand how that would be if there was, in fact, a conspiracy that fixed the price at the upstream and then that was, in fact, passed through.

...

403 Q. But if you conclude that some members were not impacted once you do the analysis, then they would be compensated even though they suffered no loss?

A. Again, it depends on how finely or where we want to draw the line of what we're analyzing or what we're measuring.

...

A. Someone could -- the average is an average and if you want to throw a zero in there, as Dr. Levinsohn does, and say that there could be zero

damages, I can't deny that, you know, if you average zero with some other numbers you get something other than zero by the definition of mathematics.

...

407 Q. ... Does the methodology which produces an average, is that average overcharge then applied to all class members irrespective of whether the average reflects the overage that they, in fact, incurred?

A. Yes.

408 Q. All right. And is there anything in the methodology that you are proposing that allows one to determine who those people are that suffered more or less? They're simply compensated on average?

...

A. In identifying him, no.

(A.R., vol. V, at pp. 216-19, emphasis added).

Dr. Reutter went on to explain that his methodology is capable of creating subgroups within the class. For example, if the evidence after discovery suggests that Toshiba stopped price-fixing for a few months and then resumed again, the class members who purchased ODDs during that time would be excluded from the model (A.R., vol. V, at pp. 220-21).

[101] It is not at all apparent that this exchange shows Dr. Reutter resiling from his opinion that *all* class members would be impacted. On the contrary, he stated that he did not understand, from an economic standpoint, how it would be possible for some members of the class *not* to have suffered a loss if there was a conspiracy and the fixed

price was passed through. Dr. Reutter's methodology therefore satisfies both the standards argued for by Toshiba and Godfrey.

[102] In any event, even were Dr. Reutter's methodology incapable of showing loss to every class member, as I explain below, it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor is it necessary that Dr. Reutter's methodology be able to identify those class members who suffered no loss so as to distinguish them from those who did. Rather, in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level. This leaves the only question being whether the courts below were correct in finding that Dr. Reutter's proposed methodology satisfies that required standard of commonality (C.A. reasons, at paras. 125 and 149). I see no reason to interfere with the certification judge's determination that Dr. Reutter's methodology satisfies this standard.

(2) What is the Standard Required to Certify Loss as a Common Issue?

[103] The *Class Proceedings Act* provides that in order for an issue to be common, the issue need not "predominate over issues affecting only individual members" (s. 4(1)(c)). Section 1 of the *Class Proceedings Act* defines "common issues" as meaning:

- (a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts

[104] In *Microsoft*, this Court reaffirmed the principles of “common issues” for the purpose of certification, as they were explained in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 108:

In . . . *Dutton* . . . this Court addressed the commonality question, stating that “[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis” (para. 39). I list the balance of McLachlin C.J.’s instructions, found at paras. 39-40 of that decision:

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

[105] In *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court clarified that the “common success” requirement in *Dutton* should be applied flexibly. “Common success” denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean *failure* for another (para. 45). A question is considered “common”, then, “if it can serve to advance

the resolution of every class member's claim", even if the answer to the question, while positive, will vary among those members (para. 46).

[106] In *Microsoft*, the representative plaintiff sought to certify a class proceeding wherein the proposed class members consisted of the end consumers of products whose prices were allegedly fixed ("indirect purchasers"). After concluding that indirect purchasers have a cause of action for price-fixing, the Court considered the standard of expert methodology required to certify loss-related questions as common issues for indirect purchaser class proceedings. The key passage from the Court's reasons states:

One area in which difficulty is encountered in indirect purchaser actions is in assessing the commonality of the harm or loss-related issues. In order to determine if the loss-related issues meet the "some basis in fact" standard, some assurance is required that the questions are capable of resolution on a common basis. In indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic models and methodologies.

The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole (see *Chadha [v. Bayer Inc. (2003), 63 O.R. (3d) 22]*, at para. 31). The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove "common impact", as described in the U.S. antitrust case of *In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002). That is, plaintiffs must demonstrate that "sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class" (*ibid.*, at p. 155). It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain.

The most contentious question involving the use of expert evidence is how strong the evidence must be at the certification stage to satisfy the court that there is a method by which impact can be proved on a class-wide basis. The B.C.C.A. in *Infineon [Technologies AG v. Option Consommateurs]*, 2013 SCC 29, [2013] 3 S.C.R. 600] called for the plaintiff to show “only a credible or plausible methodology” and held that “[i]t 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” (para. 68). . . .

...

In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied. [Emphasis added; paras. 114-18.]

[107] While there may be some room for debate arising from the references to “class-wide basis” in the above passages, in my view, the Court was employing the term “class-wide basis” synonymously with “indirect purchaser level”. *Microsoft*, therefore, directs that, for a court to certify loss-related questions as common issues in a price-fixing class proceeding, it must be satisfied that the plaintiff has shown a plausible methodology to establish that loss reached one or more purchasers — that is, claimants at the “purchaser level”. For indirect purchasers, this would involve demonstrating that the direct purchasers passed on the overcharge.

[108] Additionally, showing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability upon Toshiba and will result in “common success” as explained in *Vivendi*, given that success for one class member will not result in failure for another. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level.

[109] When thinking about whether a proposed common question would “advance *the litigation*”, it is the perspective of *the litigation*, not the plaintiff, that matters. A common issues trial has the potential to *either* determine liability *or* terminate the litigation (W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 108). Either scenario “advances” *the litigation* toward resolution. Here, if it cannot be shown that loss was suffered by *any* purchasers at the indirect purchaser level, then *none* of the indirect purchasers have a cause of action and the action with respect to *all* the indirect purchasers would fail. I endorse, in this regard, this statement of the Ontario Superior Court in *Shah (Ont. S.C.J.)* (at para. 69) :

Thus, for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing. If the plaintiff’s expert’s methodology failed in proof at trial, then the class members’ claim would fail across the indirect class members’ class because each and every one of them would have failed to prove a constituent element of their cause of action; i.e., that the price-fixing penetrated their place or “level” of the distribution channel, and the Defendants would secure a discharge of liability against all the class members. Conversely, if the methodology proved sound to show that overcharges reached the indirect purchaser place in the distribution

channel, then there might have to be individual issues trials to determine each class member's entitlement.

(3) Does Dr. Reutter's Methodology Meet the Standard?

[110] The certification judge identified the correct standard to certify commonality of loss as a common issue. As Toshiba acknowledges, the issue of whether the certification judge erred in applying that standard to Dr. Reutter's evidence is "subject to [] deference from an appellate court" (A.F. (Toshiba), at para. 42). The certification judge's analysis of Dr. Reutter's methodology as supporting certification should not be overturned absent a palpable and overriding error.

[111] I agree with the Court of Appeal that the reasoning of the certification judge reveals no basis for interfering with his common issues determination (C.A. reasons, at para. 163). There is no palpable and overriding error in the certification judge's conclusion that Godfrey showed some basis in fact for finding the loss issues to be common (Sup. Ct. reasons, at para. 180). I would therefore reject this ground of appeal.

(4) Availability of Aggregate Damages

[112] I turn, finally, to Toshiba's final argument, which goes to the availability of the aggregate damages provisions found in Division 2 of the *Class Proceedings Act*, s. 29(1)(b), which states:

Aggregate awards of monetary relief

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

...

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability.

[113] Because all other issues of fact and law must be decided before the aggregate damages provisions could apply, it is plain that aggregate damages under s. 29(1)(b) are purely remedial, available only after all other common issues have been determined, including liability (see *Microsoft*, at para. 134). Irrespective, then, of whether aggregate damages are certified as a common issue, it is for the trial judge to determine, following the common issues trial, whether the statutory criteria are met such that the aggregate damages provisions can be applied to award damages (*Microsoft*, at para. 134; *Winkler et al.*, at p. 121).

[114] Here, the certification judge certified the following common issues related to aggregate damages for the non-umbrella purchasers (para. 143):

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

...

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

As I will explain below, I would not disturb the certification judge's decision to certify these issues as common issues. Again, it is important to remember that the certification of these issues in relation to the non-umbrella purchasers and the lack of certification in relation to the umbrella purchasers neither mandates nor forecloses the possibility of the trial judge awarding aggregate damages following the common issues trial. As this Court said in *Microsoft* (para. 134): "... the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found."

[115] Toshiba has not appealed the certification of these issues as common issues. Rather, it takes issue with the certification judge's statement when discussing certification of the loss-related common issues that "the aggregate damage provisions [...] allow for an aggregate award even where some class members have suffered no financial loss" (Sup. Ct. reasons, at para. 169). Toshiba argues that this statement contradicts this Court's direction in *Microsoft* regarding the purely procedural quality of rights conferred by the *Class Proceedings Act* (A.F. (Toshiba), at para. 54). More particularly, Toshiba says that, by not confining its liability to class members who are able to show actual loss, the certification judge used the *Class Proceedings Act* to confer substantive (and not merely procedural) rights so as to grant a remedy to persons who cannot prove a loss. In this way, Toshiba argues that the certification judge treated the indirect and umbrella purchasers as "juridical entities" and eliminated the distinction between proof of harm and aggregate damages (A.F. (Toshiba), at para. 7).

[116] On this point, I agree with Toshiba that the certification judge’s statement that the aggregate damages provisions allow for an award of damages for class members that suffered no loss is inconsistent with this Court’s jurisprudence. This Court has repeatedly affirmed that the advantages conferred by class proceeding legislation are purely procedural, and that they do not confer substantive rights (see: *Hollick*, at para. 14; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, at para. 17; *Microsoft*, at para. 131-32; *Sun-Rype*, at para. 75). In *Microsoft*, this Court could not have been clearer that the aggregate damages provisions cannot be used to establish liability:

With respect, I do not agree with this reasoning. The aggregate damages provisions of the CPA relate to remedy and are procedural. They cannot be used to establish liability (2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corp., 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the CPA. This includes, where required by the cause of action such as in a claim under s. 36 of the Competition Act, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability.

I agree with Feldman J.A.’s holding in *Chadha* that aggregate damages provisions are “applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage” (para. 49). I also agree with Masuhara J. of the B.C.S.C. in *Infineon* that “liability requires that a pass-through reached the Class Members”, and that “[t]hat question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked” (2008 BCSC 575 (CanLII), at para. 176). Furthermore, I agree with the Ontario Court of Appeal in *Quizno’s*, that “[t]he majority clearly recognized that s. 24 [of the Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6] is procedural and cannot be used in proving liability” (para. 55). [Emphasis added; paras. 131-32.]

[117] The foregoing signifies that, where (as here) loss is an element of the cause of action, using the aggregate damages provisions to distribute damages to class members who did not suffer a loss would be inconsistent with the purely procedural quality of the advantages conferred by the *Class Proceedings Act*. It follows that the reliance by the courts below (Sup. Ct. reasons, at para. 169; C.A. reasons, at para. 161) on s. 31(1)(a)(i) of the *Class Proceedings Act* (which provides that the court may order an aggregate damages award where it would be impractical or inefficient to identify the class members entitled to share in the award) as indicating that the plaintiff need not establish loss to each and every class member was, in my respectful view, mistaken. Section 31(1)(a)(i) is applicable only once liability has been established; otherwise, it would effectively confer substantive rights.

[118] To be clear, I agree that the *Class Proceedings Act* permits individual members of the class to obtain a remedy where it may be difficult to demonstrate *the extent* of individual loss. What the jurisprudence of this Court maintains, however, is that, in order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has *actually suffered* a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the *Competition Act*). Therefore, ultimately, to use the aggregate damages provisions, the trial judge must be satisfied, following the common issues trial, either that *all* class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have.

[119] At this stage, it therefore remains possible that issues will arise, once it is determined that loss reached the indirect purchaser level, that affect individual class members' claims (*Microsoft*, at para. 140). In other words, while it was sufficient *for the purposes of certifying loss as a common issue* for Dr. Reutter's methodology to show merely that loss reached the indirect purchaser level, whether this methodology is sufficient *for the purposes of establishing* Toshiba's liability to *all* class members will depend on the findings of the trial judge. In this case, Godfrey intends to use Dr. Reutter's methodology to prove that all class members suffered loss. It follows from the foregoing that, if he is successful in doing so, the same methodology can be used to establish both that Toshiba is liable to all class members and that aggregate damages are available to be awarded.

[120] It should be borne in mind that the trial judge, following the common issues trial, might reach any one of numerous possible conclusions on the question of whether the class members suffered loss. For example, the trial judge might accept Dr. Reutter's evidence that *all* class members suffered a loss, in which case it would be open to the trial judge to use the aggregate damages provisions to award damages to all class members. Alternatively, the trial judge might conclude that *no* purchasers suffered a loss — for example, if the trial judge does not accept that Dr. Reutter's methodology demonstrates that loss reached the direct and indirect purchaser levels. Were that the case, the action would fail. Or, it might be that the trial judge finds that an *identifiable subset* of class members did not suffer a loss, in which case the trial judge could exclude those members from participating in the award of damages, and then use the aggregate

damages provision in respect of the remaining class members' claims. Finally, the trial judge could accept Toshiba's argument that some class members suffered a loss and some did not, but that it is impossible to determine on the expert's methodology which class members suffered a loss. In such a case, individual issues trials would be required to determine the purchasers to whom Toshiba is liable and who are therefore entitled to share in the award of damages. At the certification stage, no comment can or should be made about the potential conclusions that the trial judge may reach. I outline these possibilities and the availability of aggregate damages merely to provide guidance.

[121] But again, to be clear — neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue. As was the case in *Microsoft*, “[t]he aggregate damages questions [the certification judge] certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount” (para. 135). The certification judge's decision to certify the questions related to aggregate damages for the non-umbrella purchasers should therefore not be disturbed.

VI. Conclusion

[122] I would dismiss the appeals.

[123] Section 37(1) of the *Class Proceedings Act* provides that “neither the [British Columbia] Supreme Court nor the Court of Appeal may award costs to any

party to an application for certification”. The parties appear to take this as precluding this Court from awarding costs at those courts, and seek only their costs at this Court. I would therefore award Godfrey costs in this Court only.

The following are the reasons delivered by

CÔTÉ J. —

[124] These appeals raise a fundamental question: are courts at a stage where the balance struck by Parliament in Canada’s competition law should be upset by applying new principles of liability for price-fixing cases, resulting in near-automatic certification of class actions? In doing so, are courts going a bridge too far?

I. Overview

[125] These appeals concern the certification of a proposed class action brought in British Columbia by representative plaintiff Neil Godfrey (the “Plaintiff”, respondent in these appeals) against a number of defendants (the “Defendants”, appellants in these appeals) that manufacture or supply devices known as optical disc drives (“ODDs”). The Plaintiff alleges that the Defendants conspired to fix the prices of ODDs between January 1, 2004 and January 1, 2010 (the “Class Period”). He relies on five causes of action against the Defendants: a contravention of s. 45 of the *Competition Act*, R.S.C. 1985, c. C-34 (which is actionable pursuant to s. 36(1) of that

statute), the tort of unlawful means conspiracy, the tort of predominant purpose conspiracy, unjust enrichment, and waiver of tort.

[126] The proposed class is essentially comprised of three groups. Direct purchasers are the class members who purchased an ODD or an ODD product manufactured or supplied by a Defendant *from that Defendant*. Indirect purchasers are the class members who purchased an ODD or an ODD product manufactured or supplied by a Defendant *from a non-Defendant*. Neil Godfrey is one of those indirect purchasers. Finally, class members who purchased from a non-Defendant an ODD or an ODD product *that was not manufactured or supplied by a Defendant* are known as “Umbrella Purchasers”. The Plaintiff alleges that all of the class members in these three groups have claims against the Defendants in respect of the alleged price-fixing conspiracy.

[127] The Plaintiff’s action against most of the Defendants was commenced on September 27, 2010. He brought a separate action against certain additional Defendants — Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., Pioneer High Fidelity Taiwan Co., Ltd. and Pioneer Electronics of Canada Inc. (the “Pioneer Defendants”) — on August 16, 2013, roughly three and a half years following the end of the Class Period.

[128] At the certification stage, Masuhara J. (the “Certification Judge”) consolidated the two actions and conditionally certified them as class proceedings, in accordance with the criteria set out in s. 4(1) of British Columbia’s *Class Proceedings*

Act, R.S.B.C. 1996, c. 50 (2016 BCSC 844). The Defendants' appeals to the British Columbia Court of Appeal were unanimously dismissed (2017 BCCA 302, 1 B.C.L.R. (6th) 319).

[129] The Defendants that challenge the Court of Appeal's order before this Court in file no. 37810 (the "Toshiba Appeal") contend that both the Certification Judge and the Court of Appeal erred in three respects: (a) by permitting the Umbrella Purchasers to claim under the statutory cause of action in s. 36(1) of the *Competition Act*; (b) by allowing common law and equitable relief based on a breach of the anti-competitive prohibitions in Part VI of the *Competition Act*; and (c) by finding that loss-related issues were common among the indirect purchasers based on the expert methodology proposed by the Plaintiff.

[130] The appeal brought by the Pioneer Defendants in file no. 37809 (the "Pioneer Appeal") raises those same issues, as well as two unique issues pertaining to the treatment of the limitation defence by the courts below. The Pioneer Defendants argue that the Certification Judge erred in holding that the action against them can proceed — notwithstanding that it was commenced more than two years following the end of the Class Period — based on the application of the discoverability rule and the doctrine of fraudulent concealment. In this Court, the Pioneer Defendants submit (a) that the discoverability rule does not apply to postpone the commencement of the limitation period in s. 36(4)(a)(i) of the *Competition Act*, and (b) that the doctrine of fraudulent concealment cannot toll that limitation period unless the Plaintiff can

establish that he and the other class members stand in a “special relationship” with the Pioneer Defendants. It follows, in their submission, that the Plaintiff’s pleadings do not disclose a cause of action against them in accordance with s. 4(1)(a) of the *Class Proceedings Act*.

[131] I would allow both appeals in part. With respect to the limitations issues raised in the Pioneer Appeal, my view is that the discoverability rule does not apply to the limitation period in s. 36(4)(a)(i) because the event that triggers the commencement of the limitation period occurs without regard to the state of a plaintiff’s knowledge. As for the doctrine of fraudulent concealment, my view is that it is not plain and obvious that it will toll the operation of the limitation period in this case only if the Plaintiff is capable of demonstrating a special relationship existed. It may be that something tantamount to or commensurate with the existence of a special relationship would be sufficient to toll the limitation period. However, simply establishing the existence of the conspiracy will not suffice.

[132] With respect to the issues raised in the Toshiba Appeal, which are common to both appeals, I agree with my colleague Brown J. — although for different reasons — that the *Competition Act* does not prevent a plaintiff from advancing a claim at common law or in equity together with, or instead of, a claim pursuant to the statutory cause of action in s. 36(1) in respect of the same anti-competitive prohibitions. I disagree with my colleague on the other two issues raised in that appeal, however. In my view, the Umbrella Purchasers cannot succeed in their claims against the

Defendants under s. 36(1) of the *Competition Act*. Likewise, I cannot accept that a methodology capable of proving only that loss reached the indirect purchaser level in the distribution chain (and incapable of establishing loss in any individualized manner) is sufficient for the purpose of certifying the loss-related questions proposed by the Plaintiff as “common issues”, pursuant to s. 4(1)(c) of the *Class Proceedings Act*.

II. The Pioneer Appeal

[133] The two unique issues raised in the Pioneer Appeal are as follows:

- (a) Does the discoverability rule apply to the limitation period established by s. 36(4)(a)(i) of the *Competition Act*?
- (b) Must there be a special relationship between the parties to an action in order for the doctrine of fraudulent concealment to toll the limitation period?

[134] The statutory cause of action under s. 36(1)(a) of the *Competition Act*, which allows a claimant to recover for loss or damage resulting from conduct contrary to any provision of Part VI of that Act, is subject to the limitation period established by s. 36(4). These two provisions read as follows:

- 36 (1)** Any person who has suffered loss or damage as a result of
- (a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

...

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

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

whichever is the later . . .

[135] The Plaintiff's action against the Pioneer Defendants, which is based in part on s. 36(1) of the *Competition Act*, was commenced on August 16, 2013 — more than two years following the end of the Class Period, which is the period during which the alleged price-fixing conspiracy took place. The Pioneer Defendants take the position that the Plaintiff's claim for recovery under s. 36(1) of the *Competition Act* is time-barred by the limitation period in s. 36(4)(a)(i). The Plaintiff, for his part, says that both the discoverability rule and the doctrine of fraudulent concealment apply to toll that limitation period. If either applies, then the limitation clock will have begun ticking on the date that he discovered, or ought to have discovered, the existence of the alleged conspiracy.

[136] In order to succeed, therefore, the Pioneer Defendants must persuade this Court that *neither* the discoverability rule *nor* the doctrine of fraudulent concealment has any application in this case.

A. *Does the Discoverability Rule Apply to the Limitation Period Contained in the Statutory Cause of Action in Section 36 of the Competition Act?*

[137] On this first limitations issue raised in the Pioneer Appeal, my colleague takes the view that the discoverability rule postpones the commencement of the limitation period in s. 36(4)(a)(i) until the time at which the potential claimant discovers, or is reasonably capable of discovering, the existence of the impugned conduct that forms the basis of a claim under s. 36(1). I respectfully disagree, for the reasons that follow.

(1) The Discoverability Rule

[138] Limitation clauses are statutory provisions that place temporal limits on a claimant's ability to institute legal proceedings. The expiry of a limitation period has the effect of "extinguish[ing] a party's legal remedies and also, in some cases, a party's legal rights" (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016) ("Mew et al."), at p. 3). As this Court explained in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, statutory limitation clauses reflect the balance struck by the legislature between three distinct policy rationales: granting repose to defendants, avoiding evidentiary issues relating to the passage of time, and encouraging diligence on the part of plaintiffs.

[139] As statutory provisions, limitation clauses give rise to a number of interpretative issues. One important issue is the point at which the limitation period begins running — and in particular, whether the legislature intended that it commence only when the plaintiff has knowledge that the event which sets the clock ticking (sometimes referred to as the “triggering event”) has in fact occurred. This is key, because a determination of when a limitation period expires depends on both its duration and its commencement (Mew et al., at pp. 69-70).

[140] Discoverability is a judge-made rule of statutory interpretation that assists in determining whether the event triggering the commencement of a limitation period depends upon the state of the plaintiff’s knowledge. In *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, this Court recognized a “general rule that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence” (p. 224). What this means is that a limitation period that commences upon “the accrual of the [plaintiff’s] cause of action”, or wording to that effect, will begin running only when the plaintiff discovers, or is reasonably capable of discovering, the facts giving rise to the cause of action (Mew et al., at p. 69). That is the point at which that plaintiff’s ability to sue the defendant crystalizes.

[141] This Court expanded upon the principles applicable to the discoverability rule in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. In that case, Major J. clarified that discoverability is not a general rule that applies *despite* the wording of a legislative

enactment, but rather an “interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue” (para. 37). In so doing, he endorsed the approach to this rule that had been taken by the Manitoba Court of Appeal in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200:

In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from “the accrual of the cause of action” or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party’s knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [para. 22]

[142] The limitation period in *Peixeiro* ran for two years from the time when “damages were sustained” by the plaintiff (para. 2). Applying the test in *Fehr*, Major J. found it “unlikely that by using the words ‘damages were sustained’, the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party’s knowledge” (para. 38). In his view, “[t]he use of the phrase ‘damages were sustained’ rather than ‘cause of action arose’ . . . is a distinction without a difference” (*ibid.*). He therefore concluded that the discoverability rule applied to the limitation period at issue in that case.

[143] A different conclusion was reached by this Court on the facts in *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. That dispute turned, in part, on the interpretation of a limitation period that “prohibits an action brought six months after

letters of probate or administration of the estate of the deceased have been granted, and after the expiration of one year from the date of death” (para. 18, referring to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32). Bastarache J., writing for a unanimous Court, once again affirmed the test set out in *Fehr* and reiterated that discoverability is not a general rule but rather an “interpretative tool for construing limitation statutes” (para. 23). Applying the *Fehr* test to the limitation provision at issue in that case, Bastarache J. concluded as follows:

Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. The Act does not establish a relationship between these events and the injured party’s knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I agree with the Court of Appeal that by using a specific event as the starting point of the “limitation clock”, the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies. [Emphasis added; para. 27.]

[144] The Plaintiff in the instant case agrees that *Fehr* sets out the test for whether a limitation period is subject to the discoverability rule (R.F. (Pioneer Appeal), at para. 29), and my colleague affirms this approach at paras. 31-35 of his reasons. However, he goes on to opine that “where the event triggering the limitation period is an element of the cause of action, the legislature has shown its intention that the limitation period be linked to the cause of action’s accrual, such that discoverability will apply” (Brown J.’s reasons, at para. 38 (emphasis added)). In other words, he

equates language referring to the *accrual* or *arising* of the cause of action in its entirety with language referring to the *occurrence of an element* of the cause of action; in his view, both evidence a legislative intent that the discoverability rule apply.

[145] Although this approach accords with the view expressed by the British Columbia Court of Appeal in this case (paras. 89-90), as well as by the Ontario Court of Appeal in *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, 2016 ONCA 621, 132 O.R. (3d) 81, at paras. 40, 43 and 45, my respectful view is that it expands the scope of the discoverability rule in a manner that is neither consistent with precedent nor justifiable in principle.

[146] First, the suggestion that discoverability applies in all cases where the triggering event is “the occurrence of an element of the underlying cause of action” (Brown J.’s reasons, at para. 44) broadens the test set out by the Manitoba Court of Appeal in *Fehr* — a test which my colleague purports to endorse at paras. 33-35 of his reasons. In that case, Twaddle J.A. was very clear in explaining that the discoverability rule applies “[w]hen time runs from ‘the accrual of the cause of action’ or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained” (para. 22). Only these two situations were identified; there was no indication whatsoever that the discoverability rule ought to apply *automatically* in circumstances where the triggering event is merely the occurrence of a component element of the cause of action (and not the accrual of the cause of action in its entirety).

[147] Not only did this Court endorse *Fehr* in both *Peixeiro* and *Ryan*, but both appeals were resolved on a fairly straightforward application of this approach to discoverability. In *Peixeiro*, this Court reasoned that the limitation period — which commenced when “damages were sustained” — fell within the first category outlined in *Fehr* (to which the discoverability rule applies), given that this triggering event did *not* occur without regard to the plaintiff’s knowledge. Likewise, *Ryan* was decided on the basis that the events triggering the commencement of the limitation period at issue — the death of the defendant or the granting of letters of administration or probate — occurred regardless of the plaintiff’s state of mind and therefore fell within the second category in *Fehr*, to which the discoverability rule has no application (para. 27). Put simply, neither case was resolved by determining whether the triggering event was “related to”, “linked to the basis of” or “an element of” the plaintiff’s cause of action.

[148] It is true that this Court in *Ryan* stated that the discoverability rule does not apply where the limitation period “is explicitly linked by the governing legislation to a fixed event unrelated to the injured party’s knowledge or the basis of the cause of action” (para. 24 (emphasis added)). The Court of Appeal in the present case characterized this as an “unequivocal statement . . . that the rule can apply where the limitation period is linked to ‘the basis of the cause of action’” (para. 89). With respect, the Court of Appeal’s narrow focus on this specific statement ignores the broader context in which it was made. In the immediately preceding paragraph in *Ryan* (i.e. para. 23), Bastarache J. reaffirmed — and reproduced in full — the approach to

discoverability set out in *Fehr*, and the statement in question appears to be nothing more than a paraphrased summary of this well-accepted approach. Moreover, in the same paragraph (i.e. para. 24), Bastarache J. explained that the discoverability rule *does* apply where the commencement of the limitation period is “related by the legislation to the arising or accrual of the cause of action”. From my reading of *Ryan*, I see no intent on the part of this Court to broaden the traditional approach to discoverability, and for this reason, my view is that the words “basis of the cause of action” in para. 24 of *Ryan* should be understood as essentially synonymous with the “arising or accrual of the cause of action”.

[149] In any event, principle also commands that the discoverability rule apply *only* where the limitation period runs from the “accrual of the cause of action” (or wording to that effect) or from the occurrence of some event that is related to the state of the plaintiff’s knowledge. This is because discoverability is nothing more than a tool of statutory interpretation. Where a legislature provides that a limitation period is triggered by an event whose occurrence depends on the plaintiff’s knowledge, courts give effect to this legislative direction by calculating the running of the limitation period from the point at which the plaintiff acquired or was capable of acquiring such knowledge. Conversely, where the legislature provides that a limitation period is triggered by an event that occurs without regard to the plaintiff’s state of mind, the courts do not — and indeed, cannot — apply the discoverability rule to postpone the commencement of the limitation period until such time as the plaintiff discovered, or ought to have discovered, that the event had taken place. Courts are bound to interpret

and apply statutory law; they cannot rewrite it (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, at paras. 54-55 and 58).

[150] Limitation periods that begin running upon the accrual of the plaintiff's cause of action evidently fall within the first category outlined in the preceding paragraph. Mew et al. note that a cause of action arises only "when all of the elements of a wrong existed, such that an action could be brought" (p. 69), and conversely, that "no cause of action can be said to have accrued unless there is a plaintiff available who is capable of commencing an action and a defendant in existence who is capable of being sued" (p. 70 (footnotes omitted)). Because a cause of action cannot accrue before the plaintiff discovers that they have the right to commence proceedings against the defendant, a legislature which provides for a limitation period that begins running at that point in time necessarily intends the discoverability rule to apply. This explains the reasoning behind the "general rule" set out by this Court in *Central Trust* (see para. 140 above) and affirmed in *M. (K.)*. It is essential to recognize that the limitation period in each case was triggered by the accrual or arising of the plaintiff's cause of action.

[151] Conversely, "the occurrence of an element of the underlying cause of action" (Brown J.'s reasons, at para. 44) will not always fit within either category outlined above at para. 149. It may be that the occurrence of such an event does in fact depend on the state of the plaintiff's knowledge, but unlike the accrual of a cause of action, this does not invariably follow as a matter of logical necessity. In *Peixeiro*, for example, this Court held that the point at which damages are sustained — a constituent

element of (among other things) the tort of negligence — depends on when the plaintiff actually has knowledge of his or her injury. Knowledge will not form part of every element of the cause of action in negligence, however. A breach of a standard of care, for example, may occur years or even decades before the plaintiff first learns about it. Although such a breach is a prerequisite to a successful claim in negligence, it is also something that takes place without any regard to the plaintiff's state of mind.

[152] It is for this reason that I disagree in principle with the proposition that the discoverability rule must *always* apply where the triggering event “is related to”, “is linked to the basis of” or “constitutes an element of” the plaintiff's cause of action. My position is instead consistent with that stated by Marshall J.A. of the Newfoundland Court of Appeal in *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182:

Where the limitation period is set by the terms of the statute to run from the time when an action arises or accrues, as in *Kamloops [v. Nielsen]*, [1984] 2 S.C.R. 2] and *Central Trust*, there is room to imply that the legislation does not intend the period to commence until the injured party has, or ought to have, an awareness of the claim's existence. The criteria under such legislation provisions, therefore, imports a mental element. However, when the limitation statute explicitly ties the prescription period to a specific occurrence, such as the termination of professional services, knowledge of the claimant cannot be construed as a factor. In such instances it is the happening of the factual event which is explicitly relevant and any interpretation implying the period to be related to the claimant's consciousness of the circumstances is precluded. No scope exists to imply the discoverability rule into the legislative intent. [Emphasis added; para. 38.]

[153] With this in mind, I am respectfully of the view that my colleague's approach is undermined by the well-settled principle that the discoverability rule is

fundamentally a rule of statutory interpretation. The fact that a limitation period begins running upon the *occurrence of an element* (and not upon the *accrual* or *arising*) of the plaintiff's cause of action is not, on its own, indicative of any legislative intent regarding the applicability of the discoverability rule. As I have already indicated, my colleague's conclusion is the same as the one reached by the Court of Appeal in this case and by the Ontario Court of Appeal in *Fanshawe*: in such circumstances, according to him, discoverability applies automatically. This, however, creates an arbitrary distinction between triggering events that are related to the cause of action and those that are not, despite the fact that both may occur independently of the plaintiff's state of mind. How can it fairly be said that the legislature *intended* the discoverability rule to apply to one and not the other? Although knowledge is necessary for a cause of action to fully accrue to the plaintiff, it does not follow that an element of the cause of action also occurs only when the plaintiff has knowledge thereof.

[154] A preferable approach is instead one that considers each statutory limitation clause on its own terms, recognizing that a triggering event that relates to a cause of action can, *but need not*, be dependent upon the plaintiff's state of mind. This approach is faithful to this Court's jurisprudence, and respectful of the notion of discoverability as an interpretative tool and not a general rule that allows clear statutory wording to be disregarded. For my part, I would reaffirm the approach laid out in *Fehr* without any modification.

- (2) Application of the Discoverability Rule to the Limitation Period in Section 36(4)(a)(i)

[155] Given the foregoing, it is no surprise that I disagree with my colleague that the discoverability rule applies to the limitation period in s. 36(4)(a)(i) of the *Competition Act* on the basis that “the event triggering this particular limitation period is an element of the underlying cause of action” (Brown J.’s reasons, at para. 44). Rather, the conclusion that results from applying the law as I explained it in the preceding section is that this limitation period commences on the day on which the conduct contrary to Part VI actually takes place, and not the day on which a potential claimant discovers, or is reasonably capable of discovering, that it took place.

[156] Section 36 of the *Competition Act* was “carefully constructed” to create a limited cause of action in respect of serious criminal offences under Part VI of the *Competition Act* (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 689). For example, Parliament limited recovery to an amount “equal to the loss or damage proved to have been suffered” by the plaintiff as a result of the prohibited conduct, thereby foreclosing the availability of other types of damages, such as aggravated or punitive damages. Section 36(2) provides plaintiffs with a shortcut to proving conspiracy where the defendant was convicted of the underlying offence. And of significance for our purposes is the fact that this cause of action is circumscribed by a complex twofold limitation period at s. 36(4) that reflects the balance struck by Parliament among the certainty, evidentiary and diligence rationales that underlie this area of the law.

[157] The wording of the limitation period set out in s. 36(4)(a)(i) provides ample support for the proposition that the two-year period commences independently of when the plaintiff first learns of the wrongdoing. Rather than having the limitation period commence upon the accrual of the cause of action (as was the case in *Central Trust and M. (K.)*), Parliament decided that it would instead commence on “a day on which the conduct was engaged in” — which, contrary to the position taken by my colleague, is *not* “wording to [the same] effect” as “accrual of the cause of action” (paras. 37 and 41). There is simply no link between this triggering event and the plaintiff’s state of mind; it is, in short, an “event which clearly occurs without regard to the injured party’s knowledge”. The Certification Judge’s reading of this provision led him to the same conclusion (para. 54 (CanLII)). It was the existence of conflicting jurisprudence on this point that caused him “not [to be] satisfied that it is plain and obvious that the discoverability principle can never apply to the limitation period in s. 36(4)” (para. 58).

[158] I acknowledge that the “discoverability rule has been applied by this Court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule” (*Peixeiro*, at para. 38). However, a consideration of the context surrounding s. 36(4)(a)(i) lends further support to the conclusion that the discoverability rule does not apply.

[159] First, the cause of action in s. 36(1)(a) is based on two essential elements: (i) the defendant engaging in conduct contrary to any provision of Part VI, and (ii) the plaintiff suffering loss or damage as a result of such conduct. It is only upon the

occurrence of both events that the plaintiff can commence proceedings on the basis of this statutory cause of action. Cognizant of this, and of the fact that conspiracies of this nature take place in secret, Parliament decided that the limitation period would not begin when the plaintiff actually sustained loss or damage, but rather when the defendant engaged in the prohibited conduct. It is important to keep in mind that the point at which the conduct is engaged in necessarily precedes the point at which a claimant will suffer loss or damage as a result of such conduct. I would also note that the offence under s. 45 is complete as soon as an unlawful agreement is made, meaning that the “conduct” is “engaged in” even if the agreement is not actually implemented or prices do not actually increase. It follows as a direct consequence of this legislative choice that the limitation period can in fact expire before the plaintiff is in a position to commence proceedings under s. 36(1)(a).

[160] Second, s. 36(4)(a)(ii) provides a mechanism for the plaintiff to advance a claim that may be barred by s. 36(4)(a)(i): even if two years have expired from the day on which the prohibited conduct was engaged in, the limitation period will restart on the day on which criminal proceedings relating to the impugned conduct are finally disposed of. While s. 36(4)(a)(ii) applies only where the alleged conduct contrary to Part VI is the subject of criminal prosecution, it nevertheless provides an indication that Parliament was aware of the strictness of s. 36(4)(a)(i) and chose to enact this provision as the *only* means of relieving against it.

[161] Third, and unlike claims subject to the general limitation period in British Columbia's *Limitation Act*, S.B.C. 2012, c. 13, s. 21, Parliament has not subjected claims under s. 36(1)(a) to any ultimate limitation period. Interpreting s. 36(4)(a)(i) as commencing only when the underlying conduct becomes discoverable will therefore have the effect of leaving defendants at risk of lawsuit indefinitely. As Paul-Erik Veel helpfully observes, the result would be that "companies could face claims decades later, well after the employees involved in the alleged conspiracy may have left and documents lost, without any ability to defend themselves" (*Waiting forever for the axe to drop? Discoverability and the limitation period for Competition Act claims*, *Lenczner Slaght*, August 12, 2016 (online)). This runs contrary to the certainty and evidentiary rationales that underlie the law of limitations.

[162] Fourth, the two-year limitation period was enacted by Parliament at a time when limitation periods were comparatively much longer. For example, the provincial limitations statutes that were in force at the time in Ontario and British Columbia set out a general limitation period of six years (*The Limitations Act*, R.S.O. 1970, c. 246, s. 45(1); *Statute of Limitations*, R.S.B.C. 1960, c. 370, s. 3). The relatively short limitation period at issue here, which commences even before the cause of action fully crystalizes, provides a further indication of the premium that Parliament placed on granting repose to defendants and encouraging diligence by potential plaintiffs.

[163] The statutory provision at issue here is therefore akin to s. 138.14 of Ontario's *Securities Act*, R.S.O. 1990, c. S.5, which this Court recently considered in

Canadian Imperial Bank of Commerce v. Green, 2015 SCC 60, [2015] 3 S.C.R. 801; because there is no suspension mechanism built into that statutory limitation clause, “the limitation period begins to run regardless of knowledge on the plaintiff’s part, be it on when a document containing a misrepresentation is released, when an oral statement containing a misrepresentation is made, or when there is a failure to make timely disclosure” (para. 79). Under both provisions, the limitation period is triggered by an event that is unrelated to the state of the plaintiff’s knowledge. This is consistent with a number of judicial decisions that considered this issue as it pertains to s. 36 of the *Competition Act* (see *CCS Corp. v. Secure Energy Services Inc.*, 2014 ABCA 96, 575 A.R. 1, at para. 4; *Laboratoires Servier v. Apotex Inc.*, 2008 FC 825, 67 C.P.R. (4th) 241, at para. 488; *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996, 88 C.P.R. (4th) 7, at paras. 28-33; *Eli Lilly and Co. v. Apotex Inc.*, 2009 FC 991, 80 C.P.R. (4th) 1, at para. 729; *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, at paras. 643-46 (CanLII)).

[164] On a different note, I am not persuaded that a short limitation period, to which the discoverability rule does not apply, will defeat the purpose for which Parliament enacted s. 36 and the rest of the *Competition Act*. Civil liability under s. 36 is not the exclusive means by which persons are held to account for anti-competitive conduct: the statute also provides for a variety of penal and administrative consequences for activities that reduce competition in the marketplace. Moreover, as I will explain later in these reasons, alleged wrongdoers may also be liable at common law or in equity for conduct that constitutes an offence under Part VI. A short limitation

period for the cause of action under s. 36(1) therefore does not defeat Parliament's objective of "maintain[ing] and encourag[ing] competition in Canada . . . in order to provide consumers with competitive prices and product choices" (*Competition Act*, s. 1.1).

[165] As a result, I disagree with my colleague that the limitation period in s. 36(4)(a)(i) begins to run on the date that the conduct contrary to Part VI is either discovered or discoverable by the plaintiff. Properly interpreted, the triggering event in this statutory provision "clearly occurs without regard to the injured party's knowledge", and the provision does not contain "wording to [the same] effect" as "accrual" of the s. 36 cause of action. A proper application of the *Fehr* test therefore leads to the conclusion that the discoverability rule does not apply. Applying discoverability would make the limitation period chosen by Parliament virtually meaningless and create uncertainty around the likelihood and timing of significant litigation.

B. *Must There be a Special Relationship Between the Parties to an Action in Order for the Doctrine of Fraudulent Concealment to Toll the Limitation Period?*

[166] The fraudulent concealment doctrine is a doctrine that operates to prevent a limitation clause from being used as an instrument of injustice in circumstances where a defendant conceals the facts giving rise to a potential cause of action from a plaintiff. Because it would be unconscionable for that defendant to then rely on the limitation clause as a defence to the claim, equity "suspend[s] the running of the limitation clock

until such time as the injured party can reasonably discover the cause of action” (*Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), at para. 28). The Canadian approach to this doctrine has its origin in the England and Wales Court of Appeal’s decision in *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), in which Lord Evershed, M.R., wrote as follows:

It is now clear . . . that the word “fraud” in s. 26(b) of the *Limitation Act, 1939*, is by no means limited to common law fraud or deceit. Equally, it is clear . . . that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. [Emphasis added; p. 249.]

[167] The Pioneer Defendants, relying on *Kitchen* and the jurisprudence that followed, argue that the existence of a “special relationship” between the plaintiff and the defendant is a necessary precondition to the application of the doctrine of fraudulent concealment. Because such a relationship was not pleaded by the Plaintiff, they say that this doctrine cannot operate to toll the limitation period and that the claim against them must fail accordingly.

[168] I would note that this Court has only ever considered the operation of fraudulent concealment in the context of a special relationship between the plaintiff and the defendant. This Court applied that doctrine in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, after Dickson J. (as he then was) found that the conduct of the Indian Affairs Branch of the federal government was “unconscionable, having regard to the fiduciary

relationship between the Branch and the [Musqueam Indian] Band” (p. 390). Likewise, this Court recognized the existence of a special relationship between a parent and a child in *M. (K.)*, a case concerning incest. There, La Forest J. explained that such cases necessarily involve “a grievous abuse of a position of confidence”, since “incest is really a double wrong — the act of incest itself is followed by an abuse of the child’s innocence to prevent recognition or revelation of the abuse” (p. 58). Canadian courts have also found special relationships to exist between lawyers and clients, physicians and patients, employers and terminated employees, and trustees and beneficiaries (Mew et al., at p. 234).

[169] That said, I am not prepared to go so far as to say that a special relationship — which I understand to be one that is based on trust and confidence — is always a prerequisite or a necessary element for the operation of the fraudulent concealment doctrine. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, Binnie J. explained that fraud in equity is broader than it is at common law, as it captures “transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained” (para. 39 (emphasis added), citing *First City Capital Ltd. v. B. C. Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), at p. 37). He further noted that this ground for equitable relief “is so infinite in its varieties that the Courts have not attempted to define it”, adding that “all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken” (*ibid.* (emphasis added), citing *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9

(Ont. H.C.), at p. 19). What constitutes “unconscionable conduct” for the purposes of the doctrine of equitable fraud will vary from case to case and will depend in part on the connection between the parties. This is helpfully explained by Ian Spry in his leading textbook, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th ed. 2014):

Fraud in this sense includes, not only fraud in the sense of active dishonesty that gave rise to an action of deceit at law, but also the taking of active steps with the intention of concealing the existence of the material cause of action. The better view is that it includes also, in cases where the defendant is under a special duty to the plaintiff, a failure to disclose the events which have taken place and which give rise to the cause of action in question. So it was said by Lord Evershed that in this context fraud includes “conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other”. [p. 440.]

[170] In effect, in the commercial context, limiting the application of the fraudulent concealment doctrine to only those situations where there is a special relationship between the parties presupposes that, in that context, there can be no injustice resulting from the application of a limitation period *unless* a special relationship exists. Put differently, insofar as there may be situations in which the fraudulent concealment doctrine would rectify an injustice caused to a plaintiff by the application of a limitation period, *even though there exists no special relationship* between the parties, then limiting the doctrine by requiring such a relationship could be seen as contradicting the very spirit of a doctrine that aims to protect against unconscionable conduct.

[171] Based on this understanding of fraudulent concealment, my view is that it is not plain and obvious that equity can intervene to toll the applicable limitation period only in cases where there exists a special relationship; it may be that it can also intervene in cases — at least in the commercial context, as here — where the plaintiff can demonstrate something commensurate with or tantamount to a special relationship.

[172] To be sure, the mere allegation of a price-fixing agreement among defendants is not sufficient *on its own* for the fraudulent concealment doctrine to toll the applicable limitation period. If it were, the limitation period for which Parliament specifically provided in s. 36(4) of the *Competition Act* would be meaningless in these circumstances, given the fact that price-fixing agreements are, in practice, carried out in secret.

[173] In the case at hand, the Plaintiff did not plead that there was a special relationship between the class members and the Pioneer Defendants. However, as I explained above, it is not plain and obvious that this is fatal to the Plaintiff's fraudulent concealment claim, since a special relationship may not be a necessary precondition to the application of the fraudulent concealment doctrine. While the mere allegation of a price-fixing agreement among the Pioneer Defendants is not sufficient *on its own* for this doctrine to toll the applicable limitation period, in the commercial context, a showing of fraud in equity tantamount to or commensurate with the existence of a special relationship could be enough.

[174] The Plaintiff pleaded that the Pioneer Defendants “took active steps to, and did, conceal the unlawful conspiracy from their customers” (R.F. (Pioneer Appeal)). Given that we are at the certification stage, I am prepared to conclude that it is not “plain and obvious” that the fraudulent concealment doctrine has no application in this case. Whether or not the Plaintiff will be successful in relying on this doctrine to toll the applicable limitation period in these circumstances, however, will depend on what he can prove at trial — that is, whether he can establish a special relationship, or maybe something tantamount to or commensurate with one could suffice.

[175] On the basis of the foregoing, while the discoverability rule does not apply to toll the limitation period, it may be that the fraudulent concealment doctrine does, and, accordingly, I would dismiss the Pioneer Appeal regarding that question. However, there remain three more issues, common to all Defendants, and because the Pioneer Defendants have adopted the submissions of the Toshiba Appeal with regards to these common issues, I will consider them together in the subsequent section. For the aforementioned reasons and for the reasons that follow, I would allow the Pioneer Appeal in part.

III. The Toshiba Appeal

[176] The issues in the Toshiba Appeal, which are common to both appeals, are threefold:

- (a) Is it plain and obvious that the Umbrella Purchasers' claims under s. 36(1)(a) of the *Competition Act* cannot succeed?
- (b) Is it plain and obvious that s. 36(1) bars a plaintiff from alleging common law and equitable causes of action in respect of conduct that breaches the prohibitions in Part VI of the *Competition Act*?
- (c) What standard must a representative plaintiff meet in order to have loss-related questions certified as "common issues" among indirect purchasers, and has the Plaintiff met this standard in the present case?

[177] I write separately because my views diverge from those of my colleague on all three of these issues. I will address each in turn.

A. *Is it Plain and Obvious That the Umbrella Purchasers' Claims Under Section 36(1) of the Competition Act Cannot Succeed?*

[178] The first issue in the Toshiba Appeal is whether the Certification Judge erred in holding that the Umbrella Purchasers can advance claims under s. 36(1) of the *Competition Act* against the Defendants. The Defendants submit that the Certification Judge did so err, and that upholding his conclusion on this point will have the effect of opening up "a potentially limitless scope of liability that could not have been contemplated by Parliament and is contrary to the scheme of the *Competition Act*" (A.F. (Toshiba Appeal), at para. 97).

[179] I agree with my colleague that resolving this issue requires an exercise in statutory interpretation, under which the words of the *Competition Act* are to “be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). However, we must not lose sight of the fact that our contextual approach to statutory interpretation also draws on the relevant legal principles and norms (see *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 43; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48).

[180] On its face, s. 36(1) appears to be worded broadly enough to capture claims by umbrella purchasers, so long as they can prove that they “suffered loss or damage as a result of” the conduct specified in para. (a) or (b). According to the Defendants, however, this statutory provision must be interpreted in a manner that is consistent with the principles that limit the extent of liability at common law (A.F. (Toshiba Appeal), at paras. 97-99). They point specifically to two legal principles that are relevant for the purposes of liability to umbrella purchasers: indeterminacy and remoteness. At its core, therefore, the issue under this heading raises the question of whether those principles can inform our interpretation of s. 36(1) of the *Competition Act* — and in particular, the extent of a defendant’s liability thereunder in the context of a price-fixing claim

brought by persons whose ODD or ODD product was manufactured or supplied by a non-Defendant.

[181] *Indeterminacy* is a policy consideration that negates the imposition of a duty of care in negligence where it would expose the defendant to “liability in an indeterminate amount for an indeterminate time to an indeterminate class” (*Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.C.A. 1931), at p. 444, per Cardozo C.J.). This concern arises where finding a duty of care between a plaintiff and a defendant would open the floodgates, resulting in “massive, uncontrolled liability” (A. M. Linden et al., *Canadian Tort Law* (11th ed., 2018), at p. 278). *Remoteness* is a related principle that limits the scope of liability in negligence where “the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable” (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 12, citing A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 360). According to the authors of the 11th edition of that text:

The losses or injuries incurred by plaintiffs must not be “too remote” a consequence of the defendants’ negligent act, in order for compensation to ensue. In other words, to use the older language, negligent defendants who owe a general duty of care are not liable unless their conduct is the “proximate cause” of the plaintiff’s losses. Causation alone is not enough; it must be demonstrated that the conduct was the *proximate* cause of the damage. This issue is better described as the scope or extent of liability issue. [p. 307]

[182] Although both indeterminacy and remoteness relate primarily to liability in negligence, I agree with the Defendants that the same underlying concerns can

inform our analysis of the issue at hand, which involves claims under s. 36 of the *Competition Act* for pure economic losses. In *Taylor v. 1103919 Alberta Ltd.*, 2015 ABCA 201, 602 A.R. 105, at para. 50, for example, the Alberta Court of Appeal discerned “no principled reason why [the principle of remoteness] ought not to apply” to the statutory cause of action in Alberta’s *Land Titles Act*, R.S.A. 2000, c. L-4. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, Rothstein J. considered the principle of remoteness, among other legal norms, in his analysis of whether indirect purchasers have a cause of action under s. 36 of the *Competition Act* (paras. 42-45).

[183] Similarly, in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983), the United States Supreme Court held that common law principles — including foreseeability and proximate cause, directness of injury, certainty of damages and privity of contract — can operate to limit the scope of a defendant’s liability under the statutory cause of action for anti-competitive conduct in § 4 of the *Clayton Act*, 15 U.S.C. § 15.³ In that case, the majority held that a plaintiff could not recover under that provision for harm allegedly suffered by reason of the defendants’ coercion of third parties. Although Stevens J. recognized that “[a] literal reading of the statute is broad

³ That provision read as follows: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation” (p. 529), he nevertheless held that

the question whether the [plaintiff] may recover for the injury it allegedly suffered by reason of the defendants’ coercion against certain third parties cannot be answered simply by reference to the broad language of [the applicable statutory provision]. Instead . . . the question requires us to evaluate the plaintiff’s harm, the alleged wrongdoing by the defendants, and the relationship between them. [p. 535]

[184] The issue in the instant case turns on whether the Defendants can be held liable for loss or damage of an economic nature suffered by the Umbrella Purchasers, a group of claimants who bought from non-Defendants ODDs that were manufactured or supplied by non-Defendants. Can the Umbrella Purchasers recover as against the Defendants — companies with which they have no commercial relationship whatsoever? In my view, the answer is no. Any overcharges that those claimants may have incurred were ultimately the direct result of pricing choices *made by those non-Defendant manufacturers and suppliers*, regardless of whether or not those choices were influenced by broader trends in the market. In short, the Defendants have control over their own business decisions, but not over those of non-Defendant manufacturers and suppliers. For this reason, and bearing in mind the principles underlying indeterminacy and remoteness, I am of the view that it would be unfair to hold the Defendants liable to the Umbrella Purchasers where they had no control over such liability. Indeed, interpreting s. 36(1) in the manner suggested by the Plaintiff might well expose the Defendants to unbounded liability — capable of encompassing not only the losses of those Umbrella Purchasers themselves, but also the losses of

“[a]nyone who was affected by the economic ripples downstream of umbrella purchasers” (A.F. (Toshiba Appeal), at para. 105). In my opinion, this provision must be construed in a manner that prevents such a cascade of liability.

[185] This is consistent with the views expressed by Perell J. of the Ontario Superior Court of Justice in *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, 390 D.L.R. (4th) 87, and by a unanimous Divisional Court, in *Shah v. LG Chem, Ltd.*, 2017 ONSC 2586, 413 D.L.R. (4th) 546. *Shah* involved the certification of a price-fixing class action brought by direct, indirect and umbrella purchasers of lithium ion batteries (“LIBs”) manufactured by various defendants. On the question of whether the umbrella purchasers in that case could succeed in their claim under s. 36(1) of the *Competition Act*, Perell J. held as follows:

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

The Divisional Court unanimously upheld Perell J.’s conclusion on this point. As Nordheimer J. (as he then was) explained:

What is alleged here is that the non-defendant [LIB] manufacturers took advantage of the higher market prices being set by the [defendants] through their conspiracy, to similarly increase the prices of their LIBs or LIB products. Assuming that that occurred, the [defendants] had no control over the actions of the non-defendant manufacturers. First and foremost,

they had no control over whether the non-defendant manufacturers chose to match prices. Second, they had no control over the volume of LIBs or LIB products, that the non-defendant manufacturers chose to produce and sell. [para. 34]

[186] Both Perell J. and Nordheimer J. analogized the issue of liability to umbrella purchasers in *Shah* to the issue of indeterminacy that had arisen in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. In that case, a number of tobacco companies were facing lawsuits relating to the sale of “light” or “mild” cigarettes. Those companies, in turn, brought third-party claims against the Government of Canada, alleging that if they were found liable to the plaintiffs, they would be entitled to compensation from Canada for (among other things) negligent misrepresentation. The argument was that Canada had negligently misrepresented the health attributes of low-tar cigarettes to consumers and to those tobacco companies. Canada countered that allowing the tobacco companies’ claims in negligent misrepresentation “would result in indeterminate liability”, as “Canada had no control over the number of cigarettes being sold” (para. 97). This Court accepted Canada’s argument; McLachlin C.J., writing for a unanimous Court, explained as follows:

I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies’ claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. . . .

The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that “in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate” (para. 62). If Canada

owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate. [Emphasis added; paras. 99-100.]

[187] Although that case concerned indeterminacy in relation to the imposition of a duty of care in negligence, I agree with Nordheimer J. that “the fundamental principle is the same” (para. 32): s. 36(1) should not be interpreted in a manner that makes the Defendants liable to an indeterminate class of people for losses of an indeterminate nature that occurred as a result of business decisions over which they had no control. This accords with the approach taken by the United States Supreme Court in respect of a similar statutory cause of action for anti-competitive conduct: “An antitrust violation may be expected to cause ripples of harm to flow through the Nation’s economy; but ‘despite the broad wording of § 4 [of the *Clayton Act*], there is a point beyond which the wrongdoer should not be held liable’” (*Associated General Contractors*, at pp. 534-35, citing *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), at pp. 476-77, citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), at p. 760, per Brennan J. dissenting). In my view, a preferable reading of the statutory cause of action in s. 36(1) of the *Competition Act* is one that, consistent with the principles underlying indeterminacy and remoteness which operate at common law, limits the potential scope of liability faced by defendants of price-fixing claims to losses flowing from their own pricing decisions, not those of third parties. This promotes the value of certainty so that commercial enterprises “have some appreciation of what risk is to be borne by whom” (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1139).

[188] The Ontario Divisional Court’s decision in *Shah* was subsequently overturned by the Court of Appeal, for reasons substantially similar to those set out by my colleague (*Shah v. LG Chem, Ltd.*, 2018 ONCA 819, 142 O.R. (3d) 721). The unanimous panel in that case took the position that “normative concerns about indeterminate liability” in negligence do not apply in the context of the statutory claim under ss. 36 and 45 of the *Competition Act*, since those concerns “have already been taken care of by Parliament” (para. 47). Like my colleague, the panel stated that, first, the scope of s. 36(1) limits recovery to persons who can prove that they suffered loss or damage “as a result of” the alleged conspiratorial conduct and that, second, the subjective *mens rea* in s. 45 “limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct” (*ibid.*, at para. 51, cited in Brown J.’s reasons, at para. 75).

[189] In my respectful view, neither of those considerations actually protects against the risk of limitless liability that would flow from recognizing the availability of umbrella purchaser claims under s. 36(1). On the first point, the fact that the text of this provision reads as permitting recovery for any person capable of proving that their loss was sustained “as a result of” an alleged price-fixing conspiracy does not end the interpretative exercise. As I explained above, the dispute here concerns whether those words should be taken as allowing recovery for any and all losses that can conceivably be linked to the alleged wrongdoing, or whether relevant legal norms and principles can assist in construing the provision so as to circumscribe what might otherwise be potentially indeterminate liability. And on the second point, while I accept that the *mens*

rea in s. 45 limits liability to defendants who intend to agree upon anti-competitive conduct, this still tells us nothing about the scope of their liability under s. 36(1) — in other words, it tells us *who* is liable but not for *what* they are actually liable.

[190] Before concluding, I will add one final thought. Permitting umbrella purchaser claims under s. 36(1) opens up the possibility of recovery for overcharges that result from “conscious parallelism” — a phenomenon which occurs when parties not involved in a price-fixing conspiracy deliberately *choose* to adjust their prices in order to match those of their competitors, in the absence of any actual collusion between them. As recently observed by the Quebec Court of Appeal in *R. v. Proulx*, 2016 QCCA 1425, at para. 32 (CanLII), “[a]dopting a comparable or identical pricing policy without an agreement — which by definition requires a meeting of minds — does not fall within the scope of s. 45 of the *Competition Act*”.⁴ An interpretation of s. 36(1) that allows umbrella purchaser claims for these kinds of independent pricing decisions would effectively grant a right to recover (a) in circumstances where those decisions — to which the umbrella purchasers’ alleged overcharges are directly attributable — are neither criminally prohibited nor actionable

⁴ In its *Competitor Collaboration Guidelines* (December 2009), the Competition Bureau of Canada explains that it

does not consider that the mere act of independently adopting a common course of conduct with awareness of the likely response of competitors or in response to the conduct of competitors, commonly referred to as “conscious parallelism”, is sufficient to establish an agreement for the purpose of subsection 45(1). However, parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another’s prices, may be sufficient to prove that an agreement was concluded between the parties. [p. 7]

in and of themselves, and (b) from parties who neither made nor benefitted from those decisions.

[191] All of this leads me to conclude that s. 36(1) of the *Competition Act* should not be interpreted in a manner that would permit claimants to recover from defendants for *any* losses that in some way flowed from the alleged conspiracy. Doing so would have the undesirable effect of exposing defendants to liability that is potentially limitless in scope for loss and damage that are too remote from any price-fixing that occurred. I do not think that this could have been Parliament's intention when it enacted this statutory right of action.

[192] In light of the principles to which I have referred above, my view is that the line should be drawn at loss and damage that flowed from the pricing decisions of the Defendants themselves (that is, the loss claimed by the direct and indirect purchasers), and not those that are attributable to third parties who did not participate in — but who nevertheless would have benefitted from — the alleged price-fixing conspiracy. Because the Umbrella Purchasers' losses are indeed attributable to the pricing decisions of non-Defendant ODD manufacturers and suppliers, I find it plain and obvious that their claims in this action under s. 36(1) of the *Competition Act* cannot succeed.

B. *Is it Plain and Obvious That Section 36(1) Bars a Plaintiff From Alleging Common Law and Equitable Causes of Action in Respect of Conduct That Breaches the Prohibitions in Part VI of the Competition Act?*

[193] The second issue raised in the Toshiba Appeal turns on whether the cause of action in s. 36(1) of the *Competition Act* is the exclusive civil remedy for conduct that breaches the criminal offence provisions in Part VI of that statute. The Defendants argue that it is, and that allowing claims in respect of such conduct under common law and equitable causes of action undermines the principle of parliamentary sovereignty. The Plaintiff, by contrast, says that Parliament did not intend to preclude private law remedies for such conduct when it enacted s. 36(1) of the *Competition Act*.

[194] At its core, the issue under this heading is whether a claimant can rely on the common law and equity *as a supplement* to the right of action under s. 36(1) of the *Competition Act* — or put differently, whether a claimant can advance a common law or equitable cause of action instead of, or together with, the statutory cause of action in respect of the same allegation of anti-competitive conduct.

[195] In her leading textbook, *Sullivan on the Construction of Statutes* (6th ed. 2014), Professor Ruth Sullivan explains that “[t]he issue of supplementation arises when there is overlap between legislation and the common law such that both may apply to a particular set of facts and also when legislation is incomplete in that it says nothing of, or does not fully address, a matter relating to the subject of the legislation” (p. 549). On this point, she adds the following:

When the issue of supplementing legislation arises, the focus may be on the application of common law rules, entitlement to common law remedies or access to common law courts. Although rules, remedies and jurisdiction raise distinct concerns, in each case the fundamental question is the same: is it permissible in the circumstances to supplement the legislation by

resorting to the common law? If there is a conflict, the answer is clearly no. In the absence of conflict, the answer to the question depends first of all on legislative intent, which is discovered using the usual methods of interpretation. However, the courts pay particular attention to whether the legislation in question constitutes a complete or exhaustive code. The adequacy of the legislation and the continuing usefulness of the common law rule, remedy or jurisdiction are important considerations. [Emphasis added; p. 549.]

[196] As with the Umbrella Purchasers issue, resolving this issue requires an exercise in statutory interpretation: it must be determined, based on a proper reading of the *Competition Act*, whether Parliament intended s. 36(1) to provide the exclusive civil remedy for persons claiming to have suffered loss or damage as a result of conduct contrary to Part VI.

[197] Like my colleague, I begin my analysis with the presumption against interpreting legislation in a manner that would interfere with common law rights. According to Professor Sullivan, such a presumption allows “the courts to insist on precise and explicit direction from the legislature before accepting any change”, so as to shield the law “from inadvertent legislative encroachment” (p. 539). Such an intention can be found either in the express wording of the statute or by necessary implication (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1315-16).

[198] I agree with my colleague that the *Competition Act* does not expressly preclude claimants from supplementing the right of action in s. 36(1) with claims based on causes of action at common law or in equity. However, I am not convinced that the

reasoning in *Gendron* applies to the case at hand; while that case dealt with a statutory provision that *codified* a common law right, s. 36 of the *Competition Act* is distinguishable in that it *created* a new right that did not exist before. Instead, I would resolve this issue simply on the basis that the coexistence of statutory and common law or equitable claims arising from conduct contrary to Part VI of the *Competition Act* is in fact contemplated by s. 62 of that statute, which reads as follows:

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

[199] In my view, this provision evinces a legislative intention that the provisions of Part VI (which is titled “Offences in Relation to Competition”) not abrogate any right of action a claimant has — which might include a right of action founded on the tort of unlawful means conspiracy or in unjust enrichment — that is predicated upon a breach of the offence provisions of the *Competition Act*. As the Manitoba Court of Appeal recognized in *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335, the inclusion of this provision in the statutory framework suggests that Parliament did not intend the provisions of the *Competition Act* to intrude upon the provinces’ jurisdiction over civil rights and liberties.

[200] The fact that s. 62 applies only to Part VI of the *Competition Act* — and therefore is not *directly* applicable to s. 36(1), which is instead located in Part IV — is not, in my view, consequential. The cause of action created by s. 36(1)(a) is expressly tied to conduct that would constitute an offence under Part VI of the statute. This Court

recognized in *General Motors*, at p. 673, that the purpose of this remedial provision is to “help enforce the substantive aspects of the Act”, such as the prohibitions against anti-competitive conduct.

[201] It is also essential to note that s. 62 uses the phrase “any civil right of action”, which suggests that Parliament contemplated the preservation of the various civil rights of action that may exist in respect of conduct prohibited under Part VI, beyond the one provided for in s. 36(1). Indeed, the former provision would be redundant and pointless if it merely affirmed what the latter already states: that perpetrators of conduct prohibited by Part VI are subject *both* to criminal prosecution *and* to civil proceedings under s. 36(1)(a). This is especially the case given that s. 36(2) and s. 36(4)(a)(ii) indicate that statutory claims can be brought against defendants even after any criminal proceedings against them were finally disposed of.

[202] Therefore, when I read the words of s. 62 “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament” (Driedger, at p. 87; *Bell ExpressVu*, at para. 26), I am led to the conclusion that this provision has the effect of preserving all civil rights of action that a claimant may have — over and above the right of action available under s. 36(1) of the *Competition Act* — in respect of anti-competitive conduct that would constitute an offence under Part VI of that Act. Indeed, s. 62 would be meaningless if s. 36(1) were to be interpreted as exhaustive in respect of civil claims for such conduct.

[203] On the basis of this reasoning, I agree with the result reached by my colleague: the courts below did not err in permitting the Plaintiff to advance the pleaded common law and equitable causes of action together with the statutory cause of action under s. 36(1) in this case.

C. *What Standard Must a Representative Plaintiff Meet in Order to Have Loss-Related Questions Certified as “Common Issues” Among Indirect Purchasers, and Has the Plaintiff Met This Standard in the Present Case?*

[204] The final issue on appeal relates to the requirement of common issues in s. 4(1)(c) of the *Class Proceedings Act*. What is it that the Plaintiff must be capable of establishing at the certification stage in order to provide the necessary assurance that his loss-related questions are capable of resolution on a common basis, and does his proposed methodology for establishing loss satisfy this requirement?

(1) Background

[205] The existence of common issues among the individual class members lies at the very heart of a class proceeding. The procedural ability to aggregate these issues and to consider them at once, and for all class members, during a common issues trial is what alleviates the need for each class member to seek redress via separate actions (M. A. Eizenga et al., *Class Actions Law and Practice* (2nd ed. (loose-leaf)), at p. 3-101). The authors of *The Law of Class Actions in Canada* explain the importance of commonality in the following terms:

The presence of significant common issues provides the access to justice and judicial economies that ultimately justify certifying a class proceeding. Common issues are what actually unite and define the class. The mere fact that a group of people suffers a wrong does not justify certifying a class proceeding unless there are common issues to be decided for the defendant and the members of the group.

(W. K. Winkler et al. (2014), at p. 107)

For this reason, the determination of what constitute the common issues in any proposed class action is a key aspect of a certification motion.

[206] In his Proposed Litigation Plan, the Plaintiff submitted a number of questions for resolution on a common basis at trial (A.R., vol. II, at pp. 125-27), including questions that essentially relate to whether the class members suffered a loss in connection with the alleged price-fixing conspiracy.

[207] In order to satisfy the Certification Judge that these loss-related questions were capable of resolution on a common basis, the Plaintiff adduced evidence from an expert economist named Dr. Keith Reutter. In his expert report, Dr. Reutter took the position that “all members of the proposed Class would have been impacted” by the alleged price-fixing conspiracy and that “there are accepted methods available to estimate any overcharge and aggregate damages that resulted from the alleged wrongdoing using evidence common to the proposed Class” (A.R., vol. III, at p. 119). His methods would involve constructing an economic model to estimate the “but-for” price of the ODDs, that is, their price if the alleged anti-competitive conduct had not occurred (Certification Judge’s reasons, at para. 156), and would include “econometric

methods based on multiple regression to determine the overcharge and pass-through rates” (*ibid.*, at para. 158).

[208] The suggestion that Dr. Reutter’s methodology could establish that all class members would have been impacted by the alleged price-fixing conspiracy was called into question during his cross-examination, however (see A.R., vol. V, at pp. 210-25). The Defendants therefore resisted certification of the loss-related questions, arguing that the Plaintiff’s methodology could not address the issue of loss *on a class-wide basis* because it would not make it possible to answer the Plaintiff’s proposed questions at trial in respect of every class member — either by establishing that all of them were overcharged for their ODDs, or by identifying those who were, and distinguishing them from those who were not. In the Defendants’ submission, unless it could be determined at the common issues trial that a loss had actually been incurred by at least some specific indirect purchasers, then those loss-related questions could not be decided on a common basis at trial and should therefore not be certified as common issues.

[209] For his part, the Plaintiff argued that, from a factual standpoint, his expert’s methodology would be capable of establishing that all class members (including the indirect purchasers) had suffered a loss. As an alternative legal argument, he submitted that he was not required to demonstrate to the Certification Judge that, using his expert’s methodology, he would be able to prove at trial that all class members were harmed or to distinguish those who were from those who were not in an individualized fashion (R.F. (Toshiba Appeal), at para. 96). Instead, his position was that it would be

sufficient, at the certification stage, if the methodology were simply capable of proving that loss had reached the indirect purchaser *level* in the distribution chain — that is, that some overcharges were passed on to some indirect purchasers, without having to identify which ones.

[210] What is key, for the purposes of the commonality issue, is the difference between demonstrating that loss reached the indirect purchaser *level* — that is, that some overcharges were passed on to some *unidentified* indirect purchasers — and proving that loss reached *all* or *an identified group* of indirect purchasers.

[211] My colleague seems to accept that there is some basis in fact for finding that Dr. Reutter's methodology will have a reasonable prospect of establishing, at the common issues trial, that all of the indirect purchasers suffered a loss. In his view, however, nothing turns on this given his conclusion as to the law:

. . . it is not necessary, in order to support certifying loss as a common question, that a plaintiff's expert's methodology establish that each and every class member suffered a loss. Nor is it necessary that Dr. Reutter's methodology be able to identify those class members who suffered no loss so as to distinguish them from those who did. Rather, in order for loss-related questions to be certified as common issues, a plaintiff's expert's methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level. [Emphasis added; para. 102.]

[212] For the purposes of my analysis, I am prepared to accept that there is some basis in fact on which the Certification Judge could have found that the proposed methodology would be capable of proving at trial that loss had reached the indirect

purchaser level. My disagreement with my colleague lies elsewhere. In my view, a methodology that is incapable of establishing at trial that at least some *identifiable* indirect purchasers actually suffered a loss, but that can instead show only that loss occurred somewhere at the indirect purchaser *level* in the distribution chain, does not allow any of the loss-related questions proposed by the Plaintiff in this case to be answered on a “common” or “class-wide” basis.

(2) Analysis

[213] In *Microsoft*, this Court affirmed that, in order to have a question certified as a common issue, the representative plaintiff must show that there is some basis in fact for the commonality requirement in s. 4(1)(c) of the *Class Proceedings Act* — that is, that the question be capable of resolution *on a class-wide basis* (see paras. 99-114). What the “some basis in fact” standard requires in any given case depends on what it is that the proposed question asks; different questions will impose different requirements upon the representative plaintiff.

[214] In the case at hand, the loss-related questions proposed by the Plaintiff include the following: What damages, if any, are payable to the Class Members pursuant to s. 36 of the *Competition Act*? Did the Class Members suffer economic loss? Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of ODDs?

[215] The term “Class Member” or “Class Members” is defined in the Plaintiff’s Proposed Litigation Plan as “one or more members of the proposed class”, which is comprised of:

All persons resident in British Columbia who, during the period commencing at least as early as January 1, 2004 and continuing through January 1, 2010 (the “Class Period”), purchased optical disc drives (“ODD”) or products that contained ODD. [A.R., vol. II, at p. 114]

[216] The broad definition of the term “Class Members”, and the use of that term in stating the proposed loss-related questions, reflects the possibility that the Plaintiff might not be able to prove at trial that *everyone* who purchased an ODD or an ODD product actually suffered a loss in connection with the alleged price-fixing conspiracy. Rather, the evidence might be such that loss is provable only in respect of *some* class members. My colleague says that these questions are stated in such a way that they “could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss”, and adds that “because they could be taken in two different ways they might, following the common issues trial, be answered in different ways” (para. 91 (emphasis in original)).

[217] Regardless of how flexible these questions might be, however, they cannot be answered on a “class-wide” or “common” basis at trial if the Plaintiff’s methodology is incapable of establishing loss in any identifiable manner. This is because mere proof that some loss reached the indirect purchaser level in the distribution chain does not

dispose of any element of liability for any indirect purchaser, nor does it otherwise advance the litigation in any meaningful way.

- (a) *Proof at trial that loss reached the indirect purchaser level, without anything more, does not dispose of any element of liability for any indirect purchaser*

[218] As my colleague seems to implicitly acknowledge in his reasons, proof that loss reached the indirect purchaser *level* is insufficient for any finding of liability to be made at the common issues trial. This is because loss or deprivation suffered by the claimant is an essential element of the causes of action under s. 36 of the *Competition Act*, under the common law tort of civil conspiracy, and in unjust enrichment. This is key: the Defendants can be held liable under these causes of action only to those class members who (among other things) are found to have suffered a loss in connection with the price fixing.⁵ For this reason, the common issues trial judge cannot impose any liability on the Defendants if the Plaintiff cannot show which class members actually suffered a loss. Individual trials will then be necessary (see Brown J.’s reasons, at para. 120; C.A. reasons, at para. 158; *Shah* (Ont. S.C.J.), at para. 69). Indeed, the Plaintiff acknowledges as much in his Proposed Litigation Plan, when he states the following:

The common issues trial will determine the existence and scope of the alleged conspiracy. The common issues trial may also determine on a class-

⁵ The degree of “connection” varies among the different causes of action. For example, the cause of action under s. 36 of the *Competition Act* is for loss or damage that has occurred “as a result of” anti-competitive conduct. Recovery in unjust enrichment is available to a claimant who suffered a deprivation that “corresponds” to the defendant’s enrichment in circumstances where there is no juristic reason for either the enrichment or the deprivation.

wide basis whether Class Members were injured, leading to a finding of liability and a determination of aggregate damages. If 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. [Emphasis added; A.R., vol. II, at p. 118.]

[219] This, of course, makes sense when we consider the fact that a class action is essentially an aggregation of individual actions that share common issues of fact and law (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 27). In *Bou Malhab v. Diffusion Métromédia CMR Inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, this Court reiterated that the class proceeding is merely a procedural vehicle which “cannot be used to make up for the absence of one of the constituent elements of the cause of action”, adding that such a proceeding “can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings” (para. 52 (emphasis added)). By way of illustration, a claimant in an individual trial would not be entitled to a remedy under s. 36(1) of the *Competition Act* merely upon establishing that loss had reached some unidentified persons at his or her level in the distribution chain; that claimant would likewise have no such entitlement in a class proceeding (see *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545, at para. 75).

[220] Moreover, and again as my colleague’s reasons make clear, the aggregate damages provisions of the *Class Proceedings Act* (ss. 29 to 34) cannot be of any assistance to the Plaintiff in establishing liability to all of the class members in a case

like this, where proof of loss is a constituent element of the cause(s) of action. As Rothstein J. explained in *Microsoft*:

The aggregate damages provisions of the CPA relate to remedy and are procedural. They cannot be used to establish liability (2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp., 2010 ONCA 466, 100 O.R. (3d) 721, at para. 55). The language of s. 29(1)(b) specifies that no question of fact or law, other than the assessment of damages, should remain to be determined in order for an aggregate monetary award to be made. As I read it, this means that an antecedent finding of liability is required before resorting to the aggregate damages provision of the CPA. This includes, where required by the cause of action such as in a claim under s. 36 of the Competition Act, a finding of proof of loss. I do not see how a statutory provision designed to award damages on an aggregate basis can be said to be used to establish any aspect of liability. [Emphasis added; para. 131.]

[221] The aggregate damages provisions of the *Class Proceedings Act* therefore cannot be interpreted and applied in such a way as to give a remedy to class members who could not obtain a remedy in an individual trial due to their inability to show that they suffered a loss in connection with the alleged conspiracy. It is important not to conflate the assessment of aggregate damages with the rationale for awarding them.

[222] What all of this means is that a determination at a common issues trial of whether loss reached the indirect purchaser *level* in the distribution chain is of no assistance in resolving the question of whether the Defendants are actually liable to any or all of the indirect purchasers under the causes of action listed above. From the Plaintiff's perspective, the best case scenario is that there is a need for individual trials on the question of which indirect purchasers actually suffered a loss. His worst case scenario is that it cannot be proved that any indirect purchasers suffered a loss at all,

which would terminate the litigation altogether as it pertains to those class members. Contrary to what the Certification Judge stated in his reasons (at para. 168), establishing at trial that “the defendants took part in a conspiracy, that they sometimes or always overcharged direct purchasers, and that at least some direct purchasers passed on these overcharges” to the indirect purchasers will *not* be “sufficient to establish the fact of the defendants’ liability”. It follows, therefore, that the Certification Judge did not identify the correct standard for certifying loss as a common issue (see Brown J.’s reasons, at para. 110).

- (b) *Proof at trial that loss reached the indirect purchaser level, without anything more, does not allow for any loss-related determination that would advance the litigation in a manner that satisfies the commonality requirement*

[223] My colleague states that the loss-related questions proposed by the Plaintiff in this case satisfy the commonality requirement in s. 4(1)(c) of the *Class Proceedings Act*, based on a methodology that is capable of proving that overcharges were passed on somewhere at the indirect purchaser level, *even though* such a methodology cannot allow any finding of liability to be made at trial (see paras. 109 and 120). Similarly, the Plaintiff takes the position that a “single analysis of whether there was an overcharge and whether that overcharge was passed on to the indirect purchaser level would significantly advance the claim for all class members by avoiding repetition of the collection and analysis of large quantities of economic data” (R.F. (Toshiba Appeal), at para. 106).

[224] In light of the legal principles set out by my colleague at paras. 103-5 of his reasons, however, I cannot agree. To begin with, the fact that losses might have occurred somewhere at the indirect purchaser level in the distribution chain does not assist us in determining which specific indirect purchasers suffered losses in order to identify the class members to whom the Defendants might be liable. If the common issues trial judge finds that overcharges were passed on to at least one unidentifiable indirect purchaser, there would still be a need for individual trials; therefore, duplication of fact-finding would not be eliminated (*Dutton*, at para. 39). And if such individual trials are indeed required, then proof that loss occurred somewhere at the indirect purchaser level is not truly “necessary to the resolution of each class member’s claim”, is not a “substantial common ingredient” of their causes of action, and cannot in fact result in “success” for any of those indirect purchasers (*ibid.*, at paras. 39-40 (emphasis added)).

[225] My colleague nevertheless opines that the requisite commonality derives from the fact that failure to show that loss was suffered by *any* indirect purchasers would mean that *none* of them could succeed against the Defendants (para. 108). With respect, however, the function of the common issues trial is not to screen out unmeritorious claims; it is to allow issues of fact and law that are common among many claimants to be determined *at once*, so as to avoid the need for individual determinations for each and every class member. Furthermore, it is unclear why any representative plaintiff would seek the certification of a question that can meaningfully “advance the litigation” only if it results in failure for all indirect purchasers (see

Brown J.’s reasons, at para. 109). In any event, I agree that “it would be a gross waste of private and public resources to litigate if the only prospective ‘benefit’ was to show that there was no point bringing the case in the first place” (K. Wright, T. Shikaze and E. Snow, “On the ‘Level’ After *Godfrey*: Proving Liability in Canadian Price Fixing Class Actions” (2017), 12 *C.A.D.Q.* 13, at p. 18).⁶

[226] All of this leads me to the conclusion that proof that loss reached the indirect purchaser *level* in the distribution chain would not, without more, allow the common issues trial judge to make any loss-related determinations on a class-wide basis so as to permit the proposed questions to be certified as common issues for trial.

(c) *Microsoft does not indicate that loss-related questions are certifiable in indirect purchaser class actions so long as the representative plaintiff has a plausible methodology for proving solely that some overcharges were passed on to the indirect purchaser level*

[227] Like the courts below, my colleague relies on this Court’s decision in *Microsoft* to support his conclusion that loss-related questions in indirect purchaser class actions are certifiable even if the representative plaintiff’s methodology can show only that loss reached the indirect purchaser *level* (but cannot establish loss on any individualized basis). Because that case raised a number of issues that are similar to those in the case at hand, it is worth analyzing it in some depth.

⁶ One of the authors of this article served as counsel for certain defendants in this litigation (although not before this Court) and in *Shah*.

[228] As in this case, the class action in *Microsoft* was based on an allegation of price manipulation by the defendants, Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE (collectively, “Microsoft”). The representative plaintiffs — Pro-Sys Consultants Ltd. and Neil Godfrey (collectively, “Pro-Sys”) — specifically alleged, on behalf of all class members, that Microsoft had engaged in unlawful conduct by overcharging for its operating systems. The class was made up of indirect purchasers who had acquired Microsoft products from resellers that had themselves purchased the products from Microsoft or another reseller higher up in the distribution chain. Pro-Sys pleaded causes of action under the common law torts of intentional interference with economic interests and conspiracy, sought damages pursuant to ss. 36, 45 and 52 of the *Competition Act*, and claimed in unjust enrichment and waiver of tort.

[229] Although the loss-related questions in that case are very similar to those proposed in the case at hand, they explicitly asked whether losses or overcharges had been passed on to *all* of the indirect purchaser class members.⁷ Among the issues at the certification stage was “whether Pro-Sys’ proposed methodology will be able to show the initial overcharges and the pass-through to the proposed class members” (*Pro-Sys*

⁷ The loss-related questions proposed by Pro-Sys included the following: Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount? Did the Class Members suffer economic loss? Did the Class Members suffer economic loss as a result of the Defendants’ interference? Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge? (See *Microsoft*, Appendix.) The term “Class Members” was defined in Pro-Sys’ proposed litigation plan to mean “all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing” (*Pro-Sys A.R.*, vol. III, at p. 196 (emphasis added)).

v. *Microsoft*, 2010 BCSC 285 (“*Microsoft* (BCSC)”), at para. 8 (CanLII) (emphasis added)).

[230] Rothstein J., writing for a unanimous Court, clarified that the onus on the representative plaintiff at the certification stage is to establish that there is some basis in fact for the commonality requirement. In the context of loss-related questions, he observed that this requires the proposed methodology to “offer a realistic prospect of establishing loss on a class-wide basis” (para. 118 (emphasis added)). Importantly, Rothstein J. also expanded on how commonality can be established in indirect purchaser class actions where expert evidence is adduced to show that the issue of loss is resolvable on a class-wide basis:

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

[231] In the case at hand, the courts below interpreted this passage as meaning that loss-related questions will always be certifiable as common issues in the context

of indirect purchaser class actions so long as the representative plaintiff's methodology is capable of showing loss at the indirect purchaser level of the distribution chain. Respectfully, this reading of *Microsoft* — which focuses almost exclusively on the final sentence in the above-reproduced passage — is not consistent with the reasons as a whole, when read alongside those of the motion judge in that case.

[232] For our purposes, it is significant that the loss-related questions in *Microsoft* concerned whether *all* of the indirect purchasers had suffered a loss. Rothstein J. agreed that the class members' claims raised common issues because the resolution of those issues "would appear to advance the claims of the entire class and to answer them commonly will avoid duplication in legal and factual analysis" (para. 111). He also declined to interfere with the motion judge's finding that Pro-Sys "has a credible or plausible methodology to show that all class members were harmed by Microsoft's alleged illegal activities" (*Microsoft* (BCSC), at para. 122 (emphasis in original); see also *Microsoft*, at para. 126). This led Rothstein J. to conclude as follows:

Unlike *Hollick*, here the loss-related issues can be said to be common because there is an expert methodology that has been found to have a realistic prospect of establishing loss on a class-wide basis. If the common issues were to be resolved, they would be determinative of Microsoft's liability and of whether passing on of the overcharge to the indirect purchasers has occurred. Because such determinations will be essential in order for the class members to recover, it can be said, in this case, that a resolution of the common issues would significantly advance the action. While it is possible that individual issues may arise at the trial of the common issues, it is implicit in the reasons of [the motion judge] that, at the certification stage, he found the common issues to predominate over issues affecting only individual class members. [Emphasis added; para. 140.]

[233] A careful reading of *Microsoft* therefore makes it clear that Pro-Sys’s loss-related questions were found to be resolvable on a “class-wide” basis because there was a credible and plausible methodology capable of answering them in respect of *all of the class members* at the common issues trial. Rothstein J. most likely referred to a methodology that is “able to establish that the overcharges have been passed on to the indirect purchaser level in the distribution chain” (para. 115) because of the motion judge’s observation that, in order to succeed, Pro-Sys “must show that the alleged increased charges to the direct customers were not absorbed by any subsequent level in the distribution channel” before reaching the indirect purchasers who formed part of the class (*Microsoft* (BCSC), at para. 6). Indeed, Rothstein J. went so far as to say that “[t]he role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole”, and that what the plaintiff “must demonstrate [is] that ‘sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class’ ([*In Re: Linerboard Antitrust Litigation*, 305 F.3d 145 (3rd Cir. 2002)], at p. 155)” (para. 115 (emphasis added)).

[234] *Microsoft* is therefore a case in which the representative plaintiffs obtained the certification of questions asking whether *all* indirect purchasers had suffered a loss, by providing the motion judge with some basis in fact on which to find that the representative plaintiffs would be capable of proving at trial that they all had. Because the methodology made it possible for the common issues trial judge to resolve a necessary component of everyone’s claim at once, without the need for individual

trials, the commonality requirement was clearly met. As I have explained, however, *Microsoft* does not support the proposition that loss-related questions concerning indirect purchasers are certifiable, as a matter of course, so long as the plaintiff's methodology can show that some loss reached their level in the distribution chain. My colleague provides no reason for reading *Microsoft* in any other way (see Brown J.'s reasons, at para. 107).

(3) Conclusion on the Commonality Issue

[235] The legal dispute between the parties turns on whether loss-related questions that pertain to indirect purchasers in a price-fixing class action can be certified as common issues *even if* the representative plaintiff's methodology is capable only of establishing at trial that loss was occasioned somewhere at the indirect purchaser level of the distribution chain. I would respectfully answer this question in the negative. If the methodology is such that the common issues trial judge will be unable to make any findings as to which class members actually suffered a loss (for the purpose of making determinations as to liability), then those loss-related questions proposed by the plaintiff will not be capable of resolution on a "class-wide" or "common" basis. Indeed, this Court explained in *Sun-Rype* that "where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss" (para. 76 (emphasis added)). No two persons can prove that *they* are the ones who incurred a loss if a representative plaintiff's

methodology can demonstrate only that loss reached some unidentified persons at their level in the distribution chain; by itself, such a methodology does not establish an essential element of liability for anyone. The need for individual trials in those circumstances is indicative of the absence of commonality.

[236] That being said, what is required of the Plaintiff in this case is a methodology capable of answering the loss-related questions on an individualized basis, either by showing that all of the indirect purchasers suffered a loss or at least by identifying those who did and separating them from those who did not or those about whom we cannot be sure (and for whom individual hearings will therefore be necessary). In light of “Dr. Reutter’s admissions on cross-examination that there may be some subset of class members who were not impacted, and that it would not be possible, using his methodology, to determine which class members were actually harmed” (C.A. reasons, at para. 125), the loss-related questions should not have been certified as common issues under s. 4(1)(c) of the *Class Proceedings Act*.

IV. Conclusion

[237] Regarding the limitations issues raised in the Pioneer Appeal, I respectfully disagree that the discoverability rule has any application to s. 36(4)(a)(i). As for the doctrine of fraudulent concealment, the Plaintiff did not plead that there is any special relationship between the Pioneer Defendants and the class members, but did plead that the Pioneer Defendants took active steps to conceal the existence of the alleged conspiracy. While these pleadings are sufficient for the purposes of s. 4(1)(a) of the

Class Proceedings Act, whether any such steps are sufficient to trigger the operation of this equitable doctrine will depend on what the Plaintiff actually proves at trial. As I explained earlier, what is necessary in the commercial context, such as here, could be the demonstration of the existence of *either* a special relationship, *or* something tantamount to or commensurate with one.

[238] Regarding the issues in the Toshiba Appeal, which are common to both appeals, I agree with my colleague — though for different reasons — that the existence of the statutory cause of action in s. 36(1) of the *Competition Act* does not preclude claimants from also advancing claims at common law or in equity based on the same conduct prohibited by Part VI. However, I part ways with my colleague in two important respects. First, I do not agree that the Umbrella Purchasers have a claim against the Defendants under s. 36(1) of the *Competition Act*. Second, I cannot accept that the questions proposed by the Plaintiff that pertain to the commonality of loss among indirect purchasers can be certified where his proposed methodology will be capable of showing nothing more than the fact that some overcharges reached the indirect purchaser level of the distribution chain. In class actions where loss is an essential element of liability (as here), my view is that loss-related questions can be certified as common issues only if the representative plaintiff will be able to actually identify which class members suffered a loss at trial — either by proving that they all did or by distinguishing those who did from those who did not. Because Dr. Reutter admitted on cross-examination that his methodology would be incapable of allowing

the Plaintiff to make such an identification at trial, it follows that the loss-related questions proposed by the Plaintiff in this case should not have been certified.

[239] I would therefore allow the appeals in part.

Appeals dismissed with costs, CÔTÉ J. dissenting in part.

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