COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *NHK Spring Co., Ltd. v. Cheung,*
2024 BCCA 236

Date: 20240624
Dockets: CA48654; CA48657

Docket: CA48654

Between:

**NHK Spring Co., Ltd., NHK International Corporation,
NHK Spring (Thailand) Co., Ltd., and
NAT Peripheral (Hong Kong) Co., Ltd.**

Appellants
(Defendants)

And

Tony Cheung, Sylvie de Bellefeuille, and Graeme Honeyman

Respondents
(Plaintiffs)

And

**TDK Corporation, SAE Magnetics (HK) Ltd., Headway Technologies, Inc.,
Magnecomp Precision Technology Co., Ltd., Magnecomp Corporation, and
Hutchinson Technology Inc.**

Respondents
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And

Criminal Defence Advocacy Society

Intervener

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File Sealed (In Part)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Dickson
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated October 6, 2022 (*Cheung v. NHK Spring Co., Ltd.*, 2022 BCSC 1738, Vancouver Docket S1910612).

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Counsel for the Intervener, Criminal Defence Advocacy Society (“CDAS”) (appeared on November 9, 2024):	B. Martland, K.C.
Place and Date of Hearing:	Vancouver, British Columbia November 9–10, 2023

Place and Date of Judgment: Vancouver, British Columbia
June 24, 2024

Written Reasons by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Justice Dickson

Summary:

Appeal from an order certifying a proposed national class action pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]. The respondents allege that the appellants, who manufactured approximately 96% of the hard disk drive suspension assemblies ("Assemblies") worldwide, conspired to fix the prices of the Assemblies during 2003–2016. The causes of actions include conspiracy under s. 36 of the Competition Act, R.S.C. 1985, c. C-34 and unjust enrichment. The judge found the respondents to have satisfied the requirements for certification under s. 4(1) of the CPA. On appeal, the appellants challenge this Court's jurisdiction to entertain the alleged wrongdoing in this case that occurred outside Canada and allege a number of errors committed by the certification judge. The principal issues pertain to the judge's alleged errors in finding: (1) a real and substantial connection between the alleged conduct and British Columbia to establish territorial jurisdiction over the claim; and (2) a viable cause of action under s. 36 of the Competition Act in the absence of an arguable breach of s. 45. HELD: Appeal dismissed. First, territorial jurisdiction presumptively exists if there is a good arguable case that the appellants committed a tort in BC by participating in a conspiracy that caused economic harm in the province. Other factors were irrelevant to that analysis and the judge correctly assumed territorial competence over the appellants pursuant to the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28. Moreover, it is not plain and obvious that a claim under s. 36 of the Competition Act based on conduct contrary to s. 45 is limited by s. 6(2) of the Criminal Code or Libman v. The Queen. The judge's decision not to provide a definitive interpretation of the interaction between these provisions on a pleadings motion is entitled to deference. None of the subsidiary issues raised by the appellants disclose a reviewable error on the judge's part.

Reasons for Judgment of the Honourable Mr. Justice Harris and the Honourable Mr. Justice Fitch:

I. INTRODUCTION

[1] These appeals arise out of the certification of a national class action alleging that the two appellants engaged in an international price-fixing conspiracy, with reasons indexed as *Cheung v. NHK Spring Co., Ltd.*, 2022 BCSC 1738 ("Reasons"). The claim alleges common law conspiracy, a cause of action under s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, restitution and unjust enrichment.

[2] In short, the allegation is that the appellants conspired together to fix the prices and supply of a necessary component of hard disk drives ("HDDs"), which in turn may be components in consumer and enterprise electronics, such as: laptop

and desktop computers; servers; electronic storage devices; video recorders; and gaming consoles. The components in question are known as suspension assemblies ("Assemblies"). Assemblies are manufactured, marketed, distributed and/or sold by the appellants who fell within three corporate groups: the NHK Group, the TDK Group, and Hutchinson Technology Inc., which was acquired by TDK Corporation, the parent of the TDK Group, in 2016. Collectively, they controlled virtually the entire global market for Assemblies from January 1, 2003 to April 30, 2016 (the "Class Period"), with a combined market share of 96%.

[3] The respondents claim that the price of Assemblies manufactured by the appellants was unlawfully inflated—referred to as an "overcharge"—as a result of the conspiracy. The respondents allege that at least part of this overcharge was passed on to British Columbians and other Canadians who purchased products containing Assemblies, causing them damages or entitling them to restitution during the Class Period.

[4] On appeal, the appellants contend that the judge made a series of errors in taking jurisdiction of the case against them and in certifying the action as a class proceeding. For introductory purposes, it is sufficient to observe that there are two principal issues on appeal. First, the appellants contend that the judge erred in concluding that the alleged wrongdoing, which is based on agreements entered into and implemented outside Canada, grounded a real and substantial connection between that conduct and British Columbia or Canada to establish territorial jurisdiction over the claim as contemplated by the *Court Jurisdiction and Proceedings Transfer Act,* S.B.C. 2003, c. 28 [*CJPTA*]. Second, they argue that it is plain and obvious that the claim under s. 36 of the *Competition Act* discloses no reasonable cause of action. This is said to be so because the civil cause of action under s. 36 of the *Competition Act* is predicated on breach of conduct prohibited under s. 45 of the *Competition Act*, but the relevant conduct must amount to an offence and, by virtue of s. 6(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*], be conduct falling within the territorial jurisdiction of Canada. The nub of their contention on appeal is that all of the alleged wrongdoing occurred outside Canada

and accordingly does not amount to an offence within Canada. Hence, it is plain and obvious that the claim does not state a reasonable cause of action.

[5] The appeal raises a number of subsidiary issues which we shall address later in the judgment. For the reasons that follow, we would dismiss the appeal.

II. THE NATURE OF THE ACTIONS

[6] Although we have briefly characterized the nature of the claim, it is helpful to offer some more details about the pleadings and the record before the judge. Both the pleadings and evidence are relevant because the determination of whether territorial jurisdiction exists is ultimately assessed by reference to both.

[7] The appellants are headquartered in Japan. At the material times, they manufactured approximately 96% of Assemblies worldwide. As noted, Assemblies are incorporated into consumer and business electronics. Assemblies are low cost components in HDDs and final consumer products. The final consumer products are sold in British Columbia and Canada in the ordinary stream of commerce, as are HDDs. The pleading that British Columbia and Canada were markets in which the appellants knew or ought to have known their Assemblies would be indirectly sold was supported by expert evidence based on publicly available information about the international market for HDDs and the products in which they are incorporated.

[8] The pleadings allege that the appellants conspired to fix global prices and supply. The respondents led evidence of the appellants pleading guilty to price-fixing of Assemblies in Japan, Taiwan, Brazil and the United States, although we were informed that the guilty plea in Taiwan of one of the appellants has been set aside and further proceedings are underway. In substance, however, there is clear evidence that the appellants have admitted to conspiring to fix prices and control supply of Assemblies. The focus therefore is not on issues about whether there has been an international price-fixing conspiracy, but on the relevance of the accepted fact that the conduct grounding the conspiracy occurred outside Canada.

[9] A central allegation is that as a result of price-fixing, the proposed class members paid an overcharge for products containing Assemblies. The respondents say this overcharge passed through the supply chain to purchasers of electronic products across Canada. The fact that purchasers in British Columbia and elsewhere in Canada would pay an overcharge was, the respondents contend, within the reasonable contemplation of the appellants.

[10] The respondents allege jurisdictional facts that they contend are sufficient to ground a presumption of a real and substantial connection—namely that harm was suffered in British Columbia by the respondents and other class members as a result of the alleged conspiracy. As the judge put succinctly:

> [79] The Claim alleges a foreign conspiracy with foreseeable impact on Canadian purchasers. It alleges the defendants' Assemblies came to Canada in various electronic products "through normal channels of sale" and the defendants knew this would occur and would cause harm to Canadian consumers. It pleads that the conspiracy "was intended to, and did, affect prices of [Assemblies] and products containing Assemblies sold in Canada, including British Columbia," and that the defendants knew, or should have known, this would injure purchasers here and elsewhere.

[11] A number of potentially relevant facts are not seriously in issue. None of the appellants have a relevant personal presence in Canada. Their headquarters are overseas. They do not operate in Canada. They do not carry out business in Canada for Assemblies. There have been no direct sales of Assemblies in Canada. There has been no pleading that they conspired to fix prices in Canada, actually fixed prices in Canada, or allocated markets within Canada. The initial action does not name a defendant located in Canada and there is no Canadian market for Assemblies. That market exists outside Canada. Assemblies are low cost components and any overcharge in relation to a particular final product is arguably negligible. These factors are relied on heavily by the appellants to distinguish the current case from other price-fixing conspiracy cases in which Canadian courts have taken jurisdiction.

[12] Nevertheless, it is not disputed that the Assemblies come to Canada as components in HDDs sold here in the ordinary course of commerce. Assemblies are

sold almost exclusively to three HDD manufacturers and these direct purchasers sell their HDDs, either as branded, external HDDs sold in Canada or as internal HDDs sold to manufacturers of computer products sold in Canada, for example, laptop or desktop computers produced by major brands.

[13] Although individual Assemblies are low-cost items, the value of the overall market for Assemblies is significant. During roughly the same period as the Class Period (2003–2015), global sales totalled approximately 13.407 billion USD, with average annual sales of approximately 1.031 billion USD.

[14] The respondents proffered expert evidence to support the proposition that, regardless of the cost of individual components and given the nature of the concentration of the market for Assemblies, the alleged overcharge would be passed through the supply chain and reflected in supra-competitive prices for HDDs and final products in which they are incorporated. Further, it is possible, through a standard econometric regression model, to estimate the value of the overcharge in different markets, including the Canadian market. There was thus an evidentiary basis before the judge to conclude that Canadian consumers had been harmed as a result of the alleged price-fixing conspiracy.

III. REASONS FOR JUDGMENT

[15] As we substantially agree with the judge's conclusions and analysis, we propose to only briefly summarize the reasons for judgment on the two principal grounds of appeal. We will address the applicable principles and alleged errors in greater detail in our analysis on appeal. Later, we will address additional alleged errors.

A. The Jurisdictional Challenge

[16] The appellants' challenge to the Court's jurisdiction over them was brought pursuant to *Supreme Court Civil Rules*, R. 21-8 and the *CJPTA*. As the judge noted at para. 80 of the Reasons, in relation to the *CJPTA*:

> … [Section] 3(e) establishes territorial competence over a defendant if there is a real and substantial connection between British Columbia and the facts on which the proceeding is based. Section 10 enumerates non-exhaustive circumstances, or "connecting factors", that presumptively establish such a connection: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, para. 41.

Of particular importance in this case is whether the record demonstrated that the proceeding concerned a tort committed in British Columbia or restitutionary obligations that, to a substantial extent, arose in British Columbia (see *CJPTA*, ss. 10(f)–(g)).

[17] The judge acknowledged that the presumption of a real and substantial connection is rebuttable and correctly set out the two-stage test, quoting *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 [*Höegh*] at paras. 16–17. We will return to this point later.

[18] Briefly, the judge considered *Höegh* to be the governing authority confirming that the tort of a price-fixing conspiracy occurs where the harm occurs, even if the agreement is entered into and furthered elsewhere. He relied expressly on *Höegh* for a summary of the law governing jurisdiction over conspiracy claims:

> [77] In summary, *Imperial Tobacco* [*British Columbia v. Imperial Tobacco Canada Ltd.,* 2006 BCCA 398] and *Fairhurst* [*Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20] plainly stand for the proposition, for the purpose of assessing territorial competence, that the tort of conspiracy is committed by a defendant in British Columbia when, on unchallenged pleadings or a good arguable case, that defendant participates in a conspiracy and the conspiracy causes harm in British Columbia. *Shah* [*Shah v. LG Chem, Ltd.,* 2015 ONSC 2628], in a manner consistent with the basic principles of civil conspiracy, simply adds that the defendant's involvement in the conspiracy must be causally connected to the harm suffered in the jurisdiction. *Shah* also explains that a generalized pleading of conspiracy will not be enough when the defendant specifically, with evidence, denies involvement in that general conspiracy.

[19] The judge also identified the principal argument advanced by the appellants:

> [87] The defendants argue that, even if being party to a conspiracy that causes loss in British Columbia is a connecting factor at stage one, at stage two the relationship between Canada and the subject matter of this litigation does not reach a real and substantial connection. They point to the plaintiffs' allegation in *Höegh* (at para. 3) that the defendants, including those that were

> disputing jurisdiction, "allocated sales, territories, customers or markets for the supply of vehicle carrier services in furtherance of the conspiracy".

[20] The judge did not accept that the additional features pointed to by the appellants rendered the principles discussed in *Höegh* inapplicable to the facts before him. He treated those distinguishing features as additional connecting factors, unnecessary for the assumption of jurisdiction. The judge concluded that participation in a conspiracy that caused economic harm in British Columbia is, based on the authorities, sufficient for a real and substantial connection. He concluded:

> [89] Applying *Höegh*, I find that at stage two the defendants do not overcome the strong stage one presumption of a real and substantial connection. The allegation that the defendants' conspiracy intentionally and foreseeably caused economic harm to purchasers of products in British Columbia creates the requisite connection to this jurisdiction.

[21] The same conclusion followed with respect to restitutionary obligations based on the claim of unjust enrichment because British Columbia was where the alleged deprivation happened.

[22] Finally, the judge rejected an argument that the alleged overcharge was too small to have passed through the supply chain to consumers in British Columbia. In doing so, he relied on evidence to the contrary about the value of the market in Assemblies, concluding that total losses in British Columbia may well be material.

[23] Accordingly, he dismissed the territorial challenge.

B. The Cause of Action Under s. 36 of the *Competition Act*

[24] This issue arose in the context of the judge's analysis of whether to certify the class proceedings. As is well-known, one requirement for certification is that the pleadings disclose a cause of action: s. 4(1)(a) of the *CPA.*

[25] The judge identified the argument he had to address; namely, that the "claim for damages under s. 36 of the *Competition Act* is bound to fail because there is no arguable breach of s. 45 if the alleged price-fixing agreements were neither made, nor implemented, in Canada" (Reasons at para. 100). The factual matrix for this

argument was that it was uncontested that Assemblies are not manufactured in Canada, direct sales occur outside Canada, the alleged agreements were made outside Canada by the appellants who have no presence in Canada, and the agreements were fully performed outside Canada.

[26] The foundation of the appellants' argument is that s. 45 of the *Competition Act* creates an offence and there can be no civil claim under s. 36 if the impugned conduct does not amount to an offence in Canada. Conduct occurring outside Canada cannot amount to an offence in Canada because Canadian criminal law respects the territoriality principle. This proposition is discussed in *Libman v. The Queen*, [1985] 2 S.C.R. 178, 1985 CanLII 51, which, according to the appellants, holds that an offence is subject to the jurisdiction of Canadian courts only if "a significant portion of the activities constituting that offence took place in Canada" (Reasons at para. 106, citing *Libman* at 213). They contend that this principle is enshrined in s. 6(2) of the *Criminal Code*, which provides that no person shall be convicted of an offence committed outside Canada. On the undisputed facts, the appellants say they did not commit an offence in Canada and s. 36 can not create a cause of action for an offence, if committed at all, that is committed outside Canada.

[27] It is important, we think, to identify the basis on which the judge approached the issue before him since on appeal the appellants contend that the judge offered an erroneous and definitive interpretation of ss. 36 and 45 of the *Competition Act*. As we shall see, they say that the judge's interpretation should be assessed on a correctness standard.

[28] With respect, we think the judge went no further than to examine the arguments about the possible interpretation of ss. 36 and 45 of the *Competition Act*, specifically, whether conduct contrary to s. 45 would disclose a reasonable cause of action under s. 36 if the conduct occurred outside Canada. In the result, he went no further than to conclude that it was not plain and obvious that it did not.

[29] To this end, the judge analysed the reasons of Justice La Forest in *Libman*. He pointed out at para. 111 that "it appears La Forest J. is saying that the same real

and substantial connection test applies to both the jurisdiction of our criminal laws and the territorial jurisdiction of our courts." He identified statements in *Libman* that arguably supported a finding of territoriality based solely on harm occurring in Canada. He considered that *Libman* "arguably endorses a flexible approach accounting for all relevant facts that take place in Canada, as opposed to a strict test tied to the elements of the offence…" (Reasons at para. 113). He pointed to case law including *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59 [*Infineon*] and *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 that supported the proposition that domestic harm can ground jurisdiction, even if the conduct is foreign. And, finally, he reasoned that the cases relied on by the appellants could arguably be distinguished.

[30] Based on this analysis, he concluded, at para. 119, that "the plaintiffs' claims under the [*Competition*] *Act* are not bound to fail due to no arguable breach of s. 45."

V. ANALYSIS

A. The Order Confirming Jurisdiction

[31] Before moving into the analysis, it is relevant to set out the standard of review. The nature of the arguments presented by the appellants, and thus what standard attaches to the review, was disputed by the parties.

[32] This jurisdictional challenge, but for incidental issues, turns substantially on whether the judge misinterpreted the jurisdictional test in *Höegh* and did not allow for the appellants to rebut the presumption of jurisdiction. In *Höegh* at para. 44, it was found that "the applicable standard of review on the question of whether the court has jurisdiction in this case is correctness." The issues before the Court at the time, however, related only to extricable questions of law (*Höegh* at para. 44).

[33] The parties accepted that a standard of palpable and overriding error must attach to an error of fact (see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10). We agree that deference is owed to findings of the chambers judge on issues of fact.

[34] In their factum, the appellants allege that the chambers judge erred:

a. in finding that the Supreme Court of British Columbia has jurisdiction over this action;

b. in failing to properly apply the two-stage jurisdictional test set out in *Ewert v. Höegh Autoliners AS*;

c. in finding that jurisdiction was presumptively established under sections 10(f) and 10(g) of the *Court Jurisdiction and Proceedings Transfer Act* based only on *de minimis* alleged losses to individual class members, and without considering uncontested facts that materially differentiate this case from other alleged price-fixing cases where jurisdiction has been found;

d. in finding that the defendants did not overcome the presumption of a real and substantial connection under either sections 10(f) and 10(g) of the *CJPTA*; and

e. in failing to consider several uncontested facts that demonstrate that the presumptive connecting factors do not point to any real relationship between the subject matter of the litigation and British Columbia, or point only to a weak relationship between them.

[35] An important part of the appellants' argument rests on the proposition that the judge overlooked or gave insufficient weight in his jurisdictional analysis to what they describe as five unique uncontested distinguishing jurisdictional facts. Had he properly incorporated them into his analysis and recognized their relevance to whether a real and substantial connection really existed between the subject matter of the litigation and the forum, he should have declined jurisdiction. These factors have been summarized above, but to restate them, as was done at para. 77 of the Reasons, they are:

a) No relevant presence in Canada – None of the TDK or NHK entities were headquartered or operate in Canada and none of them ever carried on any business in Canada for Assemblies.

b) No direct sales in Canada – There have been no direct sales of [Assemblies] of any kind into Canada.

c) No conspiracy in Canada – The [respondents] have not pleaded that the [appellants]: (i) conspired to fix prices in Canada; (ii) actually did fix prices in Canada; or (iii) allocated markets within Canada.

d) No local defendant or Canadian market to allocate – There is no "local defendant" alleged as part of the conspiracy and there was no Canadian market for Assemblies to allocate or apportion.

e) No meaningful or compensable loss – To the extent that the [respondents] can establish that Assemblies were sold indirectly into Canada, any alleged overcharge was too negligible to amount to harm suffered in British Columbia.

For convenience, we will refer to these factors as the “Distinguishing Facts”.

[36] Before turning to consider these alleged errors, it is useful to set out the main governing principles to be applied in a jurisdictional analysis. It is well-settled that whether territorial jurisdiction exists is to be determined by applying the *CJPTA* (see e.g., *Höegh* at paras. 9–13). As set out below, s. 3(e) provides for territorial competence over a defendant if there is a real and substantial connection between British Columbia and the facts on which the proceeding is based (see *Höegh* at para. 12). Section 10 enumerates non-exhaustive circumstances, or “connecting factors”, that presumptively establish such a connection:

> **Application of this Part**
>
> **2** (1) In this Part, “**court**” means a court of British Columbia.
>
> (2) The territorial competence of a court is to be determined solely by reference to this Part.
>
> **Proceedings against a person**
>
> **3** A court has territorial competence in a proceeding that is brought against a person only if
>
> …
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.
>
> …
>
> **Real and substantial connection**
>
> **10** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
>
> …
>
> (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
>
> (g) concerns a tort committed in British Columbia,
>
> …

[37] The analytical approach to challenging jurisdiction was summarized by this Court in *Höegh* at paras. 16–17 and was relied on by the judge:

> [16] At the first stage of the analysis, the plaintiff must show that one of the connecting factors listed in s. 10 exists. The basic jurisdictional facts relied on by the plaintiff are taken to be true if pleaded (sometimes referred to as a presumption that the pleaded facts are true). The defendant challenging jurisdiction is entitled to contest the pleaded facts with evidence. If the defendant contests the pleaded facts with evidence, the plaintiff is required only to show that there is a good arguable case that the pleaded facts can be proven. The role of the chambers judge is not to prematurely decide the merits of the case or to determine whether the pleaded facts are proven on a balance of probabilities; the plaintiff's burden is low: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34; *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 20, leave to appeal ref'd (2013), [2012] S.C.C.A. No. 367 [*Fairhurst*]; *Environmental Packaging Technologies, Ltd. v. Rudjuk*, 2012 BCCA 343 at para. 26.
>
> [17] At the second stage, if one of the connecting factors is established either on undisputed pleadings or on disputed pleadings but with a good arguable case, the "mandatory presumption" of a real and substantial connection (and, therefore, territorial competence) is triggered: *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para. 20, leave to appeal ref'd [2010] S.C.C.A. No. 68 [*Stanway*]. This is, of course, distinct from the "presumption" that pleaded facts are true. At this stage, because the connecting factor has already been established, it is presumed that a real and substantial connection exists, and therefore that the court has territorial competence. The defendant may now attempt to rebut the presumption of real and substantial connection by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them": *Van Breda* at para. 95; [*Canadian Olympic Committee v. VF Outdoor Canada Co.,* 2016 BCSC 238] at para. 24. However, the presumption is strong and "likely to be determinative": *Stanway* at paras. 20–22. The burden on the defendant to rebut the presumption is heavy: *Fairhurst* at paras. 32, 42; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 35, aff'd 2015 BCCA 200; *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259 at para. 33. At this stage of the analysis, a connecting factor is already established: the defendant's task is to show why a real and substantial connection does not follow, despite the strong presumption that it does.

[38] Several points should be made here. First, it is sufficient to establish a presumptive real and substantial connection to British Columbia if one connecting factor exists (see *Höegh* at para. 16). Hence, the commission of a tort within British Columbia (demonstrated on undisputed pleadings or on disputed pleadings with a good arguable case) establishes a mandatory presumption of a real and substantial connection (see *Höegh* at para. 16–17). After having demonstrated one connecting factor, it is not necessary to also demonstrate additional connecting factors such as

having a physical presence in the jurisdiction, conducting business in the jurisdiction, or having a co-defendant in the jurisdiction.

[39] Moreover, it is clear in our view that if a defendant is to rebut the existence of a mandatory presumption established for a particular connecting factor, the evidence relevant to do so must be directed to demonstrating that that particular connecting factor "does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them" (*Höegh* at para. 17, citing *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 95 [*Van Breda*]; *Canadian Olympic Committee v. VF Outdoor Canada Co.*, 2016 BCSC 238 at para. 24). What needs to be displaced is that particular connecting factor. Evidence going to the absence of other connecting factors is not to the point.

[40] In our opinion, this is made clear in *The Hershey Company v. Leaf,* 2023 BCCA 264 at para. 49:

> [49] Section 10 of the *CJPTA* is, as the respondent emphasizes, disjunctive. It is possible to establish the presumption of territorial competence where a tort occurs outside of the province but the defendant carries on business in the province: *Van Breda* at paras. 119–124. However, the defendant can rebut the presumption by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.": *Van Breda* at para. 95. Where the presumptive connecting factor is carrying on business in the province, the defendant may rebut the presumption of a real and substantial connection by "showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province": *Van Breda* at para. 96. In *Van Breda*, the presumption was not rebutted because the defendant's business activities in the province were specifically directed at attracting residents of the province to stay as paying guests at the resort where the alleged tort occurred: at para. 123.

[41] The judge recognized this to be so and quite correctly concluded that jurisdiction presumptively existed if there was a good arguable case that a tort had been committed in the province and that other additional factors were irrelevant to that analysis.

[42] The appellants point to the distinguishing facts in their factum and, while accepting that the judge referred to them, say the judge:

> failed to consider their impact on the section 10 *CJPTA* connecting factors relied on by the plaintiffs. Relying on *Höegh*, but stretching the finding in that case beyond what the Court of Appeal intended, the chambers judge concluded, "the tort of conspiracy is committed in British Columbia if a defendant participates in a conspiracy elsewhere but the conspiracy causes harm here." The Court of Appeal in *Höegh*, however, only reached this conclusion after carefully considering the facts of that case, the specific claims alleged by the plaintiff and the evidence adduced by the defendants
>
> [Footnotes omitted.]

In their factum, they go on to contend that the judge's "deficient analysis" results in a plaintiff being able to "pass the jurisdictional test by simply pleading, in the most perfunctory manner, that a conspiracy has caused harm in Canada."

[43] There is no merit to these arguments. The judge's statement that the tort of conspiracy is committed where the harm occurs, even if the conspiracy is entered into elsewhere, is indisputably correct. This proposition is confirmed by cases such as *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398 at para. 41 [*Imperial Tobacco*] and *Fairhurst* at paras. 42–43. The restatement of this principle in *Höegh* does not depend on it being embedded in or dependent on any additional connecting factors. We reiterate what was said by this Court in *Höegh*:

> [77] …[F]or the purpose of assessing territorial competence, that the tort of conspiracy is committed by a defendant in British Columbia when, on unchallenged pleadings or a good arguable case, that defendant participates in a conspiracy and the conspiracy causes harm in British Columbia...
>
> [Emphasis added.]

[44] In our view, the judge was correct in his analysis in finding that the appellants could not relevantly distinguish *Höegh* by pointing to the absence of additional connecting factors since none of them were necessary to establish territorial jurisdiction if harm was suffered in British Columbia as a result of a conspiracy entered into outside Canada. The judgment did not depend, as the appellants allege, on a conspiracy to allocate the British Columbian market. Moreover, the judge's characterization of the issue set out above, and repeated here, is accurate:

> [79] The Claim alleges a foreign conspiracy with foreseeable impact on Canadian purchasers. It alleges the defendants' Assemblies came to Canada in various electronic products "through normal channels of sale" and the defendants knew this would occur and would cause harm to Canadian consumers. It pleads that the conspiracy "was intended to, and did, affect prices of [Assemblies] and products containing Assemblies sold in Canada, including British Columbia," and that the defendants knew, or should have known, this would injure purchasers here and elsewhere.

[45] It is important to note that this case does not involve merely a generalised pleading of conspiracy. The unlawful agreement is pleaded in detail. The pleadings detail: the nature of the market in issue; the effect of the agreement in leading to an overcharge for Assemblies; the supply chain; the reasonable foreseeability of the transmission of Assemblies as components into products that find their way to British Columbia and Canada; and the foreseeability of the overcharge making its way into the price of products purchased in British Columbia resulting in harm.

[46] Moreover, the respondents did not rely on the pleadings alone. The record included evidence supporting the existence of a good, arguable case. That evidence included: evidence of admissions of the conspiracy in other jurisdictions; expert evidence explaining how overcharges can find their way through the supply chain into the price ultimately paid by consumers; a methodology capable of isolating the effect of the overcharge on the price of Assemblies; and a basis for concluding that the conspirators knew or ought to have known that their illegal agreement would increase the price of HDDs internationally, including in British Columbia and Canada.

[47] The appellants did not challenge the existence of the conspiracy, although they placed weight on the fact that the conspiracy was not entered into in Canada. They did not, they say, have as a predominant purpose harming the respondents, and did not conspire directly to allocate the market in British Columbia or Canada. They also pointed to factual differences with other conspiracy cases, such as the lack of a local defendant, the fact they did not conduct business in the jurisdiction, there was no direct allocation of the local market, and there are no direct purchasers here, but as the judge rightly concluded, these are irrelevant to a determination of

whether, for jurisdictional purposes, the tort was committed in British Columbia. They also contested the expert evidence proffered by the respondents with evidence of their own. The judge examined that evidence carefully and it was, in our view, open to him to conclude that the appellants' expert evidence, which he correctly admitted, supported a good, arguable case that they could prove and quantify damages suffered by purchasers in Canada caused by the appellants' price-fixing conspiracy.

[48] In their factum, the appellants argued that the judge misapprehended the evidence about the value of the market in Assemblies. They point out that the evidence discloses total global revenues and not revenues in Canada or total profits. Moreover, given the relatively small size of the British Columbian and Canadian markets, the losses suffered individually by consumers here is *de minimis*. They say that an individual case would almost certainly be dismissed for want of jurisdiction.

[49] It is not clear whether this argument is advanced to contest the existence of a real and substantial connection at stage one of the analysis or to rebut the presumption of such a connection at stage two. In oral argument, we understood the appellants to accept that the "negligible quantum" of individual damages did not prevent the court from presumptively finding the existence of a real and substantial connection. Insofar as quantum remained relevant, it was a question of whether the existence of a real and substantial connection was rebutted in accordance with the test at stage two of the analysis. While the judge did not explicitly set out the Canadian revenues and profits, and the individual quantum of damages, we find that the conclusions reached were open to the judge on the facts.

[50] We turn now to whether the judge erred in concluding that a presumptive real and substantial connection had not been rebutted. It will be recalled that this Court clarified in *Höegh* at para. 17, citing *Van Breda* at para. 95 and *Canadian Olympic* at para. 24, that a defendant could rebut the presumption by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them." Importantly, this Court cautioned in *Höegh*

that the onus to rebut the presumption is heavy because it is tantamount to demonstrating the absence of a real and substantial connection.

[51] While we accept that the judge did not devote extensive explicit analysis to this aspect of the case, much of his previous discussion bears directly on his conclusion that the presumption had not been rebutted.

[52] Before us, the appellants argued that the judge effectively overlooked that they could rebut the presumption by showing that the presumptive connecting factor pointed only to a weak relationship between the subject matter of the litigation and the forum. In addition to the negligible quantum argument, they say the judge did not give proper weight to facts they rely on as distinguishing this case from other price-fixing cases.

[53] We can see no error in the judge's conclusion, for the reasons already given. The focus of the analysis is whether there is, on the record, a good arguable case that the appellants committed a tort within the jurisdiction. Since the tort is committed where the harm is suffered (see *Imperial Tobacco* at para. 41), there is no need for a local presence, a local defendant, allocation of the local market, direct purchasers, conducting business, or any other additional factors that might enhance or further reinforce the connection. The connection is real and substantial if the harm is suffered here. That is enough.

[54] It follows, as we have said, that the distinguishing facts are not relevant to rebutting the presumption at stage two. In our view, the respondents demonstrated a good, arguable claim that each necessary element of the cause of action could be established. This included, importantly: the conspiracy to fix prices in and to allocate international markets; the transmission of the overcharge through the supply chain; its effect on prices in the jurisdiction; and that this jurisdiction should be taken to be in the reasonable contemplation of the appellants. None of these critical jurisdictional facts were rebutted to the necessary standard.

[55] Furthermore, the fact that the damages may be negligible on an individual basis does not derogate from, or attenuate, the existence of a real and substantial connection. The courts do not generally engage in a quantitative analysis of the value of the harm to determine whether territorial jurisdiction exists. It was, in any event, open to the judge to recognise that the aggregate harm might be substantial. That is a matter for proof at trial. While class proceedings are procedural vehicles, part of their purpose is to facilitate actions that would be uneconomic for individuals by aggregating damages and also providing a forum to modify behaviour.

[56] The foregoing reasons are applicable to the claim that the conduct of the appellants has given rise to the existence of restitutionary liability to purchasers in British Columbia and Canada. We see no error in the judge's conclusion on this point.

[57] We would not accede to the appeal of the order confirming jurisdiction.

B. The Certification Order

[58] We turn next to address the errors alleged by the appellants respecting the certification order.

[59] The standard of review applicable to certification issues depends on whether the impugned elements of the certification order are rooted in discretionary decisions. Where such elements are discretionary in nature, they are to be reviewed on a highly deferential standard (see *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 37). Conversely, where the elements rest on a question of law, the applicable standard of review is correctness (see *Jiang* at para. 37, citing *Low v. Pfizer Canada Inc.*, 2015 BCCA 506 at para. 45).

1. Pleading a Reasonable Cause of Action Premised on Conduct Contrary to Section 45 of the Competition Act

[60] To reiterate, the appellants submit the judge erred in concluding it is not plain and obvious that the claim under s. 36 of the *Competition Act* discloses no reasonable cause of action. The argument has three essential building blocks. First,

the claim under s. 36 is premised on conduct said to be contrary to the offence set out in s. 45 of the *Competition Act*. Second, in the circumstances of this case, the conduct said to give rise to a breach of s. 45 (the conspiracy to fix prices) and the constituent elements of the offence all occurred offshore. The only thing said to have occurred in Canada as a result of the alleged offence is harm to indirect purchasers. Loss is not an essential element of a s. 45 offence. There is, therefore, no real and substantial connection between the offence and Canada as required by *Libman*. Third, there can be no conviction in this case for an offence allegedly committed under s. 45 of the *Competition Act* because s. 6(2) of the *Code* provides that no person shall be convicted of an offence committed outside Canada. In other words, s. 6(2) of the *Code* intervenes to bar the s. 36 claim.

[61] For convenience, we set out the legislation relevant to the discussion of this ground of appeal.

> ***Competition Act*, R.S.C., 1985, c. C-34**
>
> **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, or
>
> …
>
> may, in any court of competent jurisdiction, 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.
>
> …
>
> **Conspiracies, agreements or arrangements between competitors**
>
> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

> **Foreign directives**
>
> 46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.
>
> ***Criminal Code*, R.S.C., 1985, c. C-46**
>
> **Offences outside Canada**
>
> 6 (2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.

[62] An offence committed pursuant to s. 45(1) of the *Competition Act* is an indictable offence punishable by a maximum term of imprisonment of 14 years or a substantial fine, or both. It was common ground on appeal that s. 45 gives rise to a criminal offence.

[63] In oral argument, the appellants assert that the judge provided a definitive (and incorrect) interpretation of the interaction between ss. 36 and 45 of the *Competition Act*, s. 6(2) of the *Code* and *Libman* to the facts of this case. The intervener, the Criminal Defence Advocacy Society ("CDAS") similarly submits that the judge "pronounced" that a foreign conspiracy affecting Canadian consumers in the supply chain has a real and substantial connection to Canada sufficient to ground territorial jurisdiction based solely on harm occurring in Canada. Indeed, the intervention of CDAS was motivated by its concern about the implications of the judge's pronouncement on the development of the criminal law.

[64] Respectfully, this was a pleadings motion and the judge did not definitively pronounce on the interpretive issue. He did not decide whether the *Van Breda* or *Libman* test applied in this context. He merely concluded that the respondents were not bound to lose in their assertion that *Van Breda* expresses the test applicable to

this context. Similarly, and assuming that *Libman* and s. 6(2) of the *Code* apply in this context, the judge said no more than it is arguable, based on statements made in *Libman*, that a Canadian court could take jurisdiction over a criminal conspiracy hatched abroad where the conspirators knew it would have harmful consequences here and intended that result. He went no further than that and neither do we.

[65] In approaching the issue as he did, the judge followed the guidance given in *Trotman v. WestJet Airlines Ltd*., 2022 BCCA 22 [*WestJet*]:

> [46] This Court has been clear that the ultimate question when assessing whether there is a cause of action is the *Hunt v. Carey* [[1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321] test: "assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action?" While the burden is on the plaintiff, the bar is not high. Where the question turns on statutory interpretation, "if it is arguable," the certification judge should not engage in a merits-based analysis. The gate-keeping role of the certification judge at this stage is to avoid squandering judicial resources when it is clear that the correct statutory interpretation would leave the pleadings bound to fail. This could be the case where there is previous binding case law squarely on point or where the interpretive exercise is so straightforward the answer is plain and obvious even without previous case authority.
>
> [Emphasis added.]

We see no error in principle in the judge's application of *WestJet* to the circumstances of this case.

[66] In the alternative, the appellants submit that if the judge did not provide a definitive answer on the application of the *Libman* test and s. 6(2) of the *Code* to the circumstances of this case, he was obliged to do so. In support of this position, they place reliance on *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 18–21 [*Babstock*].

[67] *Babstock* did not alter the applicable test. A claim should only be struck if it is plain and obvious that it cannot succeed. As Justice Doherty explained in *Owsianik v. Equifax Canada Co*., 2022 ONCA 813 at para. 42, *Babstock* reinforced the notion that when the validity of a claim turns exclusively on the resolution of a legal question, and resolution of the question is unlikely to be further informed by a more

extensive factual record, it is open to a judge on a pleadings motion to decide whether it is plain and obvious that the claim discloses no cause of action, “even if the answer to the legal question is complex, policy-laden and open to some debate.”

[68] While *Babstock*, which was decided before *WestJet*, permits a judge to resolve contentious legal issues on a pleadings motion, it does not require a judge to do so. Rather, the judge has the discretion to decline to resolve questions of statutory interpretation in the absence of binding caselaw squarely on point or in circumstances where the interpretive exercise is complex and not so straightforward as to yield a plain and obvious answer: see also *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91 at para. 15; *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at para. 66; *Aubichon v. Grafton*, 2022 BCCA 77 at paras. 44–47, 52–53; *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at paras. 99–101. In our view, it cannot be said there is binding case law making it plain and obvious that the claim is bound to fail. We are also of the view that the issue is not so straightforward as to yield a plain and obvious answer. Indeed, there is scant jurisprudence directly on the point. To the extent that the issue has received judicial consideration, it is, as we shall see, at least arguable that the authorities support the position of the respondents.

[69] The judge recognized the tension that exists in the law between taking a generous approach and erring on the side of allowing questionable claims to proceed, and resolving unmeritorious claims at the gatekeeping stage: Reasons at para. 99. He also undoubtedly understood the interests served by these two approaches.

[70] In these circumstances, the judge’s decision not to definitively resolve the complex questions of law placed before him is entitled to deference. Such an exercise of discretion only warrants appellate interference if it is clearly wrong or the judge gave no or insufficient weight to relevant circumstances. In our view, and based on the applicable standard of review, there is no basis upon which this Court

could properly interfere with the way in which the judge determined to approach this issue.

[71] We turn next to the appellants' position that the respondents have no arguable cause of action under s. 36 of the *Competition Act* and that the judge was simply wrong to conclude otherwise. For the reasons that follow, we are unable to accept the appellants' position on this issue.

[72] First, we agree with the judge that it is not plain and obvious that a civil claim under s. 36 of the *Competition Act* based on conduct said to be contrary to s. 45 requires satisfaction of the *Libman* test for criminal jurisdiction. We also agree with the judge's implied conclusion that it is not plain and obvious that s. 6(2) of the *Code* applies in the case at bar to prevent recourse to the civil cause of action set out in s. 36.

[73] Under s. 36 of the *Competition Act*, any person who suffers loss or damage as a result of conduct engaged in by another person or persons that is contrary to Part VI of the *Act* may sue for and recover that loss or damage. Part VI of the *Competition Act* is entitled "Offences in Relation to Competition" and contains in s. 45(1) the offence of conspiring with a competitor to fix or control the price at which a product will be supplied.

[74] On the face of the provisions read together, it is arguable that a plaintiff's right to recovery is limited only by their ability to demonstrate two things: (1) that the defendants conspired within the meaning of s. 45 (the prohibited conduct requirement); and (2) that the loss or damage suffered by the plaintiff in Canada resulted from the prohibited conduct (the harm requirement).

[75] We note that in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 298, 20 C.P.C. (5th) 351 (S.C.J.), the court rejected an argument that an agreement made outside Canada to fix prices in the Canadian market is clearly not conduct contrary to s. 45 of the *Competition Act*. As Cumming J. noted at

para. 59, "[t]he language of s. 45 is not directed to only those conspiracies entered into within Canada."

[76] A similar point was made in *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2018 FC 64 [*Rakuten*], albeit in a different context. In that case, the issue was whether the Commissioner of Competition acted outside his jurisdiction by making orders pursuant to s. 90.1 of the *Competition Act* to remedy an agreement or arrangement between competitors to prevent or lessen competition in a market. The agreement or arrangement in issue was entered into outside Canada. Chief Justice Crampton rejected Kobo's position that the language of s. 90.1 did not provide the Commissioner with jurisdiction in respect of agreements or arrangements entered into outside Canada, noting that adopting Kobo's position would undermine the objectives of the *Act*: at para. 106. In *obiter*, Crampton C.J. also rejected the submission that, like s. 90.1, s. 45 should not be read as reaching agreements or arrangements entered into outside Canada:

> [118] Among other things, Kobo's interpretation of section 45 would suffer from essentially the same shortcomings as its interpretation of section 90.1, as described at paragraphs 106–107 above. In brief, that interpretation would be inconsistent with the purposes of the [*Competition*] Act, as set forth in section 1.1 of the Act, and it would lead to an absurd result that is to be avoided. That absurd result is exposing Canadian businesses and consumers to paying higher prices for a potentially broad range of inputs and final products than would be the case if section 45 is interpreted as applying to foreign agreements or arrangements that are implemented in Canada by the parties thereto.

[77] Chief Justice Crampton found that the occurrence of an unlawful consequence in Canada can suffice to establish a "real and substantial connection" between the impugned agreements or arrangements and Canada. He said this:

> [130] … it is not necessary for the *actus reus* element of a legislative provision to occur wholly or partially in Canada, in order for a real and substantial connection to be found to exist between this country and the activity contemplated by the provision. As I have noted above, it is sufficient if another "constituent element" takes place in this country. If, as the Supreme Court has recognized, an unlawful consequence in Canada or injury in Canada can suffice to establish a real and substantial connection to Canada…it logically follows that other forms of adverse impact within Canada can also be sufficient for this purpose.

> [131] Just as foreign electronic transmissions "which are received and have their impact here" can be found to provide a sufficient connection with Canada to warrant the exercise of jurisdiction in this country [citations omitted], the same is true of foreign agreements or arrangements that have a substantial anticompetitive impact in this country.
>
> [132] In such circumstances, the principle of international comity is not offended (*Libman*… at 211–214) …
>
> [133] Comity is a flexible concept that "must be adjusted in light of a changing world order" (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990 CanLII 29 (SCC)] at 1097) …
>
> [134] Within this framework, another nation cannot easily say that the protection of the Canadian public offends the dictates of comity (*Libman*…at 209). Indeed, it would be a sad commentary on our law, and undermine public confidence in it, if Canadian laws such as the Act could not be applied so as to protect the domestic economy and its participants from anticompetitive arrangements or other activities engaged in abroad (*Libman*…at 212). This is particularly so in the current era of increasing international commerce. In my view, allowing parties to foreign conspiracies that have anticompetitive effects in Canada to avoid the operation of the law in this country would undermine "the promotion of order and fairness" [citation omitted], as well as public confidence in the law.

[78] It is worth noting that the court in *Rakuten* (at paras. 108–118) also addressed a point raised by the appellants on this appeal that the existence of s. 46 of the *Competition Act*—making it an offence for a corporation carrying on business in Canada, to implement in Canada a directive from a person outside Canada to give effect to a conspiracy to fix prices entered into outside Canada—suggests that Parliament did not intend s. 45 to reach conspiracies entered into outside Canada. The Chief Justice acknowledged that this was one interpretation of the scope of s. 45, but not the only one. Another possible interpretation is that Parliament included s. 46 without intending to imply anything about its understanding of the scope of s. 45. In this alternative interpretation, parties to a conspiracy entered into abroad are liable under s. 45 for directly or indirectly implementing their agreements in Canada. In addition, third-party corporations carrying on business in Canada are liable under s. 46 for implementing a foreign directive to give effect to conspiracy entered into outside Canada. He concluded that the existence of s. 46 by no means makes it clear that s. 45 does not apply to conspiracies to fix prices entered into outside Canada and implemented in Canada by the parties to the agreement. In

other words, it is not plain and obvious that s. 45 does not reach foreign conspiracies that cause harm here.

[79] Finally, in a Competition Tribunal decision arising out of the same conspiracy alleged in *Rakuten*, one of the alleged co-conspirators argued that the Tribunal lacked jurisdiction to grant the relief sought because the conspiratorial acts took place outside Canada. In this context, the Tribunal concluded only that the scope of s. 45 of the *Act*, and whether it applies to agreements entered into outside Canada, "is still an open issue far from being plain and obvious" (emphasis added): *The Commissioner of Competition v. HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 CACT 10 at para. 98. The Tribunal concluded that this kind of complex exercise in statutory interpretation is best determined at trial rather than on any preliminary motion.

[80] We turn next to the application of s. 6(2) of the *Code* to the circumstances of this case. Section 6(2) prevents the conviction of a person for an offence committed outside Canada. To state the obvious, this is not a criminal proceeding and the appellants are not at risk of conviction. In our view, it is at least arguable that an action for damages premised on s. 36 of the *Competition Act* does not depend on the possibility of conviction in Canada of an offence under s. 45. It is arguable that such an action requires only proof of the blameworthy conduct proscribed by s. 45 coupled with resultant harm contemplated by s. 36. It is useful, in this regard, to recall the observation of La Forest J. in *Libman* that s. 6(2) "does not say that criminal law is confined to Canadian territory; it says rather that no person 'shall be convicted in Canada for an offence committed outside Canada'": at 209.

[81] *Cygnus Electronics v. Panasonic,* 2023 ONSC 2559 (unpublished) speaks to the application of s. 6(2) of the *Code* in similar circumstances to those that exist here. The plaintiffs moved for certification of a putative class proceeding alleging that the defendants engaged in a conspiracy to fix the price of electrolytic capacitors in Canada. The plaintiffs pleaded that the defendants breached s. 45 of the *Competition Act*, giving rise to civil liability pursuant to s. 36. The defendants argued

that the pleading did not disclose a cause of action because the alleged conspiracy was formed outside Canada and s. 6(2) of the *Code* limits the jurisdiction of Canadian courts to wrongdoing that occurs within the territorial jurisdiction of Canada. The defendants argued that it was plain and obvious the claim under s. 36 of the *Act* could not succeed as it depended on a breach of s. 45, and no prosecution under that provision was possible in the circumstances.

[82] The certification judge rejected the defendants' argument for the following reasons:

> [72] The upshot of the Defendants' argument is that because criminal proceedings could not be pursued by operation of s. 6(2) of the *Criminal Code*, no civil action can be brought. I disagree.
>
> [73] First, s. 6(2) of the *Criminal Code* limits territorial jurisdiction for criminal convictions only. The subsection refers to "convicted". It does not expressly or impliedly limit the availability of any civil remedy.
>
> [74] Second, nothing in s. 36 or s. 45 of the *Competition Act* expressly or impliedly circumscribes the availability of the civil remedy to wrongful conduct that occurred within the territorial limits of Canada. Section 36(1)(a) merely requires that the plaintiff suffered loss or damage as a result of "conduct that is contrary to a provision of Part VI".
>
> [75] Third, the right to pursue a civil action does not depend on criminal proceedings under the Act: *Havana House Cigar & Tobacco Merchants Ltd. v. Naeini* (1997), 137 F.T.R. 255 F.C.C.), at para. 5. There is no requirement that the Defendants were even investigated or charged: [*Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185], at para. 92. Section 36 provides a statutory, stand-alone civil remedy that is circumscribed only by the need to establish on a balance of probabilities that the Defendants engaged in conduct that is contrary to a provision in Part VI (s.45).
>
> [76] Fourth, limiting the availability of the civil remedy in the manner proposed would undermine the objectives of the Act including deterrence of anti-competitive behaviour that impacts the Canadian marketplace and Canadian purchasers. It would excise a key component of the integrated scheme under the Act.

Although not expressly referred to by the judge on this point, we note that *Cygnus* supports the position of the respondents and the order made below.

[83] The question before us was also argued in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, which concerned, among other things, an indirect purchaser claim brought against foreign defendants arising from an alleged

conspiracy entered into outside Canada. As in the case at bar, the defendant, Archer Daniels Midland Company, argued that an alleged conspiracy entered into outside Canada and involving foreign defendants to fix the prices of products sold to foreign direct purchasers does not constitute an offence under the *Competition Act* capable of giving rise to a cause of action under s. 36. We were provided on appeal with the factum filed in the Supreme Court of Canada on behalf of Archer Daniels Midland. They argued that:

> [60] … [F]or the purpose of s. 36(1)(a) of the *Competition Act*, the impugned conduct cannot be "contrary to any provision" of Part VI of the *Act* (the criminal provisions), unless there is a real and substantial link between that conduct and Canada. The private right of action conferred by section 36 is not engaged without a breach of one of the criminal provisions. According to the test outlined by this Court in *Libman*, those criminal provisions do not apply to conduct wholly outside of Canada.
>
> …
>
> [62] Although it may be arguable that a conspiracy entered into outside of Canada among foreign competitors to fix prices of product supplied to direct purchasers in Canada has a real and substantial link to Canada, there is no such link if the direct purchasers who are the subject of the alleged conspiracy are also outside of Canada.
>
> [63] The fact that indirect purchasers in Canada may have indirectly suffered harm as a result of an overcharge being passed through by the foreign direct purchasers is irrelevant to the analysis. The infliction of harm, either direct or indirect is not an element of an offence under s. 45. The essence of a criminal conspiracy under s. 45 is the agreement itself, not its implementation: a conspiracy would be contrary to the *Competition Act* even if it is never implemented. That is, the question of harm will have no relation to the "formulation, initiation, or commission of the offence" let alone provide any basis for a real and substantial link to Canada.
>
> [64] If a foreign conspiracy among foreign competitors to fix prices of products sold to foreign direct purchasers is not an offence under Part VI of the *Competition Act*, it follows that such a conspiracy cannot be the basis of a civil claim under section 36.

[84] Writing for the majority, Rothstein J. (at para. 44) summarized the argument of the defendants on this point but did not give effect to it. Rather, he accepted the position that the jurisdiction of Canadian courts over violations of the *Competition Act* by foreign defendants would have to be determined by reference to the presumptive connecting factors identified in *Van Breda*: at para. 45.

[85] Counsel for the appellants properly cautions us against reading too much into *Sun-Rype* given some of the other contextual factors in that case, including the positions taken by counsel. But it is of some significance that the Court declined to adopt the same position advanced on this appeal in circumstances where doing so would have been dispositive of the s. 36 claim.

[86] We will briefly mention one other case. In *Infineon*, the Court considered whether Québec courts had jurisdiction over a putative class action under art. 3148 of the *Civil Code of Québec*, S.Q. 1991, c. 64. [*CCQ*]. The action was brought by a group consisting of direct and indirect purchasers located in Québec against foreign computer microchip manufacturers. The claim was brought pursuant to art. 1457 of the *CCQ.* Harm is a required element of this claim (as it is under s. 36 of the *Competition Act*) and so is fault, which the plaintiffs submitted could arguably be made out through reliance on s. 45 of the *Competition Act*. The defendants had acknowledged their participation in an international price-fixing conspiracy in the United States and Europe. They argued, however, that in the absence of a real and substantial connection with Canada, the required fault, premised on s. 45, could not be demonstrated given that the alleged wrongdoing occurred outside Québec. The Court rejected this argument, finding that the plaintiffs' allegations were sufficient to support an inference of fault given the relatively low standard to be met at the authorization stage. As the Court put it:

> [90] … Admittedly, the criminal charges and plea agreements were rooted in events in the United States that had no explicitly demonstrated connection with Québec. But this does not attenuate the apparent international nature and impact of the appellants' anti-competitive conduct.
>
> [Emphasis added.]

[87] Although the Court found that the plaintiffs' allegations did not explicitly establish the commission of wrongful behaviour in Québec, it was reasonable to infer that anti-competitive practices in the United States would be likely to negatively affect consumers and Québec: at paras. 41, 43, 83, 87–92, 99. It is arguable, therefore, that the application of the real and substantial connection test in *Infineon* supports the position of the respondents on this appeal.

[88] The appellants rely on two sets of cases to further their argument that if there is no viable cause of action under s. 45 of the *Competition Act*, s. 36 damages are not available. In our respectful view, none of these cases assists the appellants on this appeal.

[89] The first set of cases, examples of which are *Mohr v. National Hockey League*, 2022 FCA 145 and *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183, stand for the proposition that s. 45 applies only to situations where a defendant is the supplier or producer of a product. They speak to the reach of s. 45 and are examples of conduct falling outside the purview of the provision. Here, and for the purposes of these proceedings, the appellants do not suggest that the alleged price-fixing, supplier-side agreements clearly fall outside the conduct captured by s. 45 of the *Competition Act*.

[90] The second set of cases, examples of which are *Industrial Milk Producers Assn. v. British Columbia (Milk Board)*, [1989] 1 FC 463, 1988 CanLII 9411(F.C.), and *Hughes v. Ontario (Liquor Control Board)*, 2019 ONCA 305, reflect the application of defences to the conduct captured by s. 45. Here, and for the purposes of these proceedings, the appellants do not suggest there is a defence to the alleged offending conduct.

[91] The issue here is territorial jurisdiction and that issue is not informed by whether the conduct is captured by the offence-creating provision or whether the alleged conduct is exempted due to the availability of a defence.

[92] In our view, this is sufficient to dispose of the appeal. While we are mindful of the existence of arguable distinguishing factors in the authorities canvassed thus far, we agree with the respondents that it is not plain and obvious that the criminal standard of jurisdiction or s. 6(2) of the *Code* was at all relevant to the s. 4(1)(a) *CPA* determination.

[93] But even assuming that s. 6(2) of the *Code* and the test in *Libman* applies, it is still not, in our view, plain and obvious that the claim based on ss. 36 and 45 of the *Competition Act* cannot succeed.

[94] *Libman* is generally understood as establishing a two-part test for determining whether a Canadian court should accept jurisdiction over a criminal offence.

[95] First, there must be a real and substantial link between Canada and the offence. The real and substantial connection test must be interpreted generously and it is not necessary that particular elements of the crime be committed in Canada. Rather, the inquiry must take account of "all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence": at 211. While the court in *Libman* declined to define the outer limits of the test, La Forest J. did note that "all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada": at 212–213.

[96] If the required real and substantial link is established, the inquiry moves to the second stage of the test, which engages the question of whether taking jurisdiction over the offence would offend the principles of international comity: *Libman* at 211.

[97] The judge helpfully excerpted passages from the judgment in *Libman* that, in his view, arguably support a finding of territoriality based solely on harm occurring in Canada. They are set out below:

- "As well, along with other types of protective measures, states increasingly exercise jurisdiction over criminal behaviour in other states that has harmful consequences within their own territory or jurisdiction." (at 184)
- "I might add that Canadian cases where a court will exercise jurisdiction over an offence consisting of acts committed abroad that have adverse effects here are not limited to conspiracy…" (at 202)
- "However, as in England, the Canadian courts were prepared to move beyond the gist of the offence test when the impact of a crime was felt in Canada." (at 206)
- "This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence

> here... Indeed, from an early period the English courts have recognized such an interest in other countries; [citations omitted]. The protection of the public in this country is widely acknowledged to be a legitimate purpose of criminal law, and one moreover that another nation could not easily say offended the dictates of comity." (at 209).

[98] The judge offered these passages as examples only. In the historical review undertaken by La Forest J., he also noted at 202 that:

> [50] … [T]hough the courts were willing to find jurisdiction in Canada when the agreement and preparation took place here, they were also ready to hold that the country where the results contemplated by the conspiracy took effect also had jurisdiction though the accused was not present there [citations omitted] … I might add that Canadian cases where a court will exercise jurisdiction over an offence consisting of acts committed abroad that have adverse effects here are not limited to conspiracy… [citation omitted].

[99] The harm occasioned by price-fixing was addressed in *Canada v. Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117 at paras. 54–56. In that case, Chief Justice Crampton likened price-fixing agreements to fraud and theft noting that defences of this kind "represent nothing less than an assault on our open market economy."

[100] We note, as well, that in addressing the considerations informing the comity principle that lies at the heart of the second stage of the test, La Forest J. cited Lord Diplock's concurring opinion in *Treacy v. Director of Public Prosecutions*, [1971] A.C. 537 at 562 that comity does not give immunity to persons abroad for conduct there that has harmful consequences in England:

> Comity gives no right to a state to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another state. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.

[101] The parties referred us to a number of criminal cases on the question of whether it is arguable that a Canadian court can take jurisdiction over a transnational offence that has a harmful impact here. The authorities included: *R. v. Coban*, 2022 BCSC 1441; *R. v. Barra*, 2021 ONCA 568; *R. v. Karigar*, 2017 ONCA 576;

R. v. Stucky, 2009 ONCA 151; *United States of America v. Fong*, 2005 CanLII 2055 (ONCA), [2005] O.J. No. 270; *R. v. Greco*, (2001), 155 O.A.C. 316, 2001 CanLII 8608 (ONCA); *R. v. O.B.* (1997), 99 O.A.C. 313, 1997 CanLII 949 (ONCA), and *R. v. Rowbotham; R. v. Roblin*, (1992), 76 C.C.C. (3d) 542, 1992 CanLII 12824 (ONCA); aff'd [1993] 4 S.C.R. 834, 1993 CanLII 56 (SCC).

[102] We see little point in engaging in a detailed discussion of these cases given the narrow issue that arises on this appeal and the test the judge was obliged to apply. Suffice it to say that these authorities do not support the appellants' position that it is plain and obvious that the respondents' claim cannot succeed because the alleged conduct occurred outside Canada even if it did have a material effect here. Counsel for CDAS candidly conceded in oral argument, as he did on the application for leave to intervene (see *NHK Spring Co., Ltd. v. Cheung*, 2023 BCCA 243 (Chambers) at para. 27) that *Libman* does not definitively resolve the issue of whether a Canadian court could take jurisdiction over foreign conspiracy that has material harmful effects in Canada. We think this is a fair statement of the law.

[103] For the foregoing reasons, we would not give effect to this ground of appeal.

2. Pleading Reasonable Causes of Action in Conspiracy and Unjust Enrichment

[104] The appellants contend that it is plain and obvious that the pleading of unlawful means conspiracy and unjust enrichment does not constitute a reasonable cause of action. This argument rests on acceptance of the appellants' position that there is no reasonable cause of action based on s. 36 of the *Competition Act* and the breach of s. 45. This is so because a breach of s. 45 of the *Competition Act* is the unlawful means alleged in the common law conspiracy and is the basis for the alleged absence of a juristic reason to retain any benefits acquired from the sale of Assemblies. The judge's findings on this matter are reviewable on a standard of correctness (*Jiang* at para. 38).

[105] Given our conclusion that it is not plain and obvious that a claim pursuant to the *Competition Act* is bound to fail, it is not plain and obvious that the unlawful

means conspiracy and unjust enrichment claims are bound to fail. Accordingly, this element of the certification test is met. It is not necessary to go further and determine whether those claims could survive in the absence of the alleged breach of the *Competition Act*.

[106] The appellants argue that it is plain and obvious that the claim of predominant purpose conspiracy must, on the record, fail because evidence does not demonstrate that British Columbia or Canada was contemplated by the appellants as a target of their conspiracy.

[107] Apart from the fact that evidence is inadmissible on a pleadings motion such as this, we would not accede to this argument. The respondents expressly pleaded that the appellants were aware and intended that the alleged conspiracy would call Class Members to pay supra-competitive prices for HDDs and products containing HDDs. As the respondents pointed out, in both *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 74–78 and *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 73 [*Godfrey*], the claims of predominant purpose conspiracy survived for all class members, including indirect purchasers.

[108] In the result, we would not accede to the argument that the respondents had failed to plead a reasonable cause of action for the purpose of the certification motion. The judge was correct in his findings.

3. A Plausible Methodology to Prove Damages

[109] The respondents relied on expert evidence from Dr. Reutter to establish that they had a sufficiently credible or plausible methodology to assess damages that offered a realistic prospect of establishing whether an overcharge was passed through on a class wide basis.

[110] The judge discussed the nature of the methodology at paras. 152–168 of the Reasons. He recognized that the opinion was based on a standard econometric regression model which had been accepted in other leading price-fixing cases. He concluded at para. 153 that the methodology had “sufficient *prima facie*

plausibility to establish some basis in fact for a credible and plausible methodology capable of measuring the pass-through of the overcharge to downstream purchasers on a class-wide basis."

[111] The appellants contend that this methodology did not have sufficient *prima facie* plausibility principally because, they say, the model does not take account of technological change and simply reproduces a standard model not tailored to the specific circumstances of this particular case.

[112] The appellants drew our attention to a judgment in which the respondents' expert's expertise was not recognized by the court: *Dussiaume v. Sandoz Canada Inc.*, 2023 BCSC 797. This case was of no assistance to us. It dealt with opinion evidence on a subject different from that before the Court in this case. We see no plausible basis upon which to deny that Dr. Reutter is an expert economist qualified to offer opinions on econometric analyses of the type engaged in this case.

[113] The econometric model advanced by the respondents is a standard regression analysis used to identify the effect of different costs passing through a production and distribution chain into the price of the final product. No doubt, the model must be calibrated to isolate the impact of different factors which may vary from product to product or market to market. The exact structure of the model may well depend on what information is ultimately available to be programmed into the statistical analysis. That issue, however, affects the reliability of the conclusions of the analysis, rather than the inherent reliability of the method of analysis itself.

[114] The judge's conclusion that a sufficiently reliable methodology had been put forward depends, substantially, on the judge's assessment of the record before him. There is no issue as to whether the judge applied the correct standard, though we find that he did. As such, the question of sufficiently reliable methodology attracts deference (see generally *Godfrey* at para. 94). We cannot see that the judge's conclusion rested on any error. It was open to him on the evidence. In any event, we do not accept that Dr. Reutter failed to address the issue of technological change, both from the perspective of changes in Assembly technology and in downstream

HDD products. The need and ability for a model to address the impact of technological change was recognized by the judge who commented on this issue at para. 49 of the Reasons. We agree with the judge that, in respect of an issue such as this, the appellants were inviting the judge and us to engage in a battle of the experts on the ultimate merits of any particular model. That is not the task at this stage of the analysis.

[115] We would not accede to the appellants' argument.

4. The Preferability Analysis

[116] This ground of appeal depends in the first instance on the argument that the judge erred in certifying aggregate damages as a common issue because then individual issues would predominate over common issues. Given that we have rejected the appellants' submission on this point, this alleged error has no traction.

[117] The appellants go on to say, however, that even so, a class action is not the preferable procedure. We find it difficult to understand the appellants' submission on this ground. The argument appears to depend on the proposition that the judge did not certify aggregate damages as a common issue, except for a restitutionary claim in unjust enrichment. But, in our view, this argument misreads what the judge did. The judge declined to certify aggregate damages. Moreover, he exercised his discretion in concluding that the multiplicity of factors that bear on the preferability analysis lean in favour of a class proceeding. Indeed, he concluded that a class action is not only the preferable procedure but the only procedure through which the goals of access to justice, deterrence and behaviour modification could realistically be achieved. That judgment call is entitled to deference in the absence of a demonstrated error in principle or palpable and overriding error (see *Jiang* at para. 38). We are unable to discern any such error.

VI. DISPOSITION

[118] We would dismiss the appeals.

"The Honourable Mr. Justice Harris"

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Justice Dickson"