IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cheung v. NHK Spring Co., Ltd.,*
2022 BCSC 1738

Date: 20221006
Docket: S1910612
Registry: Vancouver

Between:

Tony Cheung, Sylvie de Bellefeuille and Graeme Honeyman

Plaintiffs

And

NHK Spring Co., Ltd., NHK International Corporation, NHK Spring (Thailand) Co., Ltd., Nat Peripheral (Hong Kong) Co., Ltd., TDK Corporation, TDK U.S.A. Corporation, TDK Corporation of America, SAE Magnetics (HK) Ltd., Headway Technologies, Inc., Magnecomp Precision Technology Public Co., Ltd., Magnecomp Corporation and Hutchinson Technology Inc.

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. May 30–31 and June 1–3, 2022
Place and Date of Judgment:	Vancouver, B.C. October 6, 2022

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Introduction

[1] The plaintiffs apply for certification of a national class action against the defendants for alleged price-fixing of computer hard-drive components known as suspension assemblies (“Assemblies”).

[2] Similar class proceedings have been filed in Ontario and Québec. Counsel for the plaintiffs in the three Provinces are cooperating and have agreed to this application for national certification.

[3] The defendants are headquartered in Japan. At the material times, they manufactured approximately 95% of Assemblies worldwide. The plaintiffs led evidence, undisputed at this stage, of the defendants pleading guilty to price-fixing of Assemblies in Japan, Taiwan, Brazil and the United States.

[4] The plaintiffs allege that, due to the price-fixing, the proposed class members paid an unlawfully inflated price, or “overcharge”, for products containing Assemblies. They say this overcharge passed through the supply chain to purchasers of computer products across Canada, including in hard disk drives (“HDDs”), computers, servers, video recorders and gaming consoles. They seek damages for class members from January 1, 2003 to April 30, 2016 (“Class Period”).

[5] The plaintiffs contend the case for certification is equivalent to other successfully certified class actions alleging price-fixing of electronic components, such as *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 [*Pro-Sys*], and *Pioneer Corp. v. Godfrey*, 2019 SCC 42 [*Godfrey*].

[6] The defendants say this case differs from these certifications in two key ways. First, the alleged price-fixing agreements were made and implemented entirely outside Canada. The defendants argue that our courts therefore lack jurisdiction and the key provisions of the *Competition Act*, R.S.C. 1985, c. C-34 [*Act*], relied on in the prior cases do not apply.

[7] Second, they argue that, because Assemblies represent such a small portion of the cost of the consumer products in which they are used, there is no realistic prospect of tracing and quantifying any alleged overcharge passed through the complex global supply chain into the Canadian market. Any impact on Canadian class members must be negligible, or even non-existent, and so the proposed action fails to satisfy the statutory requirements for certification or serve the purposes of a class proceeding.

[8] I find that the plaintiffs have satisfied the requirements for certification under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1) [*CPA*]. They are therefore certified as the representatives of the proposed national class, for determination of the common issues identified below.

The Parties

[9] The proposed representative plaintiffs, Dr. Graeme Honeyman and Sylvie De Bellefeuille, reside in British Columbia and Québec, respectively. Each appears to have purchased laptop computers during the Class Period containing one or more Assemblies. Mr. Tony Cheung is no longer being put forward as a representative plaintiff.

[10] The defendants manufacture, market and sell Assemblies. During the Class Period, the defendants fell into three corporate groups. NHK Spring Co. Ltd. is the parent of the NHK Group. TDK Corporation is the parent of the TDK Group. Both corporate groups are headquartered in Japan. Courts and regulatory bodies in the United States, Japan, Taiwan and Brazil have found the parent companies and some subsidiaries to have participated in price-fixing conspiracies for their Assemblies.

[11] Hutchinson Technology Inc. (“Hutchinson”) is based in the United States, where it was found guilty of participating in this price-fixing conspiracy. In 2013, it was purchased by the TDK Group.

Assemblies

[12] Assemblies are small, inexpensive subcomponents of HDDs.

[13] HDDs store and retrieve digital data in electronic devices. Many computer products contain one or more HDDs, and each HDD typically includes between one and three Assemblies. Assemblies hold the electromagnetic read/write heads of the HDDs while they float in place to read and write information.

The Proposed Class

[14] The plaintiffs allege the defendants controlled the Assembly market and colluded to increase market prices. Their Assemblies were incorporated in products manufactured by some of the world's largest technology companies and made their way into Canada through predictable supply channels.

[15] The Claim defines the proposed "Class Members" as:

> All persons and entities in Canada who purchased one or more HDD Suspension Assemblies, or one or more products which contained an HDD Suspension Assembly, between January 1, 2003, and April 30, 2016 ("Class Period"), including a subclass of all persons and entities in Canada who purchased one or more HDD Suspension Assemblies, or one or more products that contained an HDD Suspension Assembly, in Québec during the Class Period ("Québec Subclass").

[16] This definition includes all direct and indirect purchasers, in Canada, of Assemblies manufactured by the Defendants. Direct purchasers are those who purchased Assemblies directly from the defendants. The defendants submitted evidence denying any direct sales of Assemblies in Canada during the Class Period, and thus denying the existence of any such Class Members.

[17] Indirect purchasers are those who purchased products containing the defendants' Assemblies. They are comprised largely of purchasers of HDDs, or products containing HDDs, and include both consumers and commercial entities.

[18] The definition also includes direct and indirect "umbrella purchasers". These are purchasers of Assemblies made by manufacturers other than the defendants.

The theory being that the defendants' anti-competitive cartel activity creates an 'umbrella' of inflated prices causing non-cartel manufacturers to raise prices to meet the market: see *Godfrey,* para. 58. Given the defendants' high market share, umbrella purchasers are a small portion of the Class.

Causes of Action

[19] The second amended notice of civil claim ("Claim") pleads that the defendants agreed to fix, maintain, increase or control the price of Assemblies. It alleges they did so by exchanging sensitive information, bid-rigging and allocating markets.

[20] This anti-competitive conduct was allegedly directed at the plaintiffs and the other Class Members, with a predominant purpose of harming them, when the defendants knew, or should have known, that unlawfully inflating prices for Assemblies would do so. It pleads that injury was caused to Class Members by payment of the unlawful overcharge passed through the supply chain.

[21] The causes of action are:

a) breach of s. 36 of the *Act*;

b) civil conspiracy;

c) unjust enrichment; and,

d) for the Québec Subclass, civil extra-contractual liability under s. 1457 the *Civil Code of Québec*, C.Q.L.R., c. CCQ-1991 [*CCQ*].

[22] Section 36(1) of the *Act* creates a private right of action for conduct contrary to Part VI. It permits any person who has suffered loss or damage as a result of that conduct to sue for their loss, thus providing a cause of action for direct, indirect and umbrella purchasers: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, paras. 63–71 [*Microsoft*]; *Godfrey*, paras. 56–78.

[23] The Claim alleges the defendants' price-fixing agreement breached Part VI, s. 45. It alleges this s. 45 breach, in addition to creating a s. 36 cause of action,

satisfies the illegality requirement for civil conspiracy and supports the claim for restitution in unjust enrichment: see *Godfrey*, para. 84.

[24] *Godfrey* describes the purpose of the *Act* as it relates to price-fixing cases. Justice Brown wrote:

> [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.

[25] Sections 36 and 45 of the *Act* say:

> **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
>
> **(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.
>
> …
>
> **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.[1]

[26] Regarding conspiracy, the Claim alleges both predominant purpose and unlawful means conspiracy. Predominant purpose conspiracy is the defendants' agreement to a common design, with the predominant purpose of injuring the plaintiff by lawful or unlawful means, and injury in fact occurs. Unlawful means conspiracy is the defendants' unlawful conduct directed toward the plaintiff, while they knew, or ought to have known, that injury was likely, and injury in fact occurs: *Microsoft*, paras. 74, 80.

[27] For unjust enrichment, the Claim pleads that the overcharge represents an enrichment of the defendants, a corresponding deprivation to the Class Members, and an absence of juristic reason because of the defendants' unlawful conduct. There is no claim in unjust enrichment for umbrella purchasers. By definition, any deprivation suffered by umbrella purchasers would not correspond to an enrichment of the defendants.

[28] Finally, regarding extra-contractual liability for the Québec subclass, the plaintiffs rely on *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59, in which the Supreme Court of Canada held that indirect purchasers have a viable claim under *CCQ* s. 1457 if their alleged injuries resulted from the defendants' anti-competitive conduct.

[29] Section 1457 says:

> **1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

[1] From the beginning of the Class Period until March 12, 2010, a prior version of s. 45 was in effect. It prohibited agreements intending to "unduly" lessen competition in the production, manufacture, purchase or supply "of a product".

[30] Following *Infineon,* the Claim pleads that the s. 45 breach*,* and the other conspiratorial acts alleged, establish both fault for the purpose of s. 1457 and a causal connection to the injury of paying the overcharge.

Common Issues

[31] The proposed common issues are attached as Schedule A.

[32] They fall into three broad categories. First, those relating to the alleged wrongful acts of the defendants, i.e. the existence, scope and effect of the alleged price-fixing agreements. The plaintiffs say all Class Members have a common interest in proving the facts surrounding these alleged wrongful acts.

[33] Second are the consequences of those acts for the plaintiffs, i.e., causation of harm or loss on a class-wide basis. In price-fixing cases such as this, plaintiffs seek to establish, through expert econometrics, that the overcharge was passed on in such a way as to make loss common to the class as a whole: *Microsoft*, para 115.

[34] As stated in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 [*Ewert]*, in a price-fixing conspiracy as alleged here, where indirect purchasers are predominant, "[t]he methodology to prove loss is vital for these claims if they are to be certified as part of a class proceeding." Without a methodology capable of establishing harm on a class-wide basis, "individual issues relating to loss may overwhelm the common issues concerning wrongful acts and render the action unmanageable … under s. 4(1)(d)": *Ewert,* paras. 69, 84.

[35] Third are the claims for aggregate and punitive damages. The plaintiffs argue that, if they are successful at the common issues trial, it is reasonably likely that aggregate damages will be awarded under *CPA*, s. 29(1). They say punitive damages are common because determinable based solely on the defendants' conduct.

Expert Evidence

Dr. Reutter on damages methodology

[36] Dr. Keith Reutter is an economist specializing in economic and statistical analysis in antitrust cases. He has provided expert evidence in many complex price-fixing cases, including in the Canadian electronics industry.

[37] The plaintiffs submitted three reports from Dr. Reutter. They rely on his first report ("Reutter #1") as a plausible and realistic methodology to measure any overcharge passed through the supply chain on a class-wide basis to each purchaser level in Canada.

[38] This report proposed a standard econometric regression model to isolate the impact of the alleged conspiracy on Assembly pricing. Based on his experience, Dr. Reutter expected that the requisite information would be available from the defendants' transaction, cost and pricing data, and from public and third-party sources.

[39] In response to the questions posed by the plaintiffs' counsel, Reutter #1 concluded that:

> a) There are methods to determine if, at each level of the distribution chain, members of the proposed Class would have been impacted by defendants' alleged wrongdoing, based on evidence that is common to the members of the proposed Class. The methods to make such a determination are described herein.
>
> b) There are methods available to determine if, at each level of the distribution chain, umbrella purchaser members of the proposed Class would have been impacted by defendants' alleged wrongdoing, based on evidence that is common to the members of the proposed Class. The methods are described herein.
>
> c) There are methods available to determine any overcharge and Class-wide damages that may have resulted from the alleged wrongdoing, based on evidence that is common to members of the proposed Class. The methods are described herein.
>
> d) I have identified the data necessary to address questions (a) through (c), and determined that data is available, or ought to be available …

[40] Reutter #1 said the Assembly market was vulnerable to price-fixing during the Class Period because of a number of factors: the small number of Assembly manufacturers; barriers to market entry; lack of substitutes (as Assemblies are necessary components of HDDs); and, Assemblies of one manufacturer being substitutable for those of another.

[41] The report explained that an overcharge is calculable by comparing the price of Assemblies, had the market been functioning properly, with the actual price as inflated by the alleged misconduct ("but-for price"). The but-for price is calculable by a standard regression method that adjusts for relevant factors including consumer income, costs of input (e.g., labour and energy), consumer tastes and preferences, time of year and flooding in Thailand (where he said most Assembly manufacturing occurred).

[42] To calculate pass-through, Dr. Reutter said it is reasonable to assume direct purchasers paid the full amount of any overcharge. He based this on the economic factors, described above, that render the Assembly market vulnerable to collusive conduct. In his view, economic principles indicate some calculable portion of this overcharge would have passed through each level of the distribution chain. He said the overcharge's impact on umbrella purchasers is also calculable by accepted economic models.

Dr. Winter's critique

[43] Dr. Ralph Winter is an economist, and a Professor Emeritus of Strategy and Business Economics and Research Chair in Business Economics and Policy at the Sauder School of Business. He holds a Ph.D. in economics from the University of California at Berkeley and has published extensively on industrial organization.

[44] The defendants asked whether, in his opinion, Reutter #1 proposed reliable methods for determining any overcharge from the alleged wrongdoing or identified the information necessary to reliably estimate such overcharge. Dr. Winter concluded that it achieved neither goal. In his view, there was "no reliable method of

estimating the pass-through rate and therefore no reliable method of estimating damages to members of the proposed Class in this matter."

[45] Regarding estimating overcharge, Dr. Winter's primary critique was that Dr. Reutter's method failed to account for important factors affecting price and so could not isolate the alleged misconduct. He said the key omitted factors were:

a) Technological changes that affect functionality, demand and cost. Dr. Winter said these changes must be analyzed not only for Assemblies, but also for HDDs, final consumer products and even competitive products; and,

b) Product differences, and even differences between different models of the same product. Dr. Winter said there are important differences between, for example, laptops, game consoles, photocopying machines and automobiles, and between specific models within these categories, which are substantial enough that they potentially affect Assembly pricing.

[46] With respect to estimating pass-through, Dr. Winter said Dr. Reutter's method suffered two main defects, causation and quantification:

a) His regression analysis shows the extent to which upstream and downstream prices change together, but does not indicate causation. Dr. Winter said changes in downstream prices are more likely caused, not by changes in upstream prices, but by changes in common causes external to both (such as technological change).

b) Even if Dr. Reutter's model could identify causal impact, it would be impossible to quantify the impact of changes in Assembly prices on HDD prices because Assemblies generally constitute 0.1% of HDD prices, and almost no HDD manufacturer adjusts prices to reflect such small changes in input costs. He said, although this is only a problem in calculating pass-through from Assembly manufacturers to HDD manufacturers, it is enough to render unreliable the pass-through rate for the entire supply chain.

[47] Finally, Dr. Winter said Dr. Reutter's regressions would need to be performed at least 25 times because there are five distinct supply chains for at least five product categories containing Assemblies. He said the data required by Dr. Reutter's method is likely unavailable for this "huge challenge".

Dr. Reutter's reply

[48] Dr. Reutter's reply report ("Reutter #2") said Dr. Winter's critiques did not cause him to alter his initial opinions. As a general response, he said that the use of regression models to estimate overcharge and pass-through is standard practice for economists in antitrust cases.

[49] Dr. Reutter responded to Dr. Winter's criticisms about the ability of the regression methodology to calculate overcharge as follows:

a) Regarding accounting for all important factors, one cannot identify all important variables in advance, but the type of additional variables identified by Dr. Winter can be included in the analysis if necessary;

b) Regarding technological change, it is standard for the method to account for this; and

c) Regarding time period, regression models have none of the limitations alleged.

[50] Dr. Reutter's responded to Dr. Winter's criticisms about calculating pass-through as follows:

a) Regarding causation between upstream and downstream prices, Dr. Winter's assertion that causation cannot be attributed by regression analyses is contrary to mainstream economics. According to Dr. Reutter, "if regression analyses were unable to address causation…, then decades of empirical economic analysis, including … that related to antitrust, would be meaningless";

b) Regarding the overcharge being too small to track, changes in upstream input prices get passed to downstream products even for inputs with low per-unit price. In support of this, Dr. Reutter cited what he said are "basic tenets" of economics and an article by a leading author in his field;

c) Regarding the unavailability of necessary data, he identified potential sources and says such undertakings are common;

d) Regarding complexity, he disputed whether 25 regression analyses will be necessary because the downstream market for electronics' products is generally considered competitive; however, regardless of the number of such analyses, he said the model is applicable.

Dr. Reutter on Canadian consumers

[51] Dr. Reutter's third report ("Reutter #3") opined that the defendants' Assemblies were likely imported into Canada during the Class Period, thereby passing the overcharge on to Class Members. The plaintiffs relied on this report in response to the argument that the defendants had no connection to the Canadian marketplace.

[52] Dr. Reutter's key conclusion was:

> Given the concentration in both the HDD Suspension Assembly and the HDD OEM markets, it is reasonable to conclude that NHK and TDK (including Hutchinson) HDD Suspension Assemblies would have been imported to Canada during the proposed Class period via a standalone HDD or other HDD Product. It is expected that defendants themselves or direct purchasers have the data and documents necessary to make a more definitive statement.

[53] Dr. Reutter started from his finding, in Reutter #1, that the defendants accounted for 96% of the worldwide sales of Assemblies at the material times.

[54] He opined that the market was further consolidated by the three globally-dominant HDD manufacturers, to whom the defendants sold their Assemblies. Based on this, he said the defendants' Assemblies "would have become part of the international supply chain for HDDs and HDD Products and would have been distributed to countries around the world."

[55] Dr. Reutter found nothing in the public record of the dominant HDD manufacturers to suggest Canada was an outlier: "The Canadian market for consumer electronics is no different than that for any other [W]estern economies." He attached industry advertisements for sale of their HDD products in Canada during the Class Period, and information from Canadian government databases about the manufacturer's HDD products being imported into Canada. The financial filings of some of the HDD manufacturers indicated their products being in major computer brands sold in Canada at the material times. He also opined that the only non-defendant manufacturer of Assemblies lacked the capacity to be the sole supplier of Assemblies into the Canadian market.

Dr. Mayer on data availability

[56] Dr. Michael Mayer is an Associate Professor in the Department of Mechanical and Mechatronics Engineering at the University of Waterloo. The plaintiffs rely on his evidence to support their ability to identify the specific manufacturer of Assemblies in various products.

[57] Dr. Mayer's affidavit said he expected that, with relevant manufacturer documentation, he could identify the specific products containing Assemblies from particular manufacturers. His conclusions included the following:

> 16. Conventional electronics hardware engineering is a tightly controlled and highly organized process. Companies who engage in the electronics hardware engineering process produce a document often referred to as a [BoM] as a main source of information used to design, budget and manufacture a product. It is standard practice for all companies to have such a document for all of their products.
>
> 17. In my experience, BoMs contain an exhaustive list of all of the different parts and assemblies that are required to construct, manufacture or repair a product. Typically, a BoM contains the following information for each component part: part name, an internal identification or part number, manufacturer, manufacturer part number, description, unit of measure, size, length, weight, and cost, as well as specifications or features of the product, for each component part used.
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> …
>
> 20. In my opinion, BoMs are a source of information which can assist in identifying products that contain HDD Suspension Assemblies. I expect that electronic product manufacturers have BoMs that would indicate the particulars of any HDD contained within the electronic product, and I expect that HDD manufacturers have BoMs that indicate the particulars of their constituent components, including HDD Suspension Assemblies.
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> …
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> 27. I also expect that HDD Suspension Assembly manufacturers would have specification sheets, BoMs, plans, and/or designs, used for both their own internal manufacturing purposes and which could be used to provide product information to their customers. With design drawings in particular, I expect that I could identify the manufacturer of HDD Suspension Assemblies visually.

Evidentiary Objections

[58] The defendants object to the admissibility of Reutter #3 and Dr. Mayer's affidavit.

[59] Against Reutter #3, they argue his opinion that Assemblies entered Canada as part of the normal distribution chain is outside his expertise, as he has no particular experience with HDDs or global distribution channels for the electronics industry. They argue further that it is based on unattributed hearsay, unsupported statements and summaries of publicly available material.

[60] Dr. Reutter's expertise as an economist specializing in antitrust cases involves investigation of the applicable distribution chains. Reutter #1 described this. It said for example: "Estimating indirect Class-wide damages will require an analysis of the volume of HDD Products imported to Canada during the proposed Class period. Public sources of data, for instance import trade data reported by Industry Canada, can be accessed to estimate the number and value of HDD Products entering Canada."

[61] In my view, therefore, analyzing how Assemblies came to Canada as part of the market's distribution chain is within Dr. Reutter's expertise.

[62] Turning to the defendants' second objection, *Mazur v. Lucas,* 2010 BCCA 473, summarizes the permissibility of an expert relying on information obtained through his or her investigation and research:

> [40] From these authorities, I would summarize the law on this question as to the admissibility of expert reports containing hearsay evidence as follows:
>
> - An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others – this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-835)
>
> - An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.
>
> - The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as

> the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
>
> - The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

[63] Following *Mazur,* I find Reutter #3 to be admissible. At this early stage, and particularly when there has been no document production or discovery, it is unsurprising that publicly available information -- including government statistics, retailer information, and corporate press releases -- was used to investigate the HDD supply chain into Canada. Such supply and distribution chain investigation falls within Dr. Reutter's expertise as an economist specializing in price-fixing analysis. Dr. Reutter said he expects the defendants or their direct purchasers will have more definitive data and documents on these issues.

[64] Dr. Reutter based many of his conclusions in Reutter #3 on his analysis of market concentration in Reutter #1, for which he provided the sources of publicly available information. He also provided the public information sources for his conclusions about the market consolidation of HDD manufacturing (relying on the defendants' affidavit evidence that they sold their Assemblies to these manufacturers) and the public consumer retailer sources indicating the sale of products in Canada. To a great extent, his further conclusions were based on identified government sources and public company financial filings.

[65] I see nothing objectionable in Dr. Reutter's analysis or conclusions, particularly given that at this stage it is relied on, not to support ultimate findings of fact on a balance of probabilities, but to provide some basis in fact to support the existence of the alleged common issues.

[66] The defendants pointed to their cross-examination of Dr. Reutter where he acknowledged three missing footnotes, and so was not in the moment able to identify the source of certain information. In my view, this did not undermine the

admissibility of his affidavit, given that most sources are provided and its limited evidentiary purpose at this stage.

[67] As a final point, I note Dr. Winter's acknowledgment in cross-examination that products containing Assemblies would have been sold in Canada during the Class Period.

[68] Turning to Dr. Mayer's affidavit, the defendants say his opinions about sources of information from which to identify the specific manufacturer of Assemblies in particular products is improper reply, violating the rule against case-splitting, and includes inadmissible argument and speculation.

[69] The plaintiffs say Dr. Mayer's evidence is proper reply to the defendants' evidence that: (a) the defendants lack the ability to track the distribution of their Assemblies in terms of end-use product or geographic market; and (b) it is impossible to determine the brand of Assembly in a particular HDD without destroying the HDD or end-product.

[70] In my view, Dr. Mayer's affidavit is admissible reply evidence. It is understandable that the plaintiffs might not have anticipated the defendants' evidence of inability to track and identify their Assemblies in downstream products, particularly given the sophistication of the defendants and their industry and markets.

[71] If Dr. Mayer's affidavit were not admissible as proper reply, I would still admit it in the overall interests of justice. Although served after the agreed deadlines, it is not unusual in the lead-up to a complex, wide-ranging hearing such as this for counsel to realize additional evidence is required to fully present their case.

[72] The defendants identified no prejudice from the lateness of Dr. Mayer's affidavit. It was delivered promptly after the affidavits from the defendants' principals that raised these issues, well before the scheduled cross-examination of the plaintiffs' witnesses, and eight months before the certification hearing. In my view,

the late delivery did not prejudice the defendants' ability to respond to this evidence had they chosen to do so.

[73] Finally, the defendants objected to paragraphs 13, 26 and 27 in Dr. Mayer's affidavit as speculation without evidentiary foundation. I do not accept these objections.

[74] At paragraph 13, Dr. Mayer explained that, where a product contains an HDD, the presence of the HDD and its associated specifications have utility with respect to the data storage capabilities of the product. In my view, this statement was based on Dr. Mayer's knowledge of HDDs and his experience in the electronic materials industry. I also did not understand from the defendants why it was a controversial statement or material to this application.

[75] At paragraphs 26 and 27, Dr. Mayer said he expects HDD and Assembly manufacturers to have bills of materials, specification sheets, designs and other documentation providing details about the specific Assemblies used in certain products. In my view, this expectation was reasonably founded on Dr. Mayer's experience and expertise in the electronics industry.

Jurisdiction Challenge

[76] The defendants filed jurisdictional responses challenging the Court's jurisdiction over them. Pursuant to *Supreme Court Civil Rules*, R. 21-8 and the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], they apply to stay or dismiss the claim for lack of territorial competence.

[77] They argue the uncontested facts differentiate this case from those price-fixing cases where jurisdiction has been found. They say the following facts demonstrate a lack of real and substantial connection to British Columbia:

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 HDD Suspension Assemblies of any kind into Canada.

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

(a) 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.

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

[78] In response, the plaintiffs say two connecting factors under the *CJPTA* create a presumption of real and substantial connection between the Claim and British Columbia. First, it concerns a tort committed here because, as a matter of law, the tort of conspiracy occurs where the harm occurs. Second, it concerns restitutionary obligations that, to a substantial extent, arose here.

[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.

[80] *CJPTA*, s. 3(e) provides 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.

[81] The relevant provisions are:

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,

[82] In my view, the governing authority for this jurisdictional challenge is *Ewert* v. *Höegh Autoliners AS*, 2020 BCCA 181 [*Höegh*], which found a strong presumption of a real and substantial connection to British Columbia for a foreign price-fixing conspiracy resulting in higher prices paid by British Columbians.

[83] *Höegh* summarizes the two-stage process under the *CJPTA* (at paras. 16-17). At stage one, the plaintiff can establish a presumption of real and substantial connection between the subject matter of the litigation and the forum by satisfying one of the connecting factors. At stage two, the defendant can rebut the presumption by showing that, despite the connecting factor, a real and substantial connection does not actually exist on the facts.

[84] In my view, *Höegh* supports the plaintiffs at stage one because it held that the tort of conspiracy is committed in British Columbia if a defendant participates in a conspiracy elsewhere but the conspiracy causes harm here.

[85] In *Höegh*, the defendants were among the world's largest roll-on/roll-off marine shippers, transporting vehicles around the world. They allegedly conspired to fix marine shipping prices, resulting in higher prices for purchasers of imported vehicles in British Columbia. As here, the claims against them were for breach of s. 45 of the *Act* and civil conspiracy.

[86] The parties disputed whether the defendants had any business presence in British Columbia or shipped vehicles purchased by British Columbia consumers. The chambers judge found jurisdiction, even assuming the two disputed connections to British Columbia did not exist, on the basis that that "a conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the wrongful conduct occurred": para. 33. The Court of Appeal agreed, providing a summary of the law regarding jurisdiction over conspiracy claims:

> [77] In summary, *Imperial Tobacco* and *Fairhurst* 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*, 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.

[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".

[88] In my view, *Höegh* cannot be distinguished as the defendants suggest. The Court of Appeal acknowledged that, although some additional connecting factors were present in many of the price-fixing cases, they were unnecessary for the

assumption of jurisdiction. The Court emphasized that the mandatory presumption "is likely to be determinative" and the burden to displace it is "very high": para. 50. Accordingly, the Court found participation in a conspiracy that caused economic harm in British Columbia was sufficient for a real and substantial connection:

> [87] I accept that in *Fairhurst*, at the Supreme Court level, the fact the defendants' rough diamonds ultimately made their way through the supply chain and into the British Columbia gem-grade diamond market may have been material to the conclusion that a real and substantial connection was established: see *Fairhurst* S.C. at para. 38. However, that fact does not appear to have been central to this Court's judgment on appeal, where jurisdiction was rooted in the defendants' participation in a conspiracy that caused economic harm in British Columbia.
>
> [88] In any event, the appellants also fail to distinguish *Imperial Tobacco*. The basis for the real and substantial connection in that case was that the foreign defendants who *did not* manufacture anything that was sold in British Columbia—through the normal channels of trade or otherwise—were jointly liable as parties to the conspiracy.
>
> [Emphasis in original.]

[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.

[90] In my view, the unjust enrichment claim also has a real and substantial connection to British Columbia. The alleged restitutionary obligations arose, to a substantial extent, in British Columbia because that is where the deprivation of British Columbia Class Members would have occurred. As stated by Rothstein J. in *Pro-Sys* regarding restitutionary claims by indirect purchasers*:*

> [50] … In my view, allowing indirect purchaser actions is consistent with the remediation objective of restitution law because it allows for compensating the parties who have actually suffered the harm rather than merely reserving these actions for direct purchasers who may have in fact passed on the overcharge.

[91] Finally, I do not accept the defendants' argument that jurisdiction should be refused because the overcharge was too small to pass through the supply chain to

British Columbia purchasers. This is disputed in the Claim and by the plaintiffs' expert Dr. Reutter. There is uncontested evidence that the defendants' sales exceeded US $1 billion annually over the 12-year Class Period, suggesting that total losses in British Columbia may well be material.

[92] The defendants' jurisdictional challenge is therefore dismissed.

Certification

[93] The underlying premise of a class proceeding is a class of persons with claims against one or more defendants, issues common to all of these claims, and a class proceeding being the preferable resolution: *Ewert*, para. 23.

[94] The certification hearing assesses whether the action should go forward as a class proceeding, not the merits of the claim: *Pro-Sys*, para. 65.

[95] Under s. 4(1) of the *CPA*, a case must be certified if, and only if, it satisfies five criteria:

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

[96] The first criteria, whether the pleadings disclose a cause of action, is assessed in the same manner as a motion to strike proceedings. Plaintiffs need only

show that, assuming the facts pleaded are true, it is not plain and obvious that the claim will fail: *Hollick v. Toronto (City)*, 2001 SCC 68, para. 25.

[97] The other four criteria require the plaintiff to show "some basis in fact" that they are met: *Hollick*, para 25. This is not an onerous standard and requires only a minimum evidentiary basis: *Ewert*, para. 109. This standard was recently summarized in *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307:

> [27] … The leading authorities establish that although the standard does not entail an assessment of the merits of the action, there must also be more than superficial scrutiny of the sufficiency of the evidence. It is clear that 'some basis in fact' must be demonstrated by the plaintiff on an evidentiary basis. Such evidence need not be conclusive or satisfy the civil standard of a balance of probabilities, and the particular level of evidence that will be sufficient is highly fact-specific. Where a basis in fact is intended to be established through an expert methodology, the methodology must be 'sufficiently credible or plausible' to raise some 'realistic prospect of establishing' the relevant factor.

Section 4(1)(a) – Viable Cause of Action

[98] As mentioned, to satisfy s.4(1)(a) the claim must not be bound to fail assuming the facts pleaded are true. The defendants argue that none of the allegations in the Claim meet this low threshold.

[99] The case law recognizes the tension between a generous approach, erring on the side of allowing novel or questionable claims to proceed, and the gatekeeping function of resolving unmeritorious claims at an early stage. The Court of Appeal provided guidance for navigating this tension in *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, where Chief Justice Bauman wrote:

> [46] This Court has been clear that the ultimate question when assessing whether there is a cause of action is the *Hunt v. Carey* 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.

Sections 36 and 45

[100] The defendants argue that the plaintiffs' claim for damages under s. 36 of the *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.

[101] To repeat s. 45 for convenience:

> **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.

[102] Under s. 45(2), those convicted under s. 45(1) are guilty on an indictable offence and liable to imprisonment for not more than 14 years and/or a fine not exceeding $25 million.

[103] The defendants' uncontested evidence is that they manufacture virtually all of their Assemblies in Asia, no manufacturing occurred in Canada, and all direct sales of their Assemblies occurred in Asia. They argue that the territorial jurisdiction of a criminal provision like s. 45 does not extend to the foreign civil conspiracy pleaded in the Claim, being an agreement: (a) made outside Canada; (b) by defendants with no presence in Canada; and (c) fully performed outside Canada.

[104] The defendants rely on Justice La Forest's judgment in *Libman v. The Queen*, [1985] 2 S.C.R. 178, 1985 CanLII 51, regarding the territoriality principle (now enshrined in s. 6(2) of the *Criminal Code*, R.S.C. 1985, c. C-46), which states that no person shall be convicted of an offence committed outside Canada.

[105] *Libman* concerned a telephone sales room (or "boiler room") in Toronto. From there, the accused directed sales personnel to make cold-calls to the United States, misrepresenting their identities, location, and the facts about the gold-mining shares being flogged. Buyers were asked to send their money to offices in Central America.

[106] Justice La Forest found the accused could be prosecuted in Canada for fraud and conspiracy, as the fraudulent activities occurred here and the fruits of the scheme eventually found their way here as part of the scheme. He summarized the limits of our criminal territoriality (at 212–13):

> I might summarize my approach to the limits of territoriality in this way. As I see it, 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. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country, a test well known in public and private international law …
>
> Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here. The outer limits of the test may, however, be coterminous with the requirements of international comity.
>
> [Emphasis added.]

[107] The defendants focus on the underlined words. They say that, on the pleadings, all activities constituting the alleged s. 45 offence took place outside Canada, namely, the price-fixing agreements and all sales of the price-fixed Assemblies. They argue that the aspect of the claim that occurred in Canada – the alleged harm to downstream Canadian purchasers – is not an essential element of the s. 45 offence. In fact, on the wording of s. 45, it appears the offence is complete even before anything is done to carry out the impugned agreement.

[108] The defendants rely on *Latifi v. The TDL Group Corp*., 2021 BCSC 2183, para. 70, to argue that any ambiguity in s. 45 must be interpreted narrowly in their favour because the provision is penal.

[109] Finally, the defendants say no Canadian court has extended the concept of territoriality under s. 45(1) to an alleged agreement made wholly outside of Canada, to fix the price of a product sold wholly outside of Canada, and where no parties (defendant or otherwise) sold the product itself in Canada. They point to other

geographically complex price-fixing cases to show that some connection between Canada and the essential elements of s. 45 were always present. See, for example, *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 298 (Ont. S.C.J.), para. 16; *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*, 2018 FC 64, paras. 8-11.

[110] The plaintiffs dispute this interpretation of s. 45's territoriality. They focus on they second paragraph from La Forest J. in *Libman* quoted above. They argue his fundamental point is that the territorial reach of Canada's criminal and quasi-criminal laws is defined by the same "real and substantial connection" test applied in assessing the territorial jurisdiction of our courts. As discussed above, when applying that test in conspiracy cases to questions of territorial jurisdiction, a real and substantial connection has been found where the loss occurred even if all other wrongful conduct constituting the conspiracy occurred elsewhere.

[111] In my view, the defendants have not shown the plaintiffs are bound to lose this issue. First, I agree with the plaintiffs 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. I have found the plaintiffs' Claim satisfies this test regarding territorial jurisdiction.

[112] Second, numerous statements in *Libman* arguably support a finding of territoriality based solely on harm occurring in Canada, for example:

- "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." (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" (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." (206)

- "This country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here, (as in *Peters*, for example). Indeed, from an early period the English courts have recognized such an interest in other countries; see *Jacobi and Hiller*, *Nillins* and *Godfrey*, *supra*. 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." (208)

[113] Third, *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 as argued for by the defendants (at 211):

> [The delivery of the funds into Canada] was an integral part of the scheme. While it may not in strictness constitute part of the offence, it is, I think, relevant in considering whether a transaction falls outside Canadian territory. For in considering that question we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. One must then consider whether there is anything in those facts that offends international comity.

[114] Fourth, the governing case law interpreting s. 45 arguably favours the plaintiffs. The most relevant example is *Infineon*, in which several multinational DRAM manufacturers pled guilty in the United States to a price-fixing conspiracy for dynamic random-access memory ("DRAM"). A Québec consumer, having purchased a Dell computer with DRAM over the internet from Ontario, sought to bring a class action on behalf of direct and indirect DRAM purchasers in Québec. The plaintiffs alleged the overcharge passed through the supply chain into Canada in violation of s. 45, which amounted to fault giving rise to civil liability under the *CCQ*.

[115] The defendants argued that the evidence was limited to what occurred in Europe and the United States, so there was no real and substantial connection with Canada giving rise to a violation of s. 45: *Infineon*, para. 87. The Court disagreed, accepting that s. 45 was arguably violated by this foreign price-fixing agreement because the cartel was sufficiently powerful to affect consumers in Québec: paras. 91-92. It found a potential violation of s. 45 because "the impact of conduct in the United States on prices of DRAM in the international market gives rise to an inference of an impact in the Canadian market": para 94.

[116] See also *Fairhurst v. De Beers Canada Inc*., 2012 BCCA 257, where the Court adopted the following from *Vitapharm*:

> ... there is a good arguable case that any conspiracy entered into abroad that fixes prices or allocates markets in Canada so as to create losses through artificially higher prices in Canada, gives rise to the tort of civil conspiracy in Canada. It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad. [Para. 58.]

[117] Another example is *R. v. Rowbotham; R v. Roblin* (1992), 76 C.C.C. (3d) 542 at 548, 1992 CanLII 12824 (Ont. C.A.):

> The respondents were not charged with trafficking. They were charged with conspiracy to traffic. In the words of Meredith J.A. in *R. v. Bachrack* (1913), 21 C.C.C. 257 at 265, "It must be borne in mind always that the crime of conspiracy may be complete without anything having been done to carry it out". The delivery of the drugs and the receipt of the proceeds of the sale do not constitute an element of the offence, although they may be relevant in considering whether there is a relevant and substantial link or with respect to the requirements of international comity: see *Libman*.

[118] Fifth, and finally, in my view, the cases relied on by the defendants to argue that no real and substantial connection exists where the elements of the offence are committed outside Canada are arguably distinguishable. These cases include *R. v. O.(B.)* (1997), 116 C.C.C. (3d) 189, 1997 CanLII 949 (Ont. C.A.) and *R. v. Drakes,* 2005 CanLII 23683 (Ont. Sup. Ct.). In those cases, every aspect of the offence occurred outside Canada, whereas in this case the alleged harm occurred here.

[119] I therefore find that the plaintiffs' claims under the *Act* are not bound to fail due to no arguable breach of s. 45.

Civil conspiracy

[120] The defendants argue the conspiracy claim fails under s. 4(1)(a) because it does not specify the overt acts allegedly taken by each defendant.

[121] In my view, that defence has been rejected in the case law. As stated in *Godfrey*, conspiracies such as the one alleged here "are invariably conducted through secrecy and deception": para. 46. Similarly, in *Watson v. Bank of America Corporation*, 2014 BCSC 532, Chief Justice Bauman (as he then was) said:

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

[122] The defendants argue the claim of predominant purpose conspiracy is bound to fail because there are no material facts pleaded to suggest the defendants intended to injure the plaintiffs or other Class Members.

[123] The Claim alleges it was intended and foreseeable that the overcharge would be passed down the supply chain to Canadian consumers, amongst others. Dr. Reutter says a price-fixing conspiracy such as this only works if the overcharge is passed along the supply chain, the normal channels of which extended to Canada.

[124] In my view, in these circumstances, the case law supports the plaintiffs' position. In *Godfrey*, the Court said that price-fixing effects on umbrella purchasers are "not just a known and foreseeable consequence of what the defendants are doing, it's an intended consequence": para. 73. See also *Microsoft*, paras. 74–78, where the Court said regarding indirect purchasers "At this stage, I cannot rule out Pro-Sys's explanation that Microsoft's primary intent was to injure the plaintiffs and that unlawfully increasing its profits was a result of that intention."

Unjust enrichment

[125] The defendants argue that s. 36 is a complete code for the damages available to a plaintiff for conduct contrary to the *Act*, and therefore this restitutionary remedy is bound to fail.

[126] They rely on the statement in *Watson* that "the plaintiff's claims under the [*Act*] cannot constitute the foundation for other causes of action. It is not open to the

plaintiff to plead unjust enrichment or waiver of tort to the extent that those pleadings rely on acts that are only unlawful as a result of the [*Act*]": para. 189.

[127] In my view, the defendants' argument was rejected at the certification stage in *Godfrey*, where the Court said: "it is not plain and obvious that [a plaintiff] is precluded from bringing common law and equitable causes of action alongside his s. 36(1)(a) claim": para. 89. See also *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270, paras. 33–38.

Direct purchasers

[128] The defendants argue the plaintiffs have no arguable case for claims by direct purchasers. The Claim does not plead that anyone in Canada actually purchased Assemblies, and the plaintiffs led no evidence that this occurred. The defendants' evidence is that virtually all of their Assemblies were sold in Asia and there were no direct sales in Canada during the Class Period.

[129] As I understood the plaintiffs' response, it was that direct-purchaser claims should nevertheless be certified because the court should take a "fluid and flexible" approach to certification and so should allow them to pursue this issue at least through examination for discovery. In my view, that approach would be contrary to the threshold required for certification under s. 4(1)(a).

[130] The plaintiffs having neither pleaded, nor provided any evidence in support of, such a claim, direct purchasers should be excluded from the definition of Class Members.

Section 4(1)(b) – Identifiable Class

[131] Chief Justice Bauman explained the governing principles of s. 4(1)(b) in *Jiang v. Peoples Trust Company*, 2017 BCCA 119, para. 82:

- the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
- the class must be defined with reference to objective criteria that do not depend on the merits of the claim;

> - the class definition must bear a rational relationship to the common issues—it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could *later* prove they are members of the class.
>
> [Emphasis in original.]

[132] In my view, in this case the Class is defined by the objective criteria, independent of the merits, of having purchased a product in Canada containing an Assembly in the Class Period. The definition bears a rational relationship to the proposed common issues in that Class Members are those who may have been financially harmed by the alleged conspiracy. The Class Period matches the timing of the defendants' guilty pleas or convictions, and those who may have been harmed by the impugned conduct are included without any apparent exclusions. I did not understand the defendants to dispute these points.

[133] The defendants do take issue, however, with self-identification. They argue indirect purchasers cannot self-identify through objective criteria. They may no longer have their devices or, even if they do, they would need to destroy them, as Dr. Mayer did, to ascertain whether they contain Assemblies, how many, and who manufactured them.

[134] They say the evidence from the plaintiffs indicates the following problems:

> a) Mr. Cheung only testified that he purchased a MacBook Pro that contained an HDD and that he understood from counsel that "all HDDs contain an HDD suspension assembly". He did not testify that he was able to self-identify who manufactured the suspension assembly in his device (or even that he still had the device).
>
> b) Ms. De Bellefeuille only testified that she purchased a Dell Inspiron laptop and that it contained a Toshiba hard drive which she understood from counsel contains "at least one" HDD Suspension Assembly. She did not testify that she was able to self-identify who manufactured the HDD Suspension Assembly in her device (or even that she still had the device).
>
> c) Mr. Honeyman only testified that he purchased a Dell Inspiron 1520 laptop that has a Western Digital HDD and that he understood from counsel that it contained "at least one" suspension assembly. He did not testify that he was able to self-identify who manufactured the HDD

> Suspension Assembly in his device. (He also does not testify that he still had the device, although he appeared to have provided it to Dr. Mayer.)

[135] The defendants rely on *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*], where the proposed class included purchasers of any product containing high-fructose corn syrup manufactured by the defendants, which was the subject of the alleged conspiracy. The Court found no basis in fact to suggest purchasers would be able to differentiate whether their products contained high-fructose corn syrup or sugar because the two were used interchangeably: paras. 65–67.

[136] In my view, the plaintiffs have adequate responses to this self-identification challenge. First, I accept that, to self-identify as Class Members, persons need not identify the specific manufacturer of the Assemblies in their devices. With the inclusion of umbrella purchasers, every person who purchased a product containing an Assembly in Canada will be included in the Class. As a result, Class Members need only identify whether they have a device containing an Assembly (or an HDD, which necessarily contains an Assembly), but need not identify the specific manufacturer.

[137] Self-identification of the specific Assembly manufacturer may still be necessary however. Different damages might be awarded to indirect and umbrella purchasers, or to indirect purchasers of Assemblies manufactured by different defendants. Class Members will also need to self-identify the number of Assemblies in the products they purchased.

[138] In my view, Dr. Mayer has provided some basis in fact to suggest that Class Members will be able to self-identify the particular manufacturer of the Assemblies simply by identifying the products they purchased. This may be achievable through some combination of discovery of the defendants, records from other participants in the supply chain, industry information, consultants or experts, and targeted teardown of products.

[139] The defendants advance numerous arguments in response to Dr. Mayer, such as: (a) BoMs are only in the possession of HDD manufacturers, who are not named as defendants in these proceedings; (b) there is no evidence that the plaintiffs can obtain these BoMs for numerous different HDD products from different HDD manufacturers; (c) Dr. Mayer or a third-party disassembling devices is not self-identification; (d) Dr. Mayer's evidence focusses on Assemblies in computers but not other products such as gaming consoles, surveillance devices, automobiles.

[140] These are valid concerns that might, down the road, create difficulties for the plaintiffs. In my view, however, at this stage they do not undermine Dr. Mayer's evidence as some basis in fact suggesting Class Members will be able to identify specific manufacturers and numbers of Assemblies by reference to the particular products they purchased. This differentiates our situation from *Sun-Rype*'s finding that there was no way to ascertain whether a particular purchase contained the impugned substance.

[141] In my view, the case law supports the sufficiency of Dr. Mayer's evidence. In *Jiang*, the Court noted that "[t]he definition must be such that they can self-identify, and there may be records present to assist in that identification": para. 81. *Microsoft* says there "must be some evidence of the availability of the data to which the methodology is to be applied": para. 118.

[142] Also, in *Pro-Sys v. Microsoft*, 2010 BCSC 285, rev'd on other grounds 2011 BCCA 186, rev'd 2013 SCC 57, the defendant argued that the proposed class of indirect purchasers of Microsoft software could not be objectively determined because the market was plagued by pirated software. Justice Myers found the evidence disclosed methods that would allow users to verify whether their software was produced by Microsoft to determine their class membership: paras. 171–172. Of the possible difficulties that may arise in self-identification, Myers J. said:

> [175] No doubt there may be situations in this case that may present some difficulty; however, I am not convinced that they rise to the level which merits declining to certify this case.

[143] A similar point was made by Justice Smith in *Pro-Sys*:

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

[144] For these reasons, I find the plaintiffs satisfy the requirements of s. 4(1)(b).

Section 4(1)(c) – Common Issues

[145] In *Microsoft*, para. 108, the Supreme Court of Canada provided the principles for assessment of proposed common issues:

a) The commonality question should be approached purposively.

b) An issue will be common only where its resolution is necessary to the resolution of each class member's claim.

c) It is not essential that the class members be identically situated with respect to the opposing party.

d) 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 action. The court will examine the significance of the common issues in relation to individual issues.

e) 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.

[146] A question is common if, from the perspective of the litigation as a whole, it advances the resolution of every class member's claim. Showing the loss reached some level of the class advances a common issue, even if the loss varies amongst the members at that level, or even if some are shown not to have suffered a loss at all: *Godfrey*, paras. 102-108.

[147] The defendants do not challenge the commonality of the liability issues in the Claim. In price-fixing conspiracy cases, liability involves common legal and factual questions about the existence, scope and effect of the defendants' alleged

conspiracy. Similarly, the claims in unjust enrichment focus, in part, on the benefit received by defendants for the overcharge to the detriment of the Class. Class Members have a common interest in proving the facts constituting the defendants' liability.

Causation and damages

[148] The defendants challenge the commonality of issues related to causation and damages. They argue that the plaintiffs have no plausible methodology to show a common impact on Class Members from the pass-through of any overcharge. That is, they have no basis in fact suggesting the pass-through to indirect purchasers can be assessed on common evidence using economic and statistical methods.

[149] The defendants' written submissions listed the issues they said were not common as follows:

- Class-wide loss or damage as a result of the breach of s. 45;
- Liability pursuant to s. 36;
- Costs of the investigation pursuant to s. 36;
- Whether the class suffered loss or damages as a result of any alleged conspiratorial conduct;
- Unjust enrichment, restitution and disgorgement;
- Damages under s. 1457 of the *CCQ*; and
- Aggregate damages.

[150] In a price-fixing case, to establish causation and loss as common issues for the purposes of s. 4(1)(c), the plaintiffs must show some basis in fact of a plausible and realistic methodology to establish whether an overcharge was passed through on a class-wide basis. Where the methodology consists of an econometric model, it is not necessary to build the model or identify precisely what information will be used so long as there is some evidence that information will be available to do so. Whether the model will ultimately be accepted is for the common issues trial: *Ewert*, para. 104.

[151] As explained in *Microsoft*:

> [118] … 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.

[152] As described above, Dr. Reutter's opinion was that a regression analysis can be constructed to establish loss on a class-wide basis. This same econometric regression method that he proposes has been accepted in the leading price-fixing cases: see e.g., *Pro-Sys*, para. 68; *Ewert*, para. 105; *Microsoft*, paras. 116, 126; *Godfrey*, para. 97. Dr. Reutter himself has been accepted as an expert in this regard by the Supreme Court of Canada in *Godfrey*, paras. 95–111 and *Shah*, paras. 83–102, and by the Ontario Supreme Court in *Cygnus Electronics v. Panasonic*, 2018 ONSC 2312, at paras. 46-52.

[153] In my view, Dr. Reutter's evidence, including his responses to Dr. Winter's critiques as summarized in the evidentiary section above, have 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. Trying to resolve which of the two economists is correct, even if it were possible on the current record, would be a battle of the experts exceeding the "some basis in fact" standard at certification: *Ewert*, para. 7; *Microsoft*, paras. 102, 126.

[154] The defendants augment Dr. Winter's critiques with additional arguments that Dr. Reutter's methodology: (a) is not grounded in the facts of the case; (b) relies upon data that the plaintiffs have not shown exists or can reasonably be obtained; and (c) cannot track and quantify the overcharge because it is too small and the supply chain too complex.

[155] Regarding (a), the defendants argue that Dr. Reutter is using the same method he recommended in other cases, such as *Devries v. Espar Inc.*, 2021 ONSC

4338, regarding alleged price-fixing of parking heaters. They say this "one-size-fits-all" approach indicates his approach is not grounded in the facts of this case.

[156] I do not accept this argument. The methodology is the same because, as Dr. Reutter says, the use of regression models to estimate overcharge and pass-through in antitrust cases has been standard practice for economists for several decades. His reports indicate a good understanding of the specifics of this particular case and he explains why the regression methodology is applicable to this particular task.

[157] Regarding (b), the defendants rely on *Microsoft*, para. 118, to argue that the plaintiffs lack "some evidence of the availability of the data to which the methodology is to be applied". They say Dr. Reutter did not specify what kinds of data would be relevant or whether it exists and is available.

[158] Dr. Reutter said the information necessary to analyze the overcharge and pass-through includes cost of input, consumer tastes and preferences, and sales data. Based on his experience in other cases, he expected this type of information can be found from the defendants, industry intermediaries, third-party vendors who collect such data, and government.

[159] In *Ewert*, the Court said, for purposes of certification, an expert need not confirm or ascertain that the requisite data is indeed available:

> [108] The underlying issue is the extent to which a plaintiff must prepare the case at the time of the certification application. This issue arose in *Infineon*, where the plaintiff's expert had expressed a belief that the necessary data for his analysis would be available from various sources. …
>
> [109] In *Infineon* … [t]he expert's "belief that the necessary data would be available to him from the sources he identified" was sufficient: paras. 56, 67–68. The action was certified.
>
> …
>
> [111] In my opinion, the certification judge erred in principle when he rejected the plaintiff's methodology on the ground that the plaintiff's expert had not ascertained whether the data he would need was in fact available. The plaintiff provided some basis in fact that there was a methodology that could demonstrate that overcharges had been passed through to the indirect purchasers.

[160] Regarding (c), the defendants argue that Dr. Reutter's methodology cannot reliably measure pass-through because the impact of any overcharge would be too small compared to the price of the end products. They say it may in fact be infinitesimal—as little as 0.01% of the price of an HDD and 0.001% of the price of expensive products such as computers and cars.

[161] Dr. Reutter disagreed. He estimated that Assemblies are 5–10% of the cost of HDDs, and during the Class Period their average annual sales exceeded US $1 billion. He said that "[a]s a matter of both accounting and economics, changes in upstream input prices, even for those inputs with a relatively low price per unit, get passed through in downstream products." He opined that his method could estimate these pass-through charges.

[162] In my view, Dr. Reutter's evidence provides some basis in fact for tracing the overcharge's pass-through even as a small proportion of product price. This approach was taken in *Pro-Sys,* where the cost of the electronic component in issue was less than 1% of most products that contained it: *Pro-Sys*, paras. 10, 74.

[163] Regarding complexity, in my view, the defendants have not demonstrated any greater complexity than in other price-fixing cases such as *Pro-Sys*, *Godfrey* or *Microsoft*. Dr. Reutter said that by 2012 there were only three direct purchasers of HDDs worldwide. They sold their HDDs either as branded, external products or to internal components to manufacturers of computer products.

[164] In *Microsoft*, the Supreme Court of Canada said:

> [44] 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, Brennan J., dissenting in *Illinois Brick*, observed that 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. …

[165] *Pro-Sys* reached a similar conclusion. The defendants' expert deposed that assessing harm on a class-wide basis was "not possible as practical matter … given

the complexities in the DRAM market": para. 55. The Court nonetheless upheld the trial judge's decision to certify because the *Act* gives "the case management judge flexible tools to deal with such complexities [as well as] the power to decertify the action" if necessary: *Pro-Sys*, para. 76.

[166] In *Sony Corporation*, the certified class covered "thousands of highly differentiated [optical disk drives] and [optical disk drive] products, sold through multiple pricing mechanisms, at multiple levels of supply chains, into multiple markets characterized by different competitive dynamics, and that reached members of the proposed class through multinational, multilevel supply chains": para. 162.

[167] I agree with the plaintiffs that: "Arguably, this case is less complex than others previously certified insofar as it involves fewer defendants and the market is highly concentrated at both the defendant and [direct] purchaser level."

[168] For these reasons, I find that the plaintiffs have provided some basis in fact for causation and damages being a common issue.

Aggregate damages

[169] The plaintiffs seek to certify as a common issue whether class damages can be measured on an aggregate basis and, if so, what those damages are. The defendants oppose this.

[170] The test for certifying aggregate damages as a common issue is whether there is a reasonable likelihood that the conditions of *CPA*, s. 29(1) would be satisfied if the plaintiffs were otherwise successful at the common issues trial: *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, para. 156.

[171] Section 29 says:

> **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
>
> (a) monetary relief is claimed on behalf of some or all class members,

> (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, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[172] In *Godfrey*, the Court said:

> [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).
>
> …
>
> [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.
>
> [Emphasis in original.]

[173] In my view, it is reasonably likely that, if the plaintiffs are otherwise successful at a common issues trial, an aggregate assessment of damages would be made regarding the restitutionary claim in unjust enrichment. I therefore find this to be a common issue.

[174] Whether damages arising from the other claims will satisfy the aggregate damages requirements in s. 29(1) should await the end of the common issues trial, see *Krishnan*, para. 159.

Punitive damages

[175] The defendants do not oppose punitive damages as a common issue.

[176] In my view, it is a common issue because the appropriateness of such damages would be determined based on the defendants' conduct, and the trial judge will likely have the relevant record before them. See *Chalmers v. AMO Canada Company*, 2010 BCCA 560, paras. 31–36.

S. 4(1)(d) – Preferability

[177] Once the common issues are determined, s. 4(1)(d) asks whether a class proceeding is the preferable procedure for their fair and efficient resolution of the common issues.

[178] In making this determination, s. 4(2) requires consideration of all relevant matters, including whether:

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

[179] These factors are considered through the lens of the three principal goals of class actions: judicial economy, access to justice, and behavior modification.

[180] At a high level, the defendants say that certification is not preferable. The fundamental class action objectives will not be achieved because of the minimal cost of Assemblies contrasted with the great cost and complexity of the proposed proceedings.

[181] In my view, the governing case law suggests the fundamental goals of class proceedings will be served in these circumstances. Certification is in the overall

interests of justice because price-fixing claims serve the important public purpose of "insuring the continued effectiveness of the [antitrust] action and preventing wrongdoers from retaining the spoils of their misdeeds": *Microsoft*, para. 48.

[182] Minimal individual recovery suggests that class proceedings are the only means of achieving these goals. As stated in *Microsoft*:

> [75] … Thus, the only apparent alternative to a class action is no action at all. Therefore, if this action does not proceed as a class action there is the potential for an unconscionable result – that the respondents will be allowed to retain their unlawful gains. This potential unconscionability also weighs in favour of certifying this action as a class proceeding.
>
> …
>
> [141] ... Accordingly, if the class action does not proceed, the objectives of deterrence and behaviour modification will not be addressed at all. On this issue, the class action is not only the preferable procedure but the only procedure available to serve these objectives.

[183] Similar points are made in *Pro-Sys*:

> [73] … While the fines and the settlements may well serve to modify the behaviour of the respondents and to deter them from further such conduct, the chambers judge overlooked that the goal of behaviour modification also considers other potential wrongdoers.
>
> [74] … The fact that individual recoveries would be small weighs in favour of a class proceeding. It is unlikely that class members would pursue individual actions since the costs of doing so would be out of all proportion to the potential recovery.

[184] The preferability cases relied on by the defendants are distinguishable. In *Bennett v. Hydro One Inc.*, 2017 ONSC 7065, the reasons for declining certification included that the determination of common issues left too much to be done at individual issues trials and the Ontario Energy Board's administrative process was preferable to a class action: paras. 126, 130. In *Penney v. Bell Canada*, 2010 ONSC 2801, justice was served by deferring to the CRTC proceedings: para. 193. In *Setoguchi v. Uber B.V.*, 2021 ABQB 18, there was no evidence of class-wide damages and every class member would likely require individual trials to assess damages: paras. 93, 103. In *Chow v. Facebook, Inc.*, 2022 BCSC 137, there was no

basis in fact indicating harm or loss resulting from the defendant's alleged conduct: para. 96.

[185] I turn now to the specific considerations in *CPA* s. 4(2).

Section 4(2)(a)

[186] Comparing the overall import of common issues with individual issues has particular significance in indirect purchaser cases. As stated in *Ewert*:

> [117] In these cases, there are normally some common issues relating to the cause of action, and some individual issues relating to the individual circumstances of the class members. Whether common issues predominate over individual issues will often depend on whether loss on a class-wide basis can be considered a common issue, which would support certification, or whether loss will have to be established individually for the class members, which will likely make a class proceeding unmanageable.

[187] The defendants argue the common issues in this matter do not dominate. They cite *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879, paras. 180–182, in which Justice Branch declined certification of the proposed price-fixing class action by indirect purchasers against automobile part suppliers. He said:

> [180] Even more individuality exists at the class member level. One class member might have only one product from one defendant in their vehicle, while another could have multiple products made by multiple defendants …
>
> [182] Based on my review of the evidence, I expect the required analysis would come very close to a vehicle-by-vehicle evaluation, in a case involving millions of vehicles—a daunting prospect to be sure.

[188] At least at this stage, the evidence suggests the claims here do not face this degree of individuality. My finding that liability, causation and loss are generally common issues drives the conclusion that common issues predominate over the remaining individual issues: *Ewert*, para. 118; *Microsoft*, para. 140. Furthermore, in assessing the relationship between the resolution of common issues and the management of individual interests, plaintiffs' counsel quite properly emphasized the broad powers under the *CPA* to effectively manage individual issues: *Ewert*, paras. 119–121.

Section 4(2)(b)

[189] There was no evidence to suggest that a significant number of Class Members have a valid interest in individually prosecuting separate actions. The evidence suggests that minimal individual damages and the cost and complexity of prosecution make this highly unlikely.

Section 4(2)(c)

[190] The defendants submit they have already been the subject of various international proceedings. Those proceedings did not, however, address how their alleged conduct affected Canadian indirect and umbrella purchasers or the compensatory and restitutionary remedies sought here. These prior proceedings do not render the proposed class action unfair or inefficient.

Section 4(2)(d)

[191] Comparison with other methods of resolution will often favour certification, although there may be instances where there are practical alternatives to class proceedings or the nature of the individual interests overwhelm the common interests.

[192] In this case, no practical alternative has been suggested. The comments of the Court of Appeal in *Pro-Sys* apply:

> [75] … Thus, the only apparent alternative to a class action is no action at all. Therefore, if this action does not proceed as a class action there is the potential for an unconscionable result – that the respondents will be allowed to retain their unlawful gains. This potential unconscionability also weighs in favour of certifying this action as a class proceeding.

See also *Ewert*, para 125.

Section 4(2)(e)

[193] This is a non-factor when there is no apparent alternative for litigation of these claims.

Conclusion on preferability

[194] Following the approach to preferability of price-fixing cases, as summarized in *Ewert*, paras. 115–127, in this case a class proceeding is preferable because liability, causation and loss have been found to be common issues and there is no practical alternative for resolving these claims.

[195] Additionally, as described above, the governing case law holds that certification of this type of price-fixing case serves the overall goals of class proceedings, and the s. 4(2) factors favour certification.

Section 4(1)(e) – Representative Plaintiffs

[196] The defendants do not challenge the representative plaintiffs as adequately representing the interests of the Class Members, without conflicts of interest, and with a workable litigation plan.

Conclusion

[197] As mentioned, plaintiffs' counsel advised of parallel actions in Ontario and Quebec where class counsel are cooperating and support this application. Given the apparent cost, complexity, and low individual recovery, I am satisfied that a national proceeding is preferable and in the interests of justice. The defendants did not oppose national certification.

[198] These proceedings are certified as a national class proceeding on behalf of all persons across Canada within the certified class.

[199] The class, claims, common issues, relief sought, representative plaintiffs, and litigation plan are certified in the terms sought by the plaintiffs, except for the removal of direct purchasers and aggregate damages being limited to the restitutionary claim in unjust enrichment.

"Coval J."

Schedule A

COMMON ISSUES

...

Breach of the Competition Act

(e) Did the Defendants, or any of them, breach s. 45 the *Competition Ac*t (which is contained in Part VI of the *Competition Act*) giving rise to liability pursuant to s. 36 of the *Competition Act*?

(i) From the start of the Class Period to March 12, 2010, did the Defendants and/or any unnamed co-conspirators conspire, agree or arrange with each other to:

A. prevent, limit or lessen, unduly, the manufacture or production of HDD Suspension Assemblies?; and/or

B. enhance unreasonably the price of HDD Suspension Assemblies?

(ii) From March 12, 2010, to the end of the Class Period, did the Defendants and/or any named co-conspirators conspire, agree or arrange with each other to:

A. fix, maintain, increase or control the price of HDD Suspension Assemblies;

B. allocate sales, territories, customers or markets for the production or supply of HDD Suspension Assemblies; and/or

C. fix, maintain, control, prevent, lessen or eliminate the production or supply of HDD Suspension Assemblies?

(iii) Did the Class suffer loss or damage as a result?

(f) Did the Defendants, or any of them, breach s. 46 the *Competition Ac*t (which is contained in Part VI of the *Competition Act*) giving rise to liability pursuant to s. 36 of the *Competition Act*?

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

Conspiracy

(h) Are the Defendants, or any of them, liable in tort for conspiracy to fix prices for HDD Suspension Assemblies?

(i) During the Class Period did the Defendants and/or any unnamed co-conspirator engage in unlawful conduct (by breaching sections 45 or 46 of the *Competition Act*)?

(ii) Was the unlawful conduct of the Defendants directed towards the Class?

(iii) Did the Defendants know or ought to have known in the circumstances that injury to the Class would likely result?

(iv) Did the Class suffer loss or damages as a result?

(i) Over what period of time did the conspiracy take place?

(j) Over what period of time did the conspiracy affect the price of HDD Suspension Assemblies and/or products containing HDD Suspension Assemblies?

(k) Did the Defendants, or any of them, take affirmative or fraudulent steps to conceal the conspiracy?

Unjust Enrichment

(l) Have the Defendants, or any of them, been unjustly enriched by the receipt of overcharges on the sale of HDD Suspension Assemblies?

(m) Have members of the Class suffered a corresponding deprivation in the amount of the overcharges on the sale of HDD Suspension Assemblies?

(n) Is there a juridical reason why the Defendants, or any of them, should be entitled to retain the overcharges on the sale of HDD Suspension Assemblies?

(o) What restitution or disgorgement, if any, is payable by the Defendants, or any of them, to the Class based on unjust enrichment?

(p) What restitution or disgorgement, if any, is payable by the Defendants to the Class because of their unlawful conduct?

Common Issues Specific to the Québec Subclass

(q) Does the Defendants' conduct constitute a breach of their duty to abide by the rules of conduct incumbent on them, according to the circumstances, usage or law, so as not to cause injury to another?

(r) Does the Defendants' conduct constitute a fault engaging their solidary liability towards the Québec Subclass?

(s) Was the effect of the Defendants' conduct to cause an increase in the price paid upon the purchase, in Québec, of HDD Suspension Assemblies or of products equipped with one or more HDD Suspension Assemblies? In the affirmative, does the increase constitute damage for each member of the Québec Subclass?

(t) Are the Defendants solidarily liable to pay interest at the legal rate (including the costs of the investigation into this matter and of proceedings) as well as the additional indemnity provided for in the *Civil Code of Québec*, from the

date of service of the *Application for Authorization to Institute a Class Action* [Court File no. 500-06-001014-196] to the Québec Subclass?

Aggregate Damages

(u) Can damages for the Class be measured on an aggregate basis and, if so, what are the aggregate damages for the Class?

Punitive Damages

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

Interest

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