IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Spark Event Rentals Ltd. v Apple Inc.,*
2026 BCSC 1971

Date: 20261106
Docket: S218036
Registry: Vancouver

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

Between:

Spark Event Rentals Ltd.

Plaintiff

And

Apple Inc. and Apple Canada Inc.

Defendants

Before: The Honourable Justice Thomas

Reasons for Judgment re: Certification

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Place and Dates of Hearing:	Vancouver, B.C. July 20-24 and August 24-25, 2026
Place and Date of Judgment:	Vancouver, B.C. November 6, 2026

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Overview

[1] This matter concerns a series of agreements between Google and Apple that provide Google a default position as the internet search provider on Apple's products.

[2] The US Department of Justice, joined by 40 state Attorneys General, sued Google alleging that the agreements used to secure default distribution of Google Search violate s 2 of the *Sherman Act*, 26 Stat 209, 15 USC §§ 1-7 (United States) [*Sherman Act*]. Section 2 is the monopoly provision, and although the litigation resulted in a declaration that the agreements Google entered into with Apple violated s 2, Apple was not a party to the litigation.

[3] In *Spark Event Rentals Ltd. v Google LLC*, 2023 BCSC 1115 [*Spark* 2023], aff'd 2024 BCCA 148, I stayed the proceedings against Google so that the plaintiff could initiate arbitration against Google pursuant to the arbitration clause in the sales contract through which Spark purchased search engine advertisements from Google so the arbitrator could determine if the action commenced against Google could be resolved through the arbitration clause set out in the contract.

[4] The plaintiff discontinued its action against Google, did not initiate arbitration and continues with its action against Apple. The plaintiff now seeks to certify his action as a class action against Apple.

[5] The main issues at certification are whether the plaintiff has a viable cause of action against Apple and, if so, whether a viable methodology existed to calculate damages for the proposed class.

Certification Requirements

[6] Subsection 4(1) of the *Class Proceedings Act*, RSBC 1996, c 50 [*CPA*] lists the requirements to be met for certification of a class proceeding:

> 4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

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

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[7] If all of the requirements in s 4(1) are satisfied, the court must certify the action. Certification of an action as a class proceeding is not a comment on the merits of the claim but rather a determination of whether the action can appropriately proceed as a class proceeding: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 102 [*Pro-Sys* SCC].

Section 4(1)(a) – Cause of Action

General Principles

[8] Paragraph 4(1)(a) of the *CPA* requires the pleadings to disclose a cause of action. It is evaluated using the same test as a motion to strike. A plaintiff will meet this requirement unless, assuming all pleaded facts are true, it is clear and obvious that the claim cannot succeed or has no reasonable chance of success: *Pro-Sys* SCC at para 63.

[9] The pleadings should be read as a whole and be given a generous interpretation, with a view to accommodating any inadequacies in the allegations or drafting deficiencies, and without fastening on to matters of form: *Operation Dismantle v The Queen*, 1985 CanLII 74 at para 14, [1985] 1 SCR 441 (SCC).

[10] However, bare allegations are not material facts. Without sufficient material facts, the court should not infer facts or allow the plaintiff to rely on the possibility that new facts may emerge. The plaintiff may not be in a position to prove the facts pleaded, and may only hope to prove them; but plead them it must: *Canada (Attorney General) v Frazier*, 2022 BCCA 379 at paras 20, 71.

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The Alleged Conspiracy

[11] The plaintiff has pleaded that Google and Apple were involved in a conspiracy to prevent the introduction of competing search engines in the market for search engines and search ads:

> **Barriers to Entry**
>
> 30. There are barriers to entry in the Search Ads market that protect Google's advertising dominance. Most critically, Search Ads require a Search Engine with sufficient scale to make advertising an efficient proposition for businesses.
>
> 31. … Google dominates the Search Engine market in Canada with approximately 92 percent market share, followed by Bing with about 5 percent, and DuckDuckGo with less than two percent.
>
> 32. The creation, maintenance, and growth of a Search Engine requires a significant capital investment, highly complex technology, access to effective distribution, and adequate scale. Developing a Search Engine on the scale of Google, as well as viable search algorithms, would require an upfront investment of billions of dollars and there are few potential competitors other than Apple. The costs for maintaining a Search Engine can reach hundreds of millions of dollars a year.
>
> **The Mobile Search Distribution Channel**
>
> 33. Mobile devices like smartphones and tablets represent the largest and, over the last five years, fastest growing search distribution channel.
>
> 34. In Canada, Apple mobile devices account for roughly 53 percent of mobile-device usage, and Google mobile devices or devices using Google's Android operating system account for roughly 45 percent of mobile device usage. All other mobile operating systems, combined, account for less than one percent of mobile device usage in Canada.
>
> 35. As a result of the Agreements, Google's Search Engine is set as the default for almost 90 percent of the mobile browser usage on mobile devices in Canada. As a result, Google has preset default status for an overwhelming share of the search access points on mobile devices sold in Canada.
>
> **The Computer Search Distribution Channel**
>
> 36. In Canada, Google Chrome is the leading PC browser, with just over 60 percent market share. Apple's Safari browser has approximately 15

percent share of the PC browser market. Microsoft's Edge has approximately 10 percent market share, and Mozilla's Firefox and Internet Explorer together have approximately 10 percent share.

37. As a result of the Agreement, Google's Search Engine is set as the default Search Engine on the browsers of approximately 75% of PCs in the Canadian market. …

Google and Apple's Anti-Competitive Conduct

38. Beginning in or around 2005, Google and Apple first entered into the Agreements, which were renewed from time to time, including up to the present, and which included the following:

> (a) Apple and Google agreed to make Google the preset default Search Engine for Apple's Safari browser. In return, Google gave Apple a significant percentage of Google's advertising revenue derived from the search queries on Apple devices. Further, as part of the Agreements, Apple agreed not to compete in Search Engines or Search Ads;
>
> (b) In 2007, the Agreements were extended to cover iPhones; and
>
> (c) In 2016, the Agreements expanded further to cover additional search access points—Siri (Apple's voice-activated assistant) and Spotlight (Apple's system-wide search feature)—making Google the preset default general Search Engine for both services.

39. The Agreements give Google preset default position on all significant search access points for Apple PCs and mobile devices. In exchange, Google pays Apple billions of dollars of the revenue Google generates from Search Ads.

40. The effects of the Agreements are that:

> (a) other Search Engines are locked out of one of the most significant distribution channels for Search Engines: Apple's devices, including iPhones, iPads, laptops and desktop computers, and Apple's Safari browser;
>
> (b) Apple did not compete with Google in Search Engines and Search Ads; and
>
> (c) Google has secured and maintained default Search Engine status on Apple devices, which gives Google market power in the Search Engine and Search Ads markets.

41. Google used this market power to charge the plaintiff and the Class Members supracompetitive prices for Search Ads. The revenue generated from the supracompetitive prices is shared between Google and Apple through the Payments.

42. In the absence of the Agreements, Apple would have been likely to compete with Google by developing or acquiring, or credibly threatening to develop or acquire, its own Search Engine, and selling or credibly threatening to sell Search Ads.

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> 43. The Agreements were intended to, and did, increase prices of Search Ads, and lessened unduly competition in the sale of Search Ads. The defendants knew the Agreements would injure purchasers of Search Ads.

Section 45 Prior to March 12, 2010

Actus Reus

[12] In *Watson v Bank of America Corporation*, 2015 BCCA 362 [*Watson* BCCA], our Court of Appeal expressly defined the *actus reus* of the offence under the former s 45 of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*] as follows at para 73:

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

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

[13] In *Qualcomm Incorporated v Barroqueiro*, 2025 BCCA 65 [*Qualcomm*], after reviewing the relevant jurisprudence, the Court summarized the essence of the actus reus component as follows:

> [78] These decisions demonstrate that the elements of this offence are predicated on the existence of an agreement between at least two parties to do something that is prohibited by s. 45(1)—the *actus reus* of the offence. All of the words "conspires, combines, agrees or arranges" as used in s. 45(1) connote a meeting of the minds or a mutual understanding: *Watson* at para. 77. In *Shah v. LG Chem, Ltd.,* 2018 ONCA 819, the Ontario Court of Appeal similarly described the essence of a conspiracy under this provision as "an agreement—a meeting of the minds—to do one of the things enumerated in that provision": at para. 49. Both of these decisions were cited by the Supreme Court of Canada in *Pioneer Corp.* at para. 75.

[14] The defendants say that the pleaded material facts are limited to an existing vertical distribution agreement between Google and Apple related to search engine and search ads. The critical element changing the pleading from a vertical distribution agreement (which is *per se* permissible under the *Competition Act*) to a s 45 offence is the bare allegation that as part of the Agreements, "Apple agreed not

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to compete," and that in absence of the Agreements, "Apple would have been likely to compete with Google by developing its own Search Engine."

[15] The defendants say that the allegation of an agreement not to compete:

> 88. … is pure speculation. It is not itself a material fact, and it is not supported by any material facts. The Plaintiff cannot simply assume that an illegal agreement exists or use the pre-trial discovery process as a fishing expedition in the hope of finding missing material facts.
>
> 89. The Plaintiff's pleadings cannot escape a basic level of review for sufficiency of material facts on the basis that a conspiracy is asserted as a cause of action.

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[16] The defendants say these pleadings suffer the same problem as those struck by our Court of Appeal in *Qualcomm*: the alleged wrongdoing falls within Part VIII of the *Competition Act.* The plaintiff has attempted to recast the arrangement between Google and Apple from a distribution agreement to a conspiracy to bring the allegations within this court's jurisdiction. They say, as in *Qualcomm*, that the plaintiff failed to plead an agreement to do something prohibited by s 45(1) of the *Competition Act*: *Qualcomm* at paras 86-87, 95-102.

[17] In my view, the thrust of the defendant's position is that the plaintiff has mischaracterized the agreement between Google and Apple-- a distribution agreement to make Google the default search engine on Apple's products; as a conspiracy-- an agreement by Apple not to compete with Google in the search engine and advertising markets by making Google's search engine the default search engine on Apple products.

[18] There is no dispute over the agreement's wording or terms.

[19] The plaintiff says that the agreement's ability to be reviewed by the Competition Tribunal under Part VIII of the Competition Act does not preclude it from constituting a conspiracy under s 45 of the *Competition Act*. I agree that an agreement, in principle, could be subject to both Part VIII and s 45 of the *Competition Act.*

[20] The plaintiff says that their pleadings with respect to the agreement satisfy the *actus reus* components of s 45 due to the following material facts:

a) Apple is a potential competitor of Google in the search engine market;

b) Apple's agreement with Google caused Apple not to compete in the market; and

c) lack of competition in the market allowed Google to charge supracompetitive prices which were shared with Apple.

[21] Paragraphs 30-32 of the Amended Notice of Civil Claim ("ANOCC") allege that there are significant barriers to entry in the search engine market and that due to the nature of these barriers, including access to significant capital and to a large distribution network, Apple is one of the few potential competitors.

[22] Paragraphs 38-40 of the ANOCC allege that:

a) Google and Apple entered into an agreement to make Google the provider of search engines on Apple products in exchange for billions of dollars of revenue collected by Google from search ads on Apple products; and that

b) if Apple had not entered into the agreement, Apple would have developed their own search engine for use on their products.

[23] The central proposition raised by these pleadings is that Apple could have used its resources and distribution network to enter the search engine market, but chose not to because Google paid Apple billions of dollars in revenue-share payments to make Google the default search provider on Apple products. This arrangement gave Google market power, enabling it to charge supracompetitive advertising prices on search engines.

[24] In my view, this pleads a common purpose to perform an act prohibited by s 45 of the *Competition Act*, such that it is not "clear and obvious" that the plaintiff

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has not pleaded an agreement between Google and Apple not to compete in the search engine market.

[25] This is not a case like *Qualcomm*, in which Qualcomm unilaterally imposed conditions on other equipment manufacturers to use their chips. Here, the plaintiff pleads an agreement between two parties to pursue, as a common objective, an unlawful or criminal design: specifically, an agreement to reduce competition in the search engine and advertising markets so that supra-competitive prices can be charged. See *Qualcomm* at paras 79-81.

Mens Rea

[26] In *Watson* BCCA, our Court of Appeal summarized at para 74 the *mens rea* element of the s 45 offence as it existed prior to the 2010 amendments as requiring:

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

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

[27] The defendants say that the pleadings are insufficient to establish the required *mens rea* for the offence because:

> a reasonable business person would understand the agreement as establishing a commercial relationship that simply allowed Google to obtain distribution of Google's Search Engine and Search Ads on Apple devices.

[28] The defendants' position has two aspects. The first is that Apple is not a potential competitor in the search engine and search advertising markets on Apple devices. I have determined that this is not the case and that the pleadings set out sufficient material facts to support the allegation that Apple is a potential competitor.

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[29] The second is that, even if Apple were a potential competitor, no material facts establish that a reasonable person ought to be aware that competition would be unduly lessened.

[30] In *Qualcomm*, our Court of Appeal approved the chamber's judge's summary of the law regarding sufficient subjective and objective intent with respect to s 45:

> [84] The chambers judge referred to the principles applicable to the offence under the former s. 45(1), stemming from *Nova Scotia*. He recognized that s. 45 prohibited conspiracies that unduly limited competition and required both subjective and objective fault elements. He also recognized that the structure of the market and the behaviour of the parties formed part of the inquiry into determining if an agreement has unduly lessened competition. He concluded (at para. 116) that a plaintiff must establish three things:
>
> - there was an agreement between the defendant and another person (there must have been an actual agreement, not merely conscious parallelism: see, for example, *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para. 105);
> - the defendant intended to enter into that agreement and was aware of its terms; and
> - the evidence, viewed objectively, establishes that the defendant was aware or ought to have been aware that the effect of the agreement would be to prevent or lessen competition unduly: *Nova Scotia* at paras. 119–20.

[31] The *mens rea* component of the undue effect of the agreement was considered by the Supreme Court of Canada in *R v Nova Scotia Pharmaceutical Society*, 1992 CanLII 72, [1992] 2 SCR 606 (SCC) [*Nova Scotia Pharmaceutical*]. These considerations were summarized by our Court of Appeal in *Qualcomm*:

> [72] In *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606 [*Nova Scotia*], the Supreme Court of Canada considered the offence under s. 32(1)(c) of the *Combines Investigation Act*, R.S.C. 1970, c, C-23 (which had become the former s. 45(1)(c) of the *Competition Act* at the time of that appeal). At issue was whether s. 45(1)(c) infringed s. 7 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, because of vagueness arising from the use of the word "unduly" or the *mens rea* required by the offence. Justice Gonthier, for the Court, concluded that the section did not infringe s. 7. His analysis included some historical review of competition legislation in Canada, which is helpful to ground an understanding of where the former s. 45 was situated at the time it was in force.

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[73] First, the Court noted that the *Competition Act* was central to Canadian public policy in the economic sector and s. 45 was itself "one of the pillars" of the *Act*. The following statement of the purpose of the *Act*, from *General Motors of Canada Ltd. v. City National Leasing Ltd.*, 1989 CanLII 133 (SCC), [1989] 1 S.C.R. 641, was considered apt:

> … The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.

[74] Second, the Court made several observations particular to conspiracies in restraint of trade contrary to s. 45(1)(c). It held that (1) s. 45(1)(c) remained "at the core of the criminal part of the *Act*" and was "the epitome of competition law": at 649; (2) competition is presumed by the *Competition Act* to be in the public interest and the only issue is whether an agreement impairs competition to the extent that it will attract liability: at 650; and (3) s. 45(1)(c) lies on a continuum between a *per se* rule (which attaches consequences to precisely-defined acts irrespective of the circumstances) and a "rule of reason" (which is more general and invites in-depth inquiry into the circumstances), as it allows for discussion of the anti-competitive effects of an agreement but does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement: at 650. (These two paradigms of adjudication—the *per se* rule and the rule of reason—were developed in American antitrust law and are applied under the *Sherman Act*: *Nova Scotia* at 650.)

…

[76] Nor is there any dispute about the *mens rea* requirement. In *Nova Scotia*, the Court, relying on ss. 45(1)(c), (2) and (2.2), described (at 660) both a subjective and objective fault element:

> To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.
>
> In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly. … Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the actus reus that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business

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> person would or should have known that this was the likely effect of the agreement.
>
> [Emphasis in original.]

[32] When considering whether a reasonable business person would or should be aware that the likely effect of the agreement would be to lessen competition unduly, the court inquires into two major areas: (1) the structure of the market; and (2) the behaviour of the parties.

[33] The aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement. Market power is the ability to behave relatively independently of the market.

[34] The second part of the framework examines the parties' behaviour. *Nova Scotia Pharmaceutical* at p 656 provides a useful summary of the principles to consider in conducting such an inquiry:

> The aim of the inquiry is the likely effect of the agreement. I can only quote from *R. v. Northern Electric Co.*, 1955 CanLII 392 (ON HCJ), [1955] 3 D.L.R. 449 (Ont. H.C.), at p. 469:
>
> > In considering whether the agreement or conspiracy comes within the statute, one does not judge the unlawfulness by what was done pursuant to the agreement (although this may be evidence of the agreement) but . . . one examines the nature and scope of the agreement as proved and decides whether that agreement, if carried into effect, would prejudice the public interest in free competition to a degree that in fact would be undue.
>
> See also *Aetna Insurance, supra*, at p. 747. The agreement must be or must have been likely to injure competition, irrespective of any actual effect it may have had (although evidence of the effects offers good guidance as to the likely effects of the agreement). Some agreements do not constitute behaviour likely to injure competition, while others are highly injurious.

[35] The effect of the agreement, as pled, is clear: in exchange for a percentage of ad revenues generated by Google search engines on Apple products, Apple agreed not to develop its own search engine and compete with Google in the market for search advertising, leaving essentially no viable competitors in the market for search engines and ads. This enabled Google to charge supracompetitive prices for search ads. In my view, the magnitude of payments, "billions of dollars", that Google paid

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Apple from search advertising revenues to make Google the default search engine on Apple products is an indication of market power.

[36] In my view, it is not clear and obvious that these are not sufficient material facts to satisfy the *mens rea* component of s 45.

Section 45 Post March 10, 2010

Actus Reus

[37] In *Watson* BCCA at para 75, our Court of Appeal summarized that the *actus reus* of the amended s 45 offence includes three elements:

a) a “conspiracy, agreement or arrangement”;

b) with a “competitor”;

c) to do one of three prohibited types of conduct set forth in s 45(1)(a), (b), or (c), namely price-fixing, market allocation, or restriction of supply.

(See also *Qualcomm* at para 115).

[38] The defendants say that the plaintiff has not provided sufficient material facts to plead that Apple was likely to compete with Google for search engines on Apple products.

[39] Section 45(8) of the *Competition Act* defines competitor as follows:

> … competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (concurrent)

[40] The Competition Bureau has provided some guidance on factors it considers in determining whether an entity is a potential competitor in its “Competitor Collaboration Guidelines”:

> As noted above, section 45 applies to agreements between parties that are potential competitors. Accordingly, the fact that parties were not in competition when the agreement was concluded or during the term of the

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> agreement is not in and of itself sufficient to avoid liability under section 45. In this regard, a competitor is defined by subsection 45(8) to include firms that are likely to compete with respect to a product in the absence of the impugned agreement.
>
> As with actual competitors, the Bureau is of the view that a determination of whether parties are likely to compete does not require a detailed market analysis. Rather, to determine whether parties are potential competitors, the Bureau will consider evidence regarding whether the parties to the agreement were contemplating an offer, were likely to offer, or had previously offered the same or otherwise competing products in the same or otherwise competing regions. In evaluating this issue, the Bureau will have regard to any evidence indicating whether firms were likely to compete or had competed, including business and strategic plans prepared in the course of business, marketing and communications materials, and evidence of actual competition for similar customers in neighbouring regions or in respect of similar products. The Bureau will consider this issue with respect to the periods both prior to and following the implementation of the agreement.

[41] I have already found above that:

> The central proposition raised by these pleadings is that Apple could have used its resources and distribution network to enter the search engine market, but chose not to because Google paid Apple billions of dollars in revenue-share payments to make Google the default search provider on Apple products. This arrangement gave Google market power, enabling it to charge supracompetitive advertising prices on search engines.

[42] In my view, this finding is fatal to the positions raised by the defendants with respect to whether the plaintiff has pled a viable cause of action for violation of s 45 of the *Competition Act* after March 10, 2010.

Mens Rea

[43] In *Watson* BCCA, our Court of Appeal at para 76 adapted the approach in *Nova Scotia Pharmaceutical* to define the *mens rea* of the amended s 45 offence as "including the subjective intent to agree knowing the terms, and the objective intention to fix, maintain, increase, or control the price for the supply of the product." See also *Qualcomm* at para 115, where the *mens rea* was defined as "the subjective intent to agree to do one of these prohibited acts and the objective intent to achieve that end."

[44] Again, as I have already found above:

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> The effect of the agreement, as pled, is clear: in exchange for a percentage of ad revenues generated by Google search engines on Apple products, Apple agreed not to develop its own search engine and compete with Google in the market for search advertising, leaving essentially no viable competitors in the market for search engines. This enabled Google to charge supracompetitive prices for search ads. In my view, the magnitude of payments, "billions of dollars", that Google paid Apple from search advertising revenues to make Google the default search engine on Apple products is an indication of market power.

In my view, it is once more not clear and obvious that these are not sufficient material facts to satisfy the *mens rea* component of s 45.

No Extra-Territorial Application

[45] The plaintiff's claim against the defendants is based on an allegation that they implemented a US agreement that gives effect to a foreign conspiracy in Canada.

[46] The defendants say that s 45 of the *Competition Act* does not apply to conduct outside Canada. When read in conjunction with s 46, it is apparent that ss 45 and 46 are intended to provide the basis for asserting substantive and personal jurisdiction over the conduct of entities in Canada that implement a conspiracy entered into abroad, not to assert jurisdiction over the foreign actors.

[47] I agree with the plaintiff that our Court of Appeal in *NHK Spring Co. Ltd. v Cheung*, 2024 BCCA 236, leave to appeal to SCC granted 2025 CanLII 116171, [2024] SCCA No 372 (judgment under reserve), found that it is not plain and obvious that s 45 could not capture foreign conduct causing harm in Canada: paras 64-65, 71-72, 92-93, 102.

[48] However, I disagree with the defendants' characterization of this issue. At paras 44 and 63 of the ANOCC, the plaintiff pleads that Canadian companies owned and operated by US parent companies implement and carry out the agreement in Canada. In my view, this brings the allegations within Canada and within the scope of the *Competition Act*, regardless of the Act's extraterritorial application.

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Unlawfulness Applied to Unlawful Means Conspiracy and Unjust Enrichment

[49] The unlawfulness component of the plaintiff's unlawful means conspiracy and unjust enrichment pleadings arises from two distinct alleged wrongful acts. The first is a violation of s 45 of the *Competition Act*. The defendants concede that a valid conspiracy action is sufficient to support the alleged tort of unlawful means and claim of damages pursuant to the doctrine of unjust enrichment.

[50] I have already determined that the pleadings set out a viable cause of action for breach of s 45 of the *Competition Act*.

[51] In my view, the conclusions I drew from the *mens rea* analysis—conducted to assess whether the pleadings contained sufficient material facts to satisfy the *mens rea* component of the s 45 allegation—also establish sufficient pleadings to satisfy the intent requirements of the tort of unlawful means conspiracy. Namely, that the defendant's conduct was "directed towards" the plaintiff and that the defendants knew that injury to the plaintiff was likely to result as a matter of constructive intent.

[52] If the plaintiff is ultimately unsuccessful in establishing that the agreements constitute a breach of s 45, and the agreements are found to be vertical distribution agreements, they would not constitute a *per se* breach of Part VIII of the *Competition Act*, and as such would not form a basis for the unlawfulness component of a civil conspiracy: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2011 BCCA 186 at para 16 [*Pro-Sys* BCCA].

[53] In this case, the plaintiff alternatively advances a cause of action for breach of the *Sherman Act*:

> The Agreements violate the *Sherman Act.* In particular, as found by Judge Mehta of the United States District Court of the District of Columbia in *US v. Google,* 747 F. Supp. 3d 1 (D.D.C. 2024), the Agreements maintained Google's monopoly in the general search services and general text advertising markets, violating Section 2 of the *Sherman Act,* and had anticompetitive effects including (1) market foreclosure, (2) preventing rivals from achieving scale, and (3) diminishing the incentives of rivals to invest and innovate in general search.

[54] The defendants raise two issues with the adequacy of the pleading in this scenario:

a) the *Sherman Act* is a foreign penal law. As such, the alleged violation cannot supply the unlawful conduct element of the tort in Canada; and/or

b) the decisions of the United States District Court for the District of Columbia (the "US District Court") in *United States of America et al. v Google LLC*, Case No. 20-cv-3010 (APM) (United States) [*US v Google*] do not find any unlawful conduct by Apple.

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Foreign law as a basis for unlawful conduct in Canada

[55] In *Pro-Sys,* the plaintiff pleaded an unlawful means conspiracy based, among other things, on an alleged breach of foreign law: *Pro-Sys* BCCA at para 38.

[56] In *Fairhurst v Anglo American PLC*, 2014 BCSC 2270 [*Fairhurst*], Justice Brown reviewed the somewhat convoluted jurisprudence surrounding the tort of unlawful means conspiracy generated by *Pro-Sys*:

> [29] The plaintiff pleads that actions of the defendants were calculated to produce and have produced pernicious monopolies and that these anti-competitive acts have permitted the defendants the opportunity (that they took) to charge and receive artificially inflated and unreasonable prices.
>
> [30] The plaintiff argues that the unlawfulness of restraint of trade is relevant to two issues in this case:
>
> 1. to address the juristic reason element of unjust enrichment; and
> 2. as the unlawful means of unlawful means conspiracy.
>
> [31] Similar pleadings were considered by this Court in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2006 BCSC 1047, rev'd 2011 BCCA 186, varied 2013 SCC 57. There, Mr. Justice Tysoe (as he then was) said:
>
> (iii) Restraint of Trade
>
> [50] The Defendants say that conduct amounting to a restraint of trade at common law does not satisfy the second element of illegal or unlawful means of the tort of interference with economic relations. In this regard, they point to the English decision of *Brekkes v. Cattel*, which was distinguished on another ground in Harbord Insurance Services. Relying on *Mogul Steamship Co. Ltd. v. McGregor Gow & Co.*, [1892] A.C. 25 (H.L.), Pennycuick V.-C. held that the mere

circumstance of restraint of trade at common law does not render an act unlawful for the purpose of the tort of intentional interference with economic interests.

[51] However, a contrary view was advocated by Lambert J.A. in his dissent in *No. 1 Collision*:

> If an act in restraint of trade is a wrong rectifiable, in relation to the time after the hearing, by the remedy of an injunction, then, in my opinion, that wrong ought, in appropriate circumstances, to be compensated for, with respect to the period from when the wrong was committed until the court hearing, by a money award, call it equitable compensation or call it damages, as you will. What is more, having been identified as a wrong, that is, an unlawful act which the perpetrator was not at liberty to commit, then, subject only to arguments about justification, the wrongful restraint of trade supports, in my opinion, a claim for the tort of deliberate unlawful interference with economic interests.
>
> I realize that the conclusion that I have reached in that respect is not yet independently supported by Canadian authority, or, for so far I know, by direct Commonwealth authority. But once the principles about mingling law and equity in their remedies, as enunciated by the majority of the Supreme Court of Canada in *Canson v. Boughton & Co.* have been applied to wrongful restraint of trade, those principles support the wrongful restraint of trade as being compensable by a money award, compensation or damages, and so lead to the view that as a deliberate unlawful act it will also support the tort of interference with economic interests.
>
> (¶s 183 and 184)

[52] The comments of Lambert J.A. were made in a dissenting judgment and were not addressed by the majority, who decided the appeal on other grounds. Hence, the comments are not binding on me and constitute no more than a novel argument unsupported by authority. However, Lambert J.A. is a distinguished jurist and his views are deserving of respect. While it is a novel argument, it is one deserving of consideration upon all of the relevant evidence. Under Hunt, it is not an argument which should be rejected on a Rule 19(24) application.

[53] My conclusion is that it is not appropriate for me to order that the Plaintiffs' pleading of restraint of trade as the illegal or unlawful means of the tort of interference with economic relations be struck out.

[32] On appeal from this decision, Mr. Justice Donald said:

> [33] Microsoft argues that the plaintiffs cannot supply the common element by proof of market behaviour said to be in restraint of trade. Unless and until such conduct is declared by the Competition Tribunal to violate Part VIII of the *Competition*

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> *Act*, it is not illegal in Canada. Otherwise, the common law remains as expressed in such cases as *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*, [1892] A.C. 25 (H.L.), to the effect that a contract in restraint of trade is voidable as between contracting parties but cannot ground an action by a third party for damages. According to Microsoft, Parliament altered the common law not by giving third parties a right of action but by creating an administrative scheme where the circumstances can be assessed by those with special expertise and where the remedy, if any, will be carefully measured. In short, Microsoft suggests that the plaintiffs advance a case not known to law. There is no unlawful interference with economic interests, no unlawful purpose for conspiracy, and the juridical reason for the benefits said to be unjust enrichment – namely the contracts and arrangements with OEMs – cannot be negatived.
>
> …
>
> [37] Novelty of a disputed claim is, as Tysoe J. held, not a basis for striking it out: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. The treatment of restraint of trade activity as supplying the unlawful act ingredient for the claims may be a small or a large step, but I am not persuaded that the law is so fixed in the 19th century economic philosophy represented by Mogul Shipping that on the right facts the step cannot be taken.

Mr. Justice Donald addressed the issue in dissent. The judges in majority did not need to address the issue, as they allowed the appeal on other grounds.

[33] The matter was then addressed by the Supreme Court of Canada:

> [82] Microsoft argues that the claims for unlawful means conspiracy and intentional interference with economic interests should be struck because their common element requiring the use of "unlawful means" cannot be established.
>
> [83] These alleged causes of action must be dealt with summarily as the proper approach to the unlawful means requirement common to both torts is presently under reserve in this Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2012 NBCA 33, 387 N.B.R. (2d) 215, leave to appeal granted, [2012] 3 S.C.R. v. Suffice it to say that at this point it is not plain and obvious that there is no cause of action in unlawful means conspiracy or in intentional interference with economic interests. I would therefore not strike these claims. Depending on the decision of this Court in Bram, it will be open to Microsoft to raise the matter in the BCSC should it consider it advisable to do so.

[34] In *Bram*, the Supreme Court addressed the requirements for the unlawful means tort. It did not expressly deal with restraint of trade as the

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> unlawful means in unlawful means conspiracy, or in the context of unjust enrichment. Indeed, the court recognized that there was no need for consistency in the unlawful means component of unlawful means conspiracy and the tort of causing loss by unlawful means.
>
> [35] I am left with the decisions in Microsoft. At this point, it is not plain and obvious that restraint of trade cannot be the unlawful means in unlawful means conspiracy and cannot negative the juristic reason in unjust enrichment.
>
> [36] The plaintiff pleads that the defendants have been unjustly enriched by the receipt of the artificially inflated charge on the sale of diamonds, that the plaintiff and members of the class suffered a corresponding deprivation, and that the artificially induced overcharge resulted from wrongful or unlawful acts so there can be no juridical reason for them to retain the overcharge. The plaintiff has pleaded the elements of unjust enrichment.

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[57] Justice Brown concluded that the most prudent course was to follow the Supreme Court of Canada's view that it is not plain and obvious that such a restraint of trade cannot be the unlawful means in an unlawful means conspiracy and cannot negate the juristic reason in unjust enrichment.

[58] A similar result was reached by our Court of Appeal in *Qualcomm* at paras 164-167 and 171-172.

[59] The principles from *Fairhurst* and *Qualcomm* guide my analysis here. Applying these principles to the circumstances of this case, I also conclude that it is not plain and obvious that such a restraint of trade cannot be the unlawful means required in an unlawful means conspiracy, nor is it plain and obvious that it could negate the juristic reason in unjust enrichment.

Admissibility of the US v Google Case

[60] As a threshold issue, I must address the admissibility of the *US v Google* in relation to the matter at hand. In *US v Google*, US District Judge Mehta rendered two decisions relevant to these proceedings:

a) On August 5, 2024, Judge Mehta issued a Memorandum Opinion, 747 F Supp 3d 1 (DDC 2024), No 1:20-cv-03010-APM, ECF No 1033 (United States), which provided the Court's ruling on the alleged violations of the *Sherman Act* [*US v Google* Liability Decision]; and

b) On September 2, 2025, Judge Mehta subsequently issued a further Memorandum Opinion, 2025 WL 2523010 (DCC 2025), No 1:20-cv-03010-APM, ECF No 1436 (United States), where the Court ruled on the antitrust remedies necessitated by the Liability Decision [*US v Google* Remedies Decision]

(collectively, the “Decisions”).

[61] In my view, the facts stated in the Decisions and his other decisions in *US v Google* entered as exhibits in these proceedings, which provide specific references to the source of those facts, are admissible as evidence which can establish some basis in fact. Judge Mehta's conclusions are admissible on the issue of a breach of foreign law claim, but not to establish some basis in fact at large. However, the facts Judge Mehta relied on to reach his conclusions are admissible to support an inference of his conclusion, or other inferences that may or may not be consistent with his conclusions.

Conduct of Apple in the US v Google Case

[62] In 2020, the US Department of Justice, joined by 40 state Attorneys General, sued Google alleging that the agreements used to secure default distribution of Google Search violate s 2 of the *Sherman Act*.

[63] In the *US v Google* Liability Decision at p 8, the US District Court determined in that Google had violated s 2 of the *Sherman Act*:

> Specifically, the court holds that (1) there are relevant product markets for general search services and general search text ads; (2) Google has monopoly power in those markets; (3) Google’s distribution agreements are exclusive and have anticompetitive effects; and (4) Google has not offered valid procompetitive justifications for those agreements. Importantly, the court also finds that Google has exercised its monopoly power by charging supracompetitive prices for general search text ads. That conduct has allowed Google to earn monopoly profits.

[64] The Court specifically commented on the distribution agreements that Google entered into with Apple, and determined that that agreement breaches s 2 of the

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Sherman Act because the agreement had an anti-competitive effect by influencing Apple's decision to stay out of the search engine market:

> *Entering Search.* Apple has the financial, technological, and human resources to develop or acquire a competing GSE. In 2018, Apple hired the former head of Google Search, John Giannandrea. Tr. at 2164:18–2165:12 (Giannandrea). Since then, Apple has been "investing quite a lot in" search by "building all of the technology [it] would need to build a general-purpose search engine." *Id.* at 2245:2-6 (Giannandrea); *id.* at 2247:14-16 (Giannandrea); FOF ¶ 301 (describing dollars and manpower dedicated to search at Apple). Both Apple and Google understand that Apple could develop its own GSE to replace Google as the default in Safari. FOF ¶¶ 300–301. Apple has decided not to do so thus far. FOF ¶ 302.
>
> The ISA revenue share is an important factor in Apple's calculus. In return for exclusive and non-exclusive default placements (i.e., user-downloaded Chrome and Safari default bookmarks), Google pays Apple [redacted]% of its net ad revenue, which amounted to $20 billion in 2022. FOF ¶¶ 298–299. This is almost double the payment Google made in 2020, which was at that time --% of Apple's operating profit. *Id.* Google pays Apple more in revenue share than it pays all other partners combined. FOF ¶ 299. If Apple were at all inclined to enter the market for general search, it would have to be prepared to lose these large revenue share payments. FOF ¶¶ 302–326.
>
> But the loss of revenue share is not the only reason Apple has not entered the market. There are other costs and risks. Although Apple has built an infrastructure to deliver some search results to its users, it would have to commit billions more to build and maintain a fully functioning GSE. FOF ¶ 302. It also would need to develop an ad platform to monetize searches. Critically, Apple would have to be willing to put its brand reputation—and possibly device sales—at stake if it were to produce an inferior or unpopular product. *See id.* The required investment also would divert capital from other possibly profitable ventures. *Id.* Even if all went well, Apple's own projections estimate that it would lose over $12 billion in revenue during the first five years following a potential separation from Google. *Id.*
>
> Still, the ultimate question is whether the ISA reasonably appears capable of significantly contributing to keeping Apple on the sidelines of search, thus allowing Google to maintain its monopoly. *See Microsoft*, 253 F.3d at 79. The revenue share payments unquestionably have that effect. The prospect of losing tens of billions in guaranteed revenue from Google—which presently come at little to no cost to Apple—disincentivizes Apple from launching its own search engine when it otherwise has built the capacity to do so. The payments need not be Apple's sole reason for staying out of search to constitute an anticompetitive effect. Plaintiffs are not required to prove that Google's "continued monopoly power is precisely attributable to" the ISA. *Id.*[14]
>
> …

[14] In its discussion of Apple, Google references the principle that a firm's "make or buy" decision typically does not offend antitrust law. GRCL ¶ 40 (citing Jack Walters & Sons Corp.

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> v. Morton Bldg., Inc., 737 F.2d 698, 709–10 (7th Cir. 1984) (holding that a firm's decision to vertically integrate—the decision to "make or buy" a good or service— typically does not offend antitrust law)); see also Tr. at 8698:25–8699:9 (Israel). But that principle has no application here because the question is not whether Apple's decision to remain out of search is exclusionary, but whether the exclusivity of ISA has an anticompetitive effect by influencing that decision.

(*US v Google* Liability Decision at pp 245-246).

[65] In the *US v Google* Remedies Decision at p 81, the Court restated that it had "determined that Google's exclusive distribution agreements significantly contributed to the maintenance of its monopoly power." The Court reiterated that:

> … the agreements had four main anticompetitive effects: they (1) foreclosed a substantial portion of the relevant markets, thus "impair[ing] rivals' opportunities to compete," Google, 747 F. Supp. 3d at 159; (2) "den[ied] rivals access to user queries, or scale, needed to effectively compete," id.; (3) "reduced the incentive to invest and innovate in search," id. at 165; and (4) "enabled Google to increase text ads prices without any meaningful competitive constraint," thereby allowing Google to earn "monopoly profits to secure the next iteration of exclusive deals through higher revenue share payments," id. at 178; see also id. at 162 (image of "network effects" flywheel). These effects did not persist independently. Together, they enabled Google to widen the moats and pull up the drawbridges to ward off competition.
>
> …
>
> And then there is Apple. The court found that "[t]he prospect of losing tens of billions in guaranteed revenue from Google—which presently come at little to no cost to Apple— disincentivizes Apple from launching its own search engine when it otherwise has built the capacity to do so." Id. at 168. Remedies-phase testimony from Eddy Cue, Apple's Senior Vice President of Services, confirmed that finding. Cue testified that he couldn't say he "would disagree with" the court's statement "that it was a disincentive for [Apple] to do a search engine based on the payments that [Apple was] receiving from Google. . . . It's a significant amount of money." Rem. Tr. at 3825:15-20 (Cue). Cue added that Apple still was unlikely to enter the search business because "Google does an amazing job." Id. at 3826:9-10 (Cue). Even so, Cue's testimony establishes that Google's high revenue share payments deterred Apple from trying to capture for itself all the advertising rents that flow through the Safari browser's default search box.
>
> …
>
> This summary recitation of the court's findings demonstrates that the court's liability determination was supported by more than the barest of inferences. The evidence presented required no guesswork about the exclusive agreements' impacts on competition—they "froze" the search ecosystem in place... In this case, by contrast, Google's exclusive agreements made certain that no competitor would try to lay siege to the castle.

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(*US v Google* Remedies Decision at pp 82, 84-85).

[66] The defendant says s 2 of the *Sherman Act* is the monopoly provision and focuses only on one party: Google. Therefore, although Apple signed the agreement with Google, the Court found that it was Google's conduct in entering into multiple distribution agreements, with multiple parties, to obtain monopolistic control over the search ad market that violated s 2 of the *Sherman Act.* Thus, these decisions do not involve Apple; they relate solely to Google.

[67] The plaintiff says Google's agreements with Apple, along with other distributors, violated the *Sherman Act*. The US District Court found that the agreement at issue in this action violated the *Sherman Act*. Google's non-defendant status does not invalidate the finding that the agreement Google entered into with Apple violates the *Sherman Act*.

[68] In my view, it would be premature to decide this issue given the uncertainty of the law regarding the extent of unlawful means necessary to constitute an unlawful means conspiracy and what would be sufficient to negate the juristic reason in unjust enrichment. Therefore, it is not plain and obvious that the alleged breach of the *Sherman Act* cannot be the unlawful means in an unlawful means conspiracy or cannot negate the juristic reason in unjust enrichment.

[69] Based on these findings, I am satisfied that it is not plain and obvious that the allegations of unlawful means conspiracy and unjust enrichment are not viable causes of action.

Extracontractual Liability under the Quebec Civil Code

[70] Civil extracontractual liability under the *Civil Code of Québec*, CQLR c CCQ-1991 requires the plaintiff to plead: (1) the defendants committed a fault; (2) the plaintiff and members of the class suffered an injury; and (3) a causal connection exists between the fault and the injury: *Infineon Technologies AG v Option Consommateurs*, 2013 SCC 59 at para 78.

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[71] The defendants objected to the pleadings on the basis that the plaintiff had not pleaded a breach of s 45 of the *Competition Act*, or an appropriate unlawful act. I have found that these issues have been appropriately pleaded and therefore find that it is not plain and obvious that the pleading of extracontractual liability under the *Québec Civil Code* is not a viable cause of action as well.

Application to Strike

[72] In 2025, the defendants brought an application to strike the plaintiff's ANOCC. In *Spark Event Rentals Ltd. v Google LLC*, 2025 BCSC 1860, I applied the factors summarized in *Shaver v Mallinckrodt Canada ULC*, 2021 BCSC 455 to the circumstances of the case and determined that judicial efficiency and timely resolution of the dispute required hearing the application at the certification hearing.

[73] The application to strike the pleadings was unsuccessful, except as to the unlawful act portion of the pleadings referring to Google. The pleadings identified the breach of the *Sherman Act* as a finding, rather than pleading the findings of Judge Mehta in the facts section and providing further details of the alleged breach.

[74] The defendants argued that the breach had to be pleaded as a fact, with additional particulars where required. In my view, the defendants are technically correct on this point. I say "technically" because much of the hearing focused on reviewing Judge Mehta's decisions in *US v Google*. As such, there was little confusion about what the plaintiff relied on as an unlawful act under the *Sherman Act*. However, the plaintiff knew of this deficiency and took no steps to remedy it before the hearing.

[75] The plaintiff did not put forward the proposed amendment until prompted by the Court after the start of the fourth day of the certification hearing.

[76] The certification hearing was adjourned so the plaintiff could apply to amend its pleadings, the defendants would have time to respond, and further argument could be provided on the unlawful act.

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[77] The defendants argue that the proposed amendments should not be allowed because of the egregious passage of time, the delay, the added costs to the proceedings, and the plaintiff's lack of an acceptable explanation for the delay.

[78] The defendants relied on *676083 B.C. Ltd. v Revolution Resource Recovery Inc.*, 2021 BCCA 85:

> [58] In *Basyal* at para. 43, the Court confirmed: "The case law is also clear that the requirement that the material facts be pleaded applies to class actions". The Court, at paras. 73–74, considered that the plaintiffs' unjust enrichment pleadings were inadequate, and it observed, at para. 72, that an aspect of the plaintiffs' claim pertained to "obviously contractual obligations that, if breached, would be compensable in the [contract] claim." In *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 103, 113, the Court similarly considered that the plaintiff's various restitutionary claims should not have been certified as pleaded. See also *Simsek* at para. 37.
>
> [59] I consider it plain and obvious that 676's claim in unjust enrichment, as pleaded, does not advance a proper cause of action. Normally, absent some form of particular prejudice, this Court would consider whether it is in the interests of justice to permit a plaintiff to make appropriate amendments to its pleadings, as opposed to striking out such pleadings on the basis that they are deficient. In *Sandhu*, however, the Court said that "in this mix [the court will consider] the length of time the plaintiff has had to 'get it right'": at para. 44. The Court adopted the following observation from *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36:
>
> > [92] Since [the plaintiff] has failed to plead any material facts in support of the required causal connection, we may at this late stage infer that she is unable to do so.
>
> [60] In this case, the action was commenced nearly four years ago, and the 4th ANOCC is 676's fifth pleading. The question of whether a claim in unjust enrichment can properly be grounded on those pleadings was squarely before the chambers judge, and it was squarely raised on appeal. 676 has had ample time to advance that claim properly. The nature of the deficiencies in its unjust enrichment claim are fundamental and not merely technical. Furthermore, the thesis of its claim, in relation to the Government Surcharge/Material Ban, is entirely contractual. Neither party made any meaningful submission, in writing or orally, that deviated from that focus. In such circumstances, I do not consider that 676 should be provided with a further opportunity to amend its unjust enrichment claim. It has had sufficient time to "get it right," and it can be inferred that it is unable to do so. This conclusion is also in keeping with the Court's gatekeeping role as described in *Pro-Sys Consultants* and *Sherry*.

[79] The defendants also relied on *MacKinnon v Pfizer Canada Inc.*, 2023 BCSC 2223 [*MacKinnon*]:

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> [74] The Third Amended NOCC simply does not plead material facts capable of meeting the notice requirements of the Alberta or Ontario *CPA*s. Accordingly, the plaintiffs' claims under those statutes are bound to fail: *Bhangu* #1 at paras. 59–60; *Krishnan BCSC* at para. 87.
>
> [75] I have considered whether the plaintiffs ought to be granted a further opportunity to amend to address the deficiencies in their pleading regarding notice under the Alberta and Ontario statutes and concluded that it would not be in the interests of justice to permit further amendments. The plaintiffs have had in excess of four years to properly plead their claims, including those being advanced under consumer protection legislation in the Other Jurisdictions. While it is the case that amendments should be permitted, fairness—including to defendants—requires that the essentials of a cause of action must be pleaded, else the pleadings may be found to be fatally lacking. This includes consideration of the length of time the plaintiff has had to "get it right": *Sandhu v. HSBC Finance Mortgages Inc.,* 2016 BCCA 301 at para. 44.
>
> [76] In particular, Horsman J. expressly identified the defects in the Second Amended NOCC pertaining to the issue of notice under the Alberta and Ontario *CPA*s in *Certification BCSC*, and leave to amend was granted. Despite this, the plaintiffs nonetheless failed to plead sufficient material facts in the Third Amended NOCC to address those deficiencies. This leads inevitably to the conclusion that the plaintiffs are unable to do so. Granting further leave to amend would thus serve no useful purpose.
>
> [77] I therefore conclude that it is plain and obvious that the plaintiffs' claims under the Alberta and Ontario *CPA*s and the PEI *BPA* are bound to fail such that the requirement of pleading a reasonable cause of action under s. 4(1)(a) of the Class Proceedings Act has not been met. Accordingly, I decline to certify proposed common issues (j), (k), (p), (q), (v), and (w) of the plaintiffs' Revised Common Issues as set out in Schedule "A" to these reasons on this basis.

[80] In my view, the circumstances set out in these cases are not directly applicable. There has been unexcused delay. However, during the hearing, it was clear that the unlawful act the plaintiff relied on was Judge Mehta's findings in *US v Google*. The defendants' objection was more of a technicality. This was not a situation where the plaintiff had made multiple attempts to amend their pleadings, leaving the court to infer that the plaintiff would be unable to amend pleadings that would not be bound to fail.

[81] Amendments to pleadings are a recurring problem in certification hearings. However, given the early stage at which the application is brought, the multitude of issues the parties tend to raise (some more forcefully than others), and the procedural nature of the hearing, allowances must be made.

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[82] For these reasons, I allowed the plaintiff's proposed amendment. This defeated the defendants' application to strike on the ground that the unlawful act was not properly pleaded.

General Principles – Some Basis in Fact

[83] Regarding s 4(b)-(e) of the *CPA*, the plaintiff must demonstrate "some basis in fact" for each remaining certification requirement. When assessing whether the plaintiff has met this standard, the court should not conduct a detailed weighing of evidence and should limit itself to determining if there is some evidence supporting the certification requirements: *AIC Limited v Fischer*, 2013 SCC 69 at para 43 [*AIC*].

[84] In *Noramco LLC v British Columbia,* 2026 BCCA 272 [*Noramco*], our Court of Appeal provided the following principles to guide certification:

> [3] ... When one examines the fundamentals of the claims brought by the various governments arising out of a well-documented national opioid crisis, it is clear the governments advance similar claims about the origins of that crisis and the defendants' connections to it. Not only is there a demonstrated factual foundation to these claims, their resolution in a class proceeding is reasonable. Indeed, when one compares the alternative of individual claims advanced in each province or territory litigating essentially the same questions multiple times, the preferability of a class proceeding is obvious.
>
> [4] The certification application and the subsequent appeals are examples of the unhelpful and disproportionate overcomplication of what should be a relatively straightforward inquiry brought early in a proceeding. That inquiry is to determine, as a procedural matter, whether there is some basis in fact to conclude that claims raise issues that can be decided commonly so as to avoid duplication of fact finding or legal analysis and whether it is preferable to resolve those issues in a common issues trial. The screening of cases through this lens should be functional and pragmatic, designed, not as a concealed merits test, but as a means of ensuring that a case will not founder at the merits stage for lack of commonality or preferability.
>
> [5] In our view, it is time to return to basics. We encourage parties as well as chambers judges to focus on the procedural issues engaged by commonality and the other certification criteria.

[85] In my view, the Court of Appeal is responding to the time, complexity, and expense that have crept into the current certification process over the years, and the Court's comments signal a return to basic principles.

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Section 4(1)(b) – Identifiable Class of Two or More People

[86] Paragraph 4(1)(b) of the *CPA* requires the plaintiff to demonstrate some basis in fact that "there is an identifiable class of 2 or more persons." The purpose of the class definition is to identify who is entitled to notice, who is entitled to any relief awarded, and who is bound by the judgment: *Jiang v Peoples Trust Company,* 2017 BCCA 119 at paras 74, 82 [*Jiang*].

[87] In *Jiang* at paras 82 and 88-92, the Court of Appeal summarized the principles governing this criterion as follows:

a) the class must be defined with reference to objective criteria that do not depend on the merits of the claim;

b) the class definition must bear a rational relationship to the common issues it should not be unnecessarily narrow or broad; and

c) the plaintiffs must establish 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.

[88] The plaintiff defines the proposed class as follows in the ANOCC:

> 6. The plaintiff, Spark Event Rentals Ltd., is an event rentals company in Pemberton, British Columbia.
>
> 7. The action is brought on behalf of members of the class (the "Class Members") consisting of the plaintiff and all residents of Canada who purchased Search Ads from Google from 2005 to the present (the "Class Period").
>
> 8. Search Ads are defined as all types of advertisements displayed on a Search Engine Results Page in response to online search queries, except for specialized search advertisements displayed on specialized search engines. Specialized search engines index pages for particular topics only, such as travel bookings.
>
> 9. Excluded from the class are the defendants, their parent companies, subsidiaries and affiliates.

[89] The defendant does not take serious issue with the class definition. I am satisfied that it complies with the principles summarized in *Jiang*.

Section 4(1)(c) – Do Common Issues Predominate Over Issues Affecting Individual Members?

Legal Requirement of Commonality

Position of the Defendants

[90] The defendants say that the plaintiff must show some basis in fact for each element of the alleged breach of s 45, from 2005 to present. They rely on several paragraphs from *McKinsey & Company, Inc. United States v British Columbia,* 2026 BCCA 284 [*McKinsey*] and *Noramco*, which in my view, were best summarized at paras 80-81 of *Noramco*:

> [80] Courts have frequently recognized that much of the evidence necessary to address the merits of alleged common issues may well be unavailable to plaintiffs before discovery. It may come to light only after certification. This practical reality should not frustrate the certification of an otherwise legitimate class proceeding. Hence, for example, if the appellants are correct, then a brilliantly conceived and well-executed secret conspiracy might never be capable of certification if a plaintiff had to demonstrate evidence of where agreements were reached, their exact terms, and among whom they were made. This is why it is sufficient to show some basis in fact that such agreements might or could have been made, grounded in inferences.
>
> [81] In our view, conspiracy is an example of a cause of action where evidence that there was a conspiracy is relevant to the commonality assessment. There must be some minimal evidence that agreements "might or could have been made" to conclude that "the claims of the class members raise common issues" within the meaning of s. 4(1)(c) of the *CPA*. The certification judge found the Province had tendered such evidence.

[91] The defendants say the nature of the conspiracy allegations against Apple and Google require the plaintiff to do the following:

a) provide evidence of an agreement for Apple not to compete; this includes the *mens rea* requirement of evidence of intention to commit the criminal act;

b) provide evidence of an undue lessening of competition arising from the agreement. This requires:

    i. defining the relevant market and substitutes;

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ii. an analysis of the structure of the market and determination of market power; and

iii. an analysis of the behaviours of the parties to the alleged agreement, specifically the object of the agreement and likely effect of the parties' actions;

c) the plaintiff must show that Apple was a potential competitor of Google for search engines; and

d) given the dramatic changes in the search market and growth of Apple from 2005 to present, the plaintiff must have some evidence of each of the above elements throughout the alleged time of the class.

[92] In *Noramco*, this was essentially the argument raised by the appellants at paras 70-73, and was rejected by our Court of Appeal at paras 75-84. Specifically, the court noted:

> [75] … the purported error arises from what evidence the appellants say is necessary to establish a common issue for the purposes of certification.
>
> [76] In our view, the appellants demand a degree of specificity and particularity in the evidence that goes well beyond what the cases demonstrate is sufficient to provide some basis in fact for a common issue.

[93] The Court then provided the following guidance with respect to what would satisfy the need to provide "some minimal evidence" that the allegedly wrongful conduct would be common across class members:

> [78] In our view, to demonstrate some basis in fact that industry-wide wrongful conduct might or could have occurred does not require direct evidence specific to each defendant in relation to each Opioid Product, in respect of each statement made by each defendant about the attributes of its products, or direct evidence specific to each defendant about coordination with other defendants. Generalized expert evidence can be enough to show there is some factual basis for the common issues claims. Similarly, in our view, evidence illustrative of a more general claim may be sufficient.
>
> …
>
> [84] One last word. Approaching the some basis in fact standard in this way does not mean theoretical commonality alone is enough to certify a common issue, or that the judge certified the common issues exclusively on

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> the basis of commonality. He did not. Moreover, we are satisfied it was open on the record for the judge to conclude there was some basis in fact supporting the certification of common issues relating to systemic or industry-wide conduct. This is not a case in which, as the appellants submit, issues were certified against defendants solely on the basis they were participating in a particular industry.
>
> [Emphasis in original.]

[94] I do not accept that the Court of Appeal's comments on this issue were designed to be limited to the *Noramco* case despite the specific, unique, and perhaps exceptional circumstances surrounding that litigation.

Position of the Plaintiff

[95] The plaintiff relies on the same recent Court of Appeal authorities, but stresses the comments of the Court at paras 41-42 of *Noramco*:

> [41] There must be an evidentiary foundation to satisfy each of the certification criteria. Simply put, it is not sufficient merely to plead a common issue. More is required. There is no dispute s. 4(1)(c) of the *CPA* requires "some basis in fact" to support a common issue: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 27; *Pro-Sys* at paras. 99–100; *Hollick* at para. 25. This means there must be some basis in the evidence showing the issues are common to the class members. The certification stage is not meant to test the merits of the action: *Pro-Sys* at para. 99, citing *Hollick* at para. 16. The focus instead is on "whether there is a rational connection between the class as defined and the asserted common issues": *Hollick* at para. 19. The class representative must show some basis in fact to support the certification order. The evidence on the application should be confined to the certification criteria: *Hollick* at para. 25.The focus, then, is on the certification criteria rather than the factual basis for the claim.
>
> [42] In *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, Chief Justice Bauman reaffirmed the commonality inquiry is not a test of the merits of the claim:
>
> > [57] The certification judge is not to conduct an adjudication on the merits. <u>There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis</u>: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 99 [*Pro-Sys*], citing *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. The evidence at this stage "goes only to establishing whether these questions are common to all the class members": *Pro-Sys* at para. 110. Said another way: "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis": *Grossman v. Nissan Canada*, 2019 ONSC 6180.

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> [Emphasis in original.]

[96] They rely on these passages for the proposition that all they need do to establish commonality is to provide some basis in fact that the proposed questions are common to all the class members.

[97] The plaintiff also says that the proposition of Chief Justice Hinkson, as he then was, in *O'Connor v Canadian Pacific Railway Limited*, 2023 BCSC 1371 at para 263 has been overturned by *Noramco.* That proposition reads as follows:

> I struggle to see how the plaintiff can meet his burden of showing that an issue can be proven in common for the class without providing some basis in fact that there is a common issue in the first place. Thus, whether the one-step or two-step articulation of the test is used, the outcome is the same.

[98] As such, the plaintiff argues that one need not show evidence of the underlying cause of action to establish commonality.

[99] In my view, the plaintiff's argument was rejected by our Court of Appeal in *Noramco* at paras 78 and 84 (referred to earlier), and in *McKinsey* at paras 54-55 and 61:

> [54] In *O'Connor*, Chief Justice Hinkson recognized there was uncertainty in the caselaw regarding the evidence required to meet the commonality requirement of the certification test. He referred to numerous cases in this province and elsewhere that applied the two-step approach but considered the plaintiff's burden to be the same whether the test involves one or two steps, and stated:
>
> > [263] I struggle to see how the plaintiff can meet his burden of showing that an issue can be proven in common for the class without providing some basis in fact that there is a common issue in the first place. …
>
> [55] I agree with the observations in *Lilleyman* and *O'Connor* that describing the some basis in fact requirement as involving one step or two does not assist in the analysis. The two-step approach has not been endorsed by this Court. Most recently, in *Noramco*, the Court rejected it as unhelpful, stating "there is no utility in chambers judges in this province continuing to evaluate whether a two-part test is the test or is satisfied": at para. 86. The approach in British Columbia is a functional one that does not require two distinct categories of evidence but simply requires a minimum evidentiary foundation supporting the existence of a common issue: see *Nissan* at paras. 132–134. The "existence" of the common issue is often implicit in the pleaded cause of action and to that extent, evidence that the impugned conduct could or might have occurred is relevant to commonality.

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> *Lilleyman* and *O'Connor* are examples of this. I respectfully depart from the endorsement of the two-step test in *Jensen*.
>
> …
>
> [61] Similarly, I would also avoid equating the standard with requiring a "triable issue" as in summary judgment. It is sufficient that there be a factual or legal issue, or "colourable claim", that advances the litigation. I agree with the certification judge's conclusion, following *Bowman v. Kimberly Clark Corporation*, 2023 BCSC 1495 at para. 136, that "a pleading, legislation or legal principles can support the 'existence' of an issue, and together with some evidence of commonality, will meet the certification test". Mere pleading of an issue is not enough.

Conclusions on Commonality

[100] Cases involving conspiracy, by their nature, raise common legal and factual questions about the existence, scope, and effect of the alleged conspiracy. Class members share a common interest in proving the facts and circumstances of the alleged conspiratorial conduct, which are central and overriding issues for all members of the class: *Bui v Cargill, Incorporated*, 2025 BCSC 1870 at para 61.

[101] In these cases, the courts must ensure that they do not certify cases against defendants solely because they participate in a particular industry: *Noramco* at para 84; *Bui v Cargill, Incorporated*, 2026 BCSC 1939 at para 60 [*Bui*]. There must be some evidence that agreements leading to a conspiracy "might or could have been made, grounded in inference" to conclude that the claims of the class members raise common issues within the meaning of s 4(1)(c) of the *CPA*: *Noramco* at paras 80-81.

[102] On a common issue, in my view, the court must be satisfied that the proposed common issue raises a meaningful question the court can answer in common. This means the court must have some basis to be satisfied that there is a colourable claim that advances the litigation of the central allegation underpinning the action: *Bui* at paras 51-52, citing *McKinsey* at para 61 and *Cleaver v The Cadilliac Fairview Corporation Limited*, 2026 BCCA 353 at paras 2, 29 [*Cleaver*].

[103] In determining what is necessary to provide a basis to satisfy the court that there is a colourable claim, I am cognisant of Justice Matthews' comments in *Bowman v Kimberly-Clark Corporation*, 2023 BCSC 1495:

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> [136] I would add to that observation that an issue "exists" if it is a live issue of fact or law in the proceeding. Such existence can and often does arise from the pleadings, jurisprudence or legislation. While in *Hollick* at para. 25, cited in *Pro-Sys*, Justice Gascon made it clear that the evidentiary burden with regard to common issues is some evidence "apart from the pleadings", i.e.: pleading an issue does not make it common, I am of the view that a pleading, legislation or legal principles can support the "existence" of an issue, and together with some evidence of commonality, will meet the certification test.

[104] In my view, this gives the court discretion to review, in a functional and pragmatic manner, the fundamental issues raised by the pleadings and the associated evidence supporting the allegation (without weighing such evidence) to determine whether the common issues are meaningful: *Bui* at para 55, citing *McKinsey* at para 42 and *British Columbia v Apotex Inc.*, 2025 BCSC 92 at para 589.

Fundamental Basis for the Claim of Conspiracy

[105] I have made the following characterization above about the fundamental nature of the allegations advanced by the plaintiff against the defendants:

> The central proposition raised by these pleadings is that Apple could have used its resources and distribution network to enter the search engine market, but chose not to because Google paid Apple billions of dollars in revenue-share payments to make Google the default search provider on Apple products. This arrangement gave Google market power, enabling it to charge supracompetitive advertising prices on search engines.

[106] This breaks down to the following fundamental material facts:

a) the search engine market has significant barriers to entry limiting the number of potential competitors;

b) Apple could have used its resources and distribution network to enter the search engine market;

c) Apple chose not to do so because Google paid them to make Google the default search provider on Apple products; and thus

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d) this provided Google with market power to charge supracompetitive prices for advertising on its search engine and to share that revenue with Apple.

Barriers to Entry

[107] Dr. Brander, the economist retained by the plaintiff, provides evidence that there are barriers to entry in the search engine market. Creating, maintaining, and growing a search engine requires significant capital investment, highly complex technology, access to effective distribution, and adequate scale. Developing a search engine would require an upfront investment of billions of dollars; maintaining it could cost hundreds of millions of dollars a year: Affidavit of Dr. Brander #1 at paras 38, 52-54 [1st Brander Affidavit].

[108] This is consistent with the testimony of Mr. Giannandrea, Apple's Senior Vice President of Machine Learning and AI Strategy in *US v Google*: see generally, for example, the redacted September 22, 2023 testimony of John Giannandrea, No 1:20-cv-03010-APM, ECF No 940 at pp 61-175 [Giannandrea Testimony].

[109] Dr. Brander also provides evidence that the search engine market is highly concentrated, which, combined with the high barriers to entry, makes it conducive to anti-competitive conduct. 1st Brander Affidavit at paras at 2, 37, 54.

[110] I find that this provides some basis in fact that the search engine market has high barriers to entry, is highly concentrated and is conducive to anti-competitive conduct.

Potential for Apple to compete with Google

[111] Mr. Roszak, Vice President, Finance at Google, testified that Google internally estimated how much it would cost Apple to create and maintain a general search engine that could compete with Google: *US v Google* Liability Decision at p 26.

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[112] Mr. Giannandrea testified that Apple has the financial and technological resources to develop or acquire a general search engine but has chosen not to do so: Giannandrea Testimony at p 47.

[113] I find that this provides some basis in fact that Apple has the potential to compete with Google in the search engine market.

Impact of Apple's Agreement with Google

[114] Mr. Giannandrea further testified that from 2018 onward, Apple internally compared the pros and cons of developing, or purchasing and developing, a search engine to assess the feasibility of Apple competing with Google. He noted that obtaining their own search engine would likely end their agreement with Google, as it would put them in "head-to-head" competition with Google: Giannandrea Testimony at pp 85-109.

[115] Mr. Cue, Apple's Senior Vice President, Services, testified to the following in *US v Google*:

> Q. And, Mr. Cue, I'm going to ask you to focus just on the question that I'm asking you.
>
> You told Mr. -- you reported to Mr. Cook that you had told Mr. Pichai that if you couldn't agree on the economic terms of the deal, Apple would walk away from the ISA, correct?
>
> A. Again, if we couldn't agree on the deal, economic terms or something else, then ultimately, you have -- it's not a walk away; there's no deal. So, yes.
>
> Q. Apple wanted to get paid its fair share under the ISA?
>
> A. Yeah, I agree with that.
>
> Q. Again, without saying specific percentages, ultimately were Google and Apple able to agree on the amount of revenue share that Apple would receive under the ISA?
>
> A. We were.
>
> (Redacted September 26, 2023 testimony of Eduardo H. Cue, No 1:20-cv-03010-APM, ECF No 942 at p 22 [Cue Testimony]).

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[116] Apple did not develop or acquire and develop a search engine. Apple chose to continue the Agreement with Google and install Google as the default search engine on its products in exchange for large revenue payments from Google.

[117] I find that this provides some basis in fact, supporting the inference that Apple did not compete with Google in the search engine market because of its Agreement with Google.

[118] I am cognisant that the defendants say that this excerpt from Mr. Cue's testimony must be considered within the context of his entire testimony, including:

> Q. And if you weren't able to reach a deal on the economic terms, you were willing to walk away from the ISA, right?
>
> A. I think – again, you make this all about economics. The deal has a lot more to it than economics.
>
> I think ultimately, you have to get a deal across everything, not just economics. Economics are important part, of course.
>
> And so, the question of what would have happened if we hadn't gotten a deal; I don't know. Like I said, I didn't spend a lot of time thinking about it.
>
> You know I've been fairly clear that I didn't think at the time, nor today, that there's anybody out there who's anywhere near as good as Google at searching. And so certainly there wasn't a valid alternative that we could have gone with at that time.
>
> But what would we have done? Would we have gone off and -- I don't know. I don't know what we would have done in that case. We could have built our own. I don't know what we would have done.
>
> It's not something we ever really truly considered, investigated, or did. My objective at that time was to get a deal done, and I felt confident that I would be able to do that.
>
> …
>
> Q. … Mr. Cue, we've talked about how Bing and DuckDuckGo were not viable options for Apple to set as the Safari default in the 2015/2016 time period. Did Apple consider setting any other search engines as the default in Safari in 2015, 2016?
>
> A. No we did not.
>
> Q. If you were unable to reach a deal with Google in 2016, what would Apple have done?
>
> A. It's a lot of speculating. It's not something I spent any time thinking about in any significant way because I thought that I would be able to do a deal with Google.

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> Ultimately -- I don't know the answer, but I'm going to speculate a little bit, and that is, it wasn't a choice to pick any of the existing search engines, so we probably would have been left with no other choice than potentially building our own. But, again, not something we went off and investigated.
>
> You have to understand that even as successful and as big as Apple is, we have limited resources, and we want to spend our resources in the areas that we think we can make a material difference for our customers.
>
> In the case of search, we have somebody that we're working with who is the best in the world at it, is investing significant amounts of money, and we have found a way to work with them on that.
>
> …
>
> Q. So if you had been unable to reach a deal with Google in 2016, in your view, Apple's next best option would have been to develop its own search engine?
>
> A. Again, I said I was speculating because I haven't spent a lot of time thinking about that.
>
> What I do know is that search engines that were out there weren't good enough. And so that makes it very difficult to pick on of those. So that's not a choice.
>
> So I don't know. You know, that's -- that would be my guess right now. If we had to do that, that's probably my guess.
>
> (Cue Testimony at pp 21-22, 97-99).

[119] The defendants say that Mr. Cue's evidence, when examined as a whole, demonstrates that Apple had no feasible choice but to use Google for search engines, and that Apple had no intention or ability to obtain a different search engine. Apple is not in the search engine business and prefers to devote their resources to other endeavours.

[120] The defendants misconstrue the purpose of the some basis in fact test at the certification stage. In my view, the Court's role is to determine whether there is some basis to infer that Apple could have used an alternative search engine for its products but chose not to because of the agreements.

[121] The defendants have proposed alternative interpretations or inferences that could be drawn from Mr. Cue's evidence and other evidence they presented at certification. I agree the plaintiff has cherry-picked evidence to support his case. However, in my view it is appropriate to do so at this stage in the proceedings.

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[122] In *Cleaver,* our Court of Appeal upheld the decision of the chamber's judge dismissing the allegation because the plaintiff had no basis supporting the central allegation underpinning their action, nor would they be able to establish one in the proceedings.

[123] The defendants' objections here differ significantly from those in *Cleaver*. The defendants have failed to show that the central allegations lack a basis; instead, they seek to challenge the material facts the plaintiff has demonstrated have some basis by leading different or contradictory evidence, or by arguing that different inferences can be drawn from the evidence.

[124] I will not weigh the evidence, engage in a fact-finding process, or make a determination of which inference is most likely or ultimately established on a balance of probabilities: *Noramco* at para 43. The issue is whether there is some basis to support the inference that Apple did not compete in the search engine market because of its agreements with Google. There is a clear basis for this inference.

[125] The defendants may have a factual basis for numerous defences to the allegations made against them. The certification hearing is not an appropriate platform to assess the strength of their position or weigh the plaintiff's factual basis. That exercise falls outside the scope of the certification inquiry. Raising them unnecessarily lengthens and complicates the process.

Google's Resulting Market Power

[126] In my view, the basis that I have found establishing barriers to entry in the search engine market, Apple's potential to compete in search, and the impact of the Agreement between Google and Apple provides a sufficient basis to infer that Google has market power.

[127] The evidentiary record provides some basis for directly establishing market power. For example, evidence in *US v Google* demonstrated that Google used various "pricing knobs" in the auction process to drive price increases of 5-15% without triggering a shift in the purchase of advertisements. Google did not consider

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the pricing of any rival search engine advertisers in implementing its price increases. Instead, Google raised prices to meet periodic and long-term revenue growth targets. Google faced no competitive constraints on its ability to raise prices by manipulating the auction process in the search engine advertisement market and took steps to ensure that purchasers of advertisements were not aware of the manner in which prices were manipulated: *US v Google* Liability Decision at pp 87-97, 263-267.

[128] The defendants point to Dr. Madansky's evidence on the dynamic changes in the search engine market and the number of real and potential competitors in both the search engine and search engine advertising markets. Specifically, the defendants rely on her evidence that:

a) in 2002, Yahoo, not Google, was the dominant internet search engine. In addition to Yahoo, there were 16 other search engines used by more than 1% of internet users. It was only over time and from substantial investment on behalf of Google that Google emerged as the dominant search engine in both Canada and the US;

b) there are many other advertising options for advertisers to consider across both offline and online media. In 2005, internet search advertising accounted for less than 10% of the overall advertising spend, reaching 34% in 2014 and 75% today; and

c) in 2005, at the commencement of the class action period, Google was a start-up company focusing on internet searches, and Apple was a device maker with a limited range of products and had not yet launched the iPhone.

In addition, the defendants rely on Judge Mehta's comments in the *US v Google* Remedies Decision, in which he concludes that the rise of artificial intelligence has profoundly and fundamentally changed the search engine market.

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[129] The defendants say that, as a result, the plaintiff must provide some basis in fact for each element of the alleged conspiracy on an ongoing basis as the market changed over time.

[130] As I noted earlier, this argument rests on a degree of specificity that goes well beyond what the cases show is sufficient to provide some basis in fact for certification. In this case, as in *Noramco*, the plaintiff's generalized evidence is sufficient to show a factual basis for the proposed conspiracy common issue.

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Ability to Establish Damages through Economic Modelling

General Principles

[131] To certify a common issue regarding causation—i.e., whether any of the defendants' conduct caused the alleged loss (an "overcharge" in this case)—the plaintiff must show some basis in fact that the issue can be determined on a class-wide basis at a common issues trial. In *Pro-Sys* SCC at para 113, the Supreme Court of Canada stated that certifying this type of loss-related issue would "require the use of expert evidence in order for commonality to be established." There must be some evidence:

a) that the methodology is sufficiently credible or plausible to establish some basis in fact for the commonality requirement, such that there is a realistic prospect of establishing loss on a class-wide basis;

b) that the methodology is not purely theoretical or hypothetical, but grounded in the facts of the case; and

c) of the availability of the data to which the methodology is to be applied.

(*Pro-Sys* SCC at para 118).

[132] In *Ewert v Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, leave to appeal to SCC refused 2019 CanLII 120704, [2019] SCCA No 311 [*Ewert*], our Court of Appeal at para 104 clarified that it is not necessary for the plaintiff to build the proposed econometric model or identify with precision what information will be used

to populate the model. The some basis in fact requirement is satisfied as long as there is some evidence of the existence of the necessary data.

Methodology Proposed by the Plaintiff

[133] Dr. Brander, an economist, opines that Google has the dominant search engine globally and in Canada. Although the extent of Google's dominance is in issue, the defendant's economist, Dr. Sweeting, agrees that Google is the dominant search engine globally and in Canada. Dr. Brander also sets out the reasons that he believes create high barriers to entry in the search engine market.

[134] He concludes that high market concentration and significant barriers to entry, along with the search engine advertising market's "two-sided platform" structure and auction-based pricing, create circumstances in which collusive conduct likely leads to overcharges.

[135] The basic principle normally used in the assessment of overcharges due to alleged wrongful practices is the "but-for" principle. This requires asking what the price structure would have been but-for the agreements between Google and Apple. Dr. Brander opines that the agreements could have two primary effects: (1) preventing Apple from competing in the search engine market; and/or (2) preventing other competitors from competing more effectively.

[136] Dr. Brander proposes applying standard economic methods to assess whether Apple or another potential competitor to Google's search engine would have competed in the but-for market, using publicly available information and information obtained from Apple. His methodology parallels the methodology set out in the Merger Enforcement Guidelines used by the Competition Bureau of Canada to assess and enforce Part VIII and IX (the primary provisions dealing with mergers) of the *Competition Act.*

[137] In this situation, it is not possible to use previous conditions in the Canadian search engine and search engine advertising markets to construct a but-for market,

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since there are no viable competitors to Google prior to or during the relevant time frame.

[138] Dr. Brander proposes using benchmarks from other firms in similar industries, other products Google produces, and jurisdictions where Google has a lower market share than in Canada to estimate the but-for market conditions. He proposes two benchmark methods: (1) the profit margin method, which is based on price charged in relation to average cost (the primary method); and (2) the rate-of-return method, based on the rate of return earned on the capital stock (a robustness check). These methods would estimate and compare the profit margins and rate of return on capital generated in the Canadian markets to the benchmark markets.

[139] Dr. Brander proposes quantifying overcharge by calculating how much Google's search engine ad prices would have needed to fall to reduce its profitability to the but-for level for each year of the class period. The overcharge is then multiplied by the class members' expenditure on search advertisements to estimate the economic harm to class members.

[140] Dr. Brander used publicly available data and industry experts, as well as experts retained by the plaintiff, to calculate market share percentages and concluded that sufficient information was available to construct his economic model. He noted that he would refine these calculations with additional data obtained during pre-trial discovery.

[141] Dr. Brander relied primarily on Mr. Regan regarding the availability of pricing and cost information to opine that appropriate data would be available for the benchmarking analysis.

[142] Mr. Regan is a Chartered Professional Accountant with considerable expertise in forensic accounting and auditing. He opines that accepted accounting methods can determine the revenue Google obtained from advertisers in Canada from sales of search engine advertising and the costs Google incurred to obtain that revenue. This opinion is based on Google's use of these methods, including

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geographic area information such as revenue obtained from advertisers in those areas. With respect to cost data, Google is also required to disclose the costs of revenue in its 10-Ks and 10-Qs. Mr. Regan also bases his opinion on his experience analyzing the financial records of public entities such as Google.

[143] The plaintiff says he has met the certification requirements to establish a valid methodology for calculating loss. Dr. Brander has provided:

a) a viable method of establishing and quantifying overcharge;

b) grounded in the facts of the case; and

c) some evidence of the existence of data necessary to do the above.

Position of the Defendants

Dr. Brander's report should be given little weight

[144] The defendants say Dr. Brander is not an unbiased witness because he has primarily provided evidence on behalf of plaintiffs in other class proceedings and relies on factual evidence provided by Shivan and Adam Raff, who were complainants in a European Union case against Google.

[145] The defendants concede that their concerns do not affect the admissibility of Dr. Brander's evidence, but rather I should be cautious and place little weight on his evidence when it is uncorroborated or diverges from the defendants' expert evidence.

[146] In my view, this submission, although common in certification hearings in our jurisdiction, is unhelpful because it encourages the court to inappropriately weigh the evidence. In fairness, the plaintiff raised the same concerns about the defendants' expert Dr. Sweeting. I will not inappropriately weigh conflicting evidence from either party's expert.

[147] I wish to stress that I am not critical of either counsel: both demonstrated a high degree of skill and professionalism throughout the hearing. In my view, the

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return to basics called for by our Court of Appeal requires the Court to be more vigilant to ensure certification hearings focus on the procedural issues engaged by commonality and other certification criteria.

The use of Dr. Brander's Benchmarking Methodologies in Prior Cases is Irrelevant

[148] In *Pro-Sys v Microsoft*, 2010 BCSC 285 [*Pro-Sys* BCSC], Dr. Netz and Dr. Brander proposed benchmarking methodologies based on a profit margin model and a rate of return model to calculate economic loss in a market where there were essentially no competitors: *Pro-Sys* BCSC at paras 24-25. The defendants say the court approved only Dr. Netz's methodology, not Dr. Brander's methodology. However, this is misleading, as the Court characterized and addressed Dr. Brander's methodology as similar to Dr. Netz's methodology: *Pro-Sys* BCSC at paras 28,164].

[149] In *Watson v Bank of America Corporation*, 2014 BCSC 532 [*Watson* BCSC], Dr. Brander proposed a benchmarking methodology based on the profit margin model to calculate economic loss in a two-sided market allegedly subject to collusive pricing activity: *Watson* BCSC at para 251.

[150] In my view, our Court's acceptance of these methodologies in previous certification matters provides some basis for determining that the methodology is credible and plausible. As in *Watson* BCSC, the remaining issue is whether Dr. Brander's methodology is sufficiently grounded in the facts of this case such that it offers a real prospect of success:

> [259] I accept that, in general, the methods proposed by Dr. Brander are common economic methods that can be used to determine overcharges in typical price-fixing cases. Despite differences in terminology, they resemble the methods that were deemed acceptable in Microsoft (Pro-Sys v. Microsoft, 2010 BCSC 285 at paras. 24-28). It is notable that Dr. Brander was an expert for the plaintiff in that case. However, the trial judge accepted the methodologies proposed by the other expert for the plaintiff and therefore found it unnecessary to consider Dr. Brander's evidence, even though it largely conformed to the evidence of the other expert (at paras. 28 and 164). The question that remains is therefore whether the methods offer a realistic prospect of success in this specific case.

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Is Dr. Brander's methodology sufficiently grounded in the facts of the case?

Dr. Brander does not account for the impact of advertising revenue on product improvement

[151] Dr. Sweeting says the search engine market is unique because it is a two-sided market, where increases in search engine advertising revenue may be essential to developing and improving the quality of the search engine, which in turn increases the quality of the product advertisers receive. Dr. Brander assumes that advertisers' quality and value derived from search engine advertisements would be the same in the but-for benchmark. The defendants say this represents a fatal flaw in applying Dr. Brander's methodology to the facts of this case: any price increase may simply reflect the higher quality and value the advertiser receives.

[152] Dr. Brander disagrees. He opines that the Agreements likely reduced innovation and quality such that the price overcharge alone understates the harm to purchasers who likely paid higher prices for an inferior product. However, differences in product quality are an empirical question that can be investigated, estimated, and, if necessary, accounted for in his methodology.

[153] In *US v Google*, there was evidence that Google ran quality degradation experiments to monitor the impact of reducing search quality on revenue and has degraded the quality of its text advertisements: *US v Google Liability Decision* at pp. 52, 158-159, 254, 267-268. In my view, this provides some basis of support for Dr. Brander's proposition that lack of competition may result in a lower-quality product.

[154] This gives me further comfort that the concerns raised by Dr. Sweeting are not whether Dr. Brander has accounted for this aspect of the market in his methodology such that there is a reasonable possibility that his methodology can estimate potential overcharges; but extend to the ultimate issue to be resolved at trial: has the alleged unlawful conduct generated a compensable overcharge.

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[155] In addition, it is contentious as to whether potential increases in the quality of a product can be used to offset supra-competitive pricing under ss 36 and 45 of the *Competition Act*. I say this for the following reasons:

a) accounting for this offset may fall within the scope of the tracing exercise that was rejected by the Supreme Court of Canada: *Pro-Sys* SCC at paras 42-45;

b) the offset may constitute an efficiencies defence that may not be available under s 45. In my view, it is not clear that the use made of supra-competitive profits is a relevant factor under s 45 both prior and subsequent to the 2010 amendment; and

c) if the offset is relevant to calculating damages for s 36 purposes, the defendants may have an onus of establishing that the offset is sufficiently related to the breach to ameliorate damages associated with the increased purchase cost: *IBM Canada Limited v Waterman*, 2013 SCC 70 at paras 20, 25, 28, 37-38.

In my view, a full evidentiary record is appropriate and necessary to assess whether the defendants' proposed set-off applies to ss 36 and 45 of the *Competition Act*. This is not simply a methodological issue; it raises legal questions that, in my view, are best resolved after certification.

Dr. Brander's benchmarks are not reliable

[156] To determine and quantify price overcharges, Dr. Brander proposes to compare the actual profitability of Google’s search business, measured in either profit margins or rates of return, to benchmarks that reflect Google’s profitability in the but-for world.

[157] Dr. Brander suggested a broad category based on Code 50: Communication Services in the S&P Global Industry Classification Standard, which represents a broad sector of firms that produce generally similar products and services. Dr. Brander also identifies a more specific subgroup in this sector, specifically the

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industry group of Media and Entertainment (Code 5020), as well as a further subclassification under that industry group: the Interactive Media and Services (Code 502030).

[158] In cross-examination, Dr. Brander agreed that, when identifying the initial benchmark groups, he did not focus on firms with key characteristics present in the market Google operates in for search engine and advertising, such as firm size, two-sided platforms, network effects, large barriers to entry, and auction pricing.

[159] The defendants say that Dr. Brander's proposed benchmarks are not sufficiently similar to Google and the markets in which it operates to reliably apply the benchmarking methodology.

[160] The plaintiff says the issues the defendants raise about selecting appropriate benchmarks are implementational and require analysis of data not yet available to Dr. Brander.

[161] Dr. Brander stated that he proposes to follow the benchmarking approach proposed for to be used in *Pro-Sys* SCC. The starting point would be to select a set of firms in the same industry as Google and calculate their profitability. This set of firms would reflect the normal or competitive level of profitability. Rather than specify in advance which proposed group is appropriate, Dr. Brander proposes examining the profitability of all three groups. How one would proceed depends on considerations of profit variability and sample size.

[162] After selecting the appropriate benchmarking group, Dr. Brander would consider whether the actual market's specific characteristics require additional adjustments to the benchmark but-for market.

[163] The implementational nature of Dr. Sweeting's concerns is illustrated by examining his criticisms of the proposed benchmarking sample. For example, he criticizes the lack of comparable firm size in the proposed sample. He notes that only Meta is comparable in size to Google, and he suggests that all smaller firms were

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unreliable benchmarks and represent a fatal flaw to applying the methodology to the facts of this case on this basis alone.

[164] Dr. Brander accepted that size could be an issue, but emphasized that specific characteristics need empirical analysis to determine their importance, if any. The issue is not the specific characteristic, but its impact, and then if and how the benchmark group can account for it. Dr. Brander provides several examples of how to empirically analyze specific characteristics and account for them in the benchmark group. He notes that this is standard practice in benchmarking methodology and was the approach proposed and accepted by the court in *Pro-Sys*: Affidavit of Dr. Brander Affidavit #2 at paras 74-82 [2nd Brander Affidavit].

[165] In my view, the same comments made by our Court of Appeal in *Pro-sys* BCCA apply here:

> [66] Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial. …
>
> [67] The chambers judge subjected the evidence of Dr. Ross to rigorous scrutiny. He weighed it against the respondents' evidence and against Ms. Sanderson's evidence in particular. In so doing, he failed to take into account that the factual evidence upon which Ms. Sanderson's opinion was based came in part from the respondents and was untested. Further, he failed to adequately consider that Dr. Ross' opinion was necessarily preliminary since the appellant has not yet had access to the information Dr. Ross needs to perform his analysis. In my view, this approach was fundamentally unfair at this stage of the proceeding, when the appellant has not had discoveries and an adequate opportunity to marshal the evidence required by Dr. Ross for his analysis.
>
> [68] The appellant was required to show only a credible or plausible methodology... The dispute here is over whether total gain or loss can be determined as a practical matter on the particular facts of this case. Those facts have not yet been fully developed and it was therefore premature of the chambers judge to reject Dr. Ross' opinion. The close examination to which he subjected it should have been left for the trial judge, whose task it will be to evaluate the conflicting expert opinions and to decide what weight to give them. In my view, Dr. Ross' evidence met the low threshold required to establish for purposes of certification that gain and its counterpart, damage, can be shown on common evidence.

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[166] I am satisfied that Dr. Brander's proposed benchmarking methodology provides a reasonable possibility of estimating potential overcharges when applied to the facts of this case.

[167] Our Court of Appeal's call to return to basics in *Noramco* and *McKinsey* to avoid turning certification hearings into a concealed merits test directly applies to the issues raised by the defendants on this point. Although economic methodology must be carefully analyzed, it must be done in a functional and pragmatic manner. The granularity and specificity the defendants require would require gathering and analyzing massive amounts of data the plaintiff does not yet possess.

[168] In my view, this submission by the defendants, although again common in certification hearings in our jurisdiction, amounts to a "concealed merits test" that leads to an "unhelpful and disproportionate overcomplication of the certification inquiry": *Noramco* at paras 3-5. I reiterate my view that our Court of Appeal has instructed this Court to be cognisant of its guidance and apply it.

Dr. Brander does not account for all potential "but for" markets

[169] Dr. Sweeting states that Dr. Brander does not propose a methodology to account for the range of plausible but-for outcomes that are consistent with the facts of the case. In cross-examination, Dr. Brander agreed that many different scenarios could exist in the comparison but-for market.

[170] Dr. Brander does not attempt to predict all of the possible but-for outcomes. He proposes a methodology to empirically assess whether Apple could have built or acquired a competitive search engine to Google and whether another competitor such as Bing could have been more competitive if the Agreement did not exist. Applying the evidence to his methodology will allow him to estimate the likelihood of competition from any of these sources during the class period. His methodology compares Google's actual profitability with an estimate of but-for profitability based on appropriate benchmarks, which can be applied to any potential but-for scenario.

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[171] Dr. Sweeting points out that different scenarios in different years will generate different competitive forces, which would drive different profitability levels in the but-for market. For example, Apple may not be a viable competitor to Google for years while it develops a competitive search engine, or it may choose not to develop one. This would result in different levels of profitability in the but-for market during those periods. Dr. Brander accepted this principle in cross-examination. His methodology addresses this issue by conducting an annual benchmark comparison, adjusted to the appropriate but-for market conditions derived by applying the data to his methodology, 2nd Brander Affidavit at para 83.

[172] In my view, Dr. Sweeting has identified potential weaknesses and complications that could arise when applying the benchmarking methodology to the empirical data Dr. Brander hopes to obtain through discovery. Dr. Brander has explained how his methodology could address these concerns. In my view, having accepted that Dr. Brander's methodology is credible and plausible, and having been advised of how Dr. Brander hopes to apply this methodology to the particular facts of this case raised by Dr. Sweeting, I am satisfied that there is a reasonable possibility of addressing his concerns. The inquiry need go no further than that.

The average overcharge calculation cannot be applied to individual class members without individual trials

[173] The defendants say that even if Dr. Brander's methodology could prove an average overcharge, that finding alone would not be sufficient to establish which, if any, particular Class Members suffered harm and are entitled to damages. They rely on *Pioneer Corp. v Godfrey*, 2019 SCC 42 at paras 116-118 [*Pioneer*] for this proposition.

[174] *Pioneer* does not stand for the proposition that aggregate damages must be established for every class member for certification. I agree with the plaintiff that this argument, as applied to certifying loss as a common issue, misinterprets *Pioneer*. *Pioneer* clearly states that all that is required at certification is methodology which can establish a loss at the purchaser level, not to individual class members:

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

…

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

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

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

> Thus, for the purposes of certification, the methodology about the existence of loss need only be shown to be a plausible one that the passing-on reached the indirect purchaser level of the distribution channel and that there might be individual issues about whether any particular class member experienced illegal price-fixing. If the plaintiff's expert's methodology failed in proof at trial, then the class members' claim would fail across the indirect class members' class

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> because each and every one of them would have failed to prove a constituent element of their cause of action; i.e., that the price-fixing penetrated their place or "level" of the distribution channel, and the Defendants would secure a discharge of liability against all the class members. Conversely, if the methodology proved sound to show that overcharges reached the indirect purchaser place in the distribution channel, then there might have to be individual issues trials to determine each class member's entitlement.

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[175] *Pioneer* at paras 116-118 clarifies that where, as here, loss is an element of the cause of action, using the aggregate damage provisions to distribute damages to class members who did not suffer a loss would be an error. Aggregate damages can only be awarded if the trial judge is satisfied, following the common issues trial, that: "either that all class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have." Following the common issues trial, the trial judge might reach any one of numerous possible conclusions on the question of whether or who within the class suffered a loss. At that time the trial judge may determine that aggregate damages are be appropriate for all, some or none of the class members: *Pioneer* at para 119.

[176] Contrary to the defendants' position, *Pioneer* goes on to say that:

> [121] But again, to be clear — neither the range of possible findings of the trial judge following the common issues trial, nor the unavailability of aggregate damages for class members that suffered no loss, is relevant to the decision to certify aggregate damages as a common issue. As was the case in *Microsoft*, "[t]he aggregate damages questions [the certification judge] certified relate solely to whether damages can be determined on an aggregate basis and if so in what amount" (para. 135).

[177] Dr. Brander says that, based on his understanding of the market, he believes that if he establishes an overcharge, it is likely that all class members would have been subject to it. Additional factual support for this opinion lies in the evidence referred to by Judge Mehta in *US v Google* regarding Google's methods and ability to implement and sustain general price increases by controlling the various knobs in the auctioning process and keeping advertising purchasers unaware of how prices were being manipulated: *US v Google* Liability Decision at pp 87-97, 267-267. In my

view, this is some evidence that Google utilized general policies to uniformly increase the price of all search engine advertisements.

[178] Dr. Brander provides a methodology to establish harm to individual class members if an overcharge is established. This would involve examining specified samples of purchasers' search-advertisement purchase histories within specific time periods and assessing the impact of the number of advertisers in various auctions and the prices charged. Dr. Brander expects this analysis to allow him to statistically identify harm to all or various class members and to establish a methodology to statistically assess the amount of individual loss: 2nd Brander Affidavit at paras 95-99.

[179] In my view, as in *Pro-Sys*, it would be appropriate to proceed with proposed common issues to resolve whether damages can be determined on an aggregate basis and, if so, in what amount. I am satisfied that Dr. Brander's methodology poses a reasonable prospect of addressing this issue.

Dr. Brander has not shown that data is likely available

[180] The defendants say that calculation of the profit margin and rate of return methods Professor Brander proposes requires data on:

a) Google's revenue cost and capital stock associated with search advertisements; and

b) the profit margins and rates of return from a large number of benchmark firms.

This data would be voluminous, highly detailed and likely contain non-public information, especially for Google. Neither Google nor the benchmark firms are parties to this litigation, and much of Google's data, in particular, lies within the United States.

[181] Dr. Brander concedes that much of the relevant Google data is not public. However, Google is one of the world's most sophisticated collectors and users of

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data. He is confident that Google has sufficient internal data to allow reasonable cost and revenue allocations across products and that an appropriate Canadian share of revenue and cost can be readily obtained.

[182] This is not analogous to the concerns arising in *Donegani v Facebook Inc.,* 2025 ONSC 6020, in which the plaintiffs sought data with respect to millions of users of Facebook and related third-party applications from over 10 years ago, without making any inquiries from Facebook or the third parties as to whether the necessary data had been retained. In this case, detailed factual evidence from *US v Google* provides ample evidence that this data existed, that Google actively used it, and that Google produced it in that litigation.

[183] Plaintiff's counsel is familiar with the procedural process for obtaining the necessary information from Google in the United States. They propose obtaining this information pursuant to one or both of Title 28, Section 1782 of the *United States Code* and Rule 7-1(18) of the *Supreme Court Civil Rules,* BC Reg 168/2009. In my view, the plaintiff has established a reasonable possibility of obtaining the necessary data; the exact route to take depends on factors that arise during the process. Courts have many ways to protect privacy in sensitive commercial information.

[184] Google is not a perfect stranger to this litigation. The agreement Google entered into with Apple lies at the heart of this matter. Ultimately, if the data is not available and the methodology cannot be applied, the matter can be decertified. I agree with the comments of the court in *Gomel v Live Nation Entertainment Inc*. 2026 BCSC 1276 [*Gomel*]:

> [42] As an overarching matter (and this observation will echo throughout the balance of these reasons), in the absence of any discovery, it is premature to stop the plaintiff in his tracks based on the potential unavailability of critical evidence. If, at a much later date, all discovery mechanisms have been exhausted and Dr. Marshall cannot implement his proposed methodology because of the unavailability of that evidence, the action may become hopeless and need to be decertified.

[185] Dr. Brander proposes to use accounting data, as described by Mr. Regan, to perform profitability calculations for the benchmark companies. The main concern

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raised by the defendants to this approach is conveyed by Dr. Sweeting in his affidavit:

> … [t]he assessment of economic outcomes in the but-for world requires economic analysis, which may differ in important ways from accounting approaches used to produce financial statements.
>
> (Affidavit of Dr. Sweeting #1 at para 154).

[186] In my view, this is a hypothetical concern that has no impact on the low threshold the plaintiff must meet to show that this information is likely available and need not be addressed given the evidence provided by Dr. Brander and Mr. Regan on the availability of data. Nonetheless, Dr. Brander provides a complete answer to this in his evidence: see 2nd Brander Affidavit at paras 107-109.

Some Basis in Fact for Other Alleged Conspiracy Related Common Issues

[187] The position raised by the defendant on no basis in fact with respect to the unlawful means conspiracy, unjust enrichment, fraudulent concealment, and *Civil Code of Québec* causes of action are that they are derivative of the breach of s 45 actions, and derivative from a finding that *US v Google* constitute a finding that the Agreement have been found to be unlawful. On that basis, I find some basis in fact supporting these causes of action.

Some Basis in Fact for Punitive Damages

[188] In my view, the law with respect to certification of punitive damages was succinctly summarized by Justice Watchiuk in *Sherry v CIBC Mortgage Inc.*, 2015 BCSC 490 at para 28:

> The Court of Appeal in *Chalmers* confirmed that the focus at this stage is the defendant's conduct. The certification judge should not certify punitive damages as a common issue if the reprehensibility of the defendant's conduct cannot be assessed without considering the plaintiff's individual circumstances: *Chalmers* at para. 31. However, if the assessment of the defendant's conduct will be focused on systemic wrongdoing against the group, rather than wrongdoing towards individual class members, then certification may be appropriate: *Rumley* at para. 34.

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More recently, our Court of Appeal held that there must be some basis in fact beyond the pleadings for the certification of punitive damages as a common issue: *MacKinnon* at para 7.

[189] In this case, the alleged conduct that could support punitive damages can clearly be assessed as a common class issue independent of any individual assessment. In my view, the requisite intent element implicit in the alleged breach of s 45 of the *Competition Act* is sufficient to satisfy me that posing this question as a common issue will be meaningful.

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Section 4(1)(d) – Is a Class Proceeding the Preferable Procedure for the Fair and Efficient Resolution of the Common Issues?

[190] The defendants raise three issues with respect to preferability:

a) there are no common issues related to conspiracy or harm. I have rejected this argument, so it is no longer relevant to the preferability analysis;

b) the matter will inevitably break down to individual trials on damages, so it is not appropriate for certification; and

c) damages could be assessed against Google pursuant to the arbitration clause contained in the contracts used to sell advertisements on Google's search engines

Inevitable Reduction to Individual Issues

[191] I do not accept that this represents a legitimate point of concern in this case for two reasons. First, as discussed earlier, resolving common issues about the conspiracy and whether harm has been caused to a group of class members will advance the litigation. Therefore, the need for individual trials to assess damages is not determinative in these circumstances.

[192] Second, the plaintiffs are advancing restitution and disgorgement, which are gain-based remedies in parallel with the conspiracy actions. In my view, it remains an open question whether these gain-based remedies could avoid the need for

individual actions if the plaintiffs succeed on the common-issue conspiracy questions: *Neal v Canada*, 2025 BCSC 1498 at paras 209-210; *Live Nation Entertainment Inc. v Gomel*, 2023 BCCA 274 at para 143; *Gomel* at para 69.

[193] In my view, resolution of the common issues concerning the existence of the causes of action would meaningfully advance the litigation for all class members. Therefore, I need not consider the Supreme Court of Canada's comments in *Pioneer* at para 121 that an inevitable breakdown into individual issues at the damages stage may not even be relevant to preferability considerations.

Alternative Relief Available from Google

[194] The main thrust of the defendants' position at certification is that this action is directed at Google and that Apple is an innocent bystander. They say Apple is not obligated to compete with Google or provide exclusive or default distribution through its products to firms that might compete with Google.

[195] In *Spark* 2023, I stayed the proceedings against Google so that the plaintiff could initiate arbitration against Google pursuant to the arbitration clause in the sales contract through which Spark purchased search engine advertisements from Google. The defendants argue that Google is the appropriate defendant and that the appropriate forum is arbitration.

[196] Having determined that there is a legal basis and some basis in fact for the common issues raised against Apple, the fact that alternative relief may be available from a third party is inconsistent with the goals of deterrence and behaviour modification and in these circumstances is of limited import to the preferability analysis: *AIC* at para 22; *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 29.

[197] In any event, I do not accept the defendants' blanket assertion that the plaintiff can pursue the same monetary relief against Google at arbitration in place of a class proceeding against Apple. In *Spark* 2023, I ruled that arbitration could be initiated against Google, so an arbitrator could determine whether the nature of the

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action fell within the parameters of the arbitration agreement (the arbitrator could find, for example, that it was economically prohibitive to arbitrate the issue). However, to date, the plaintiff has not exercised its ability to commence arbitration against Google, and thus this issue has not been decided. It would not be appropriate for me to do so in this context as definitively as Apple suggests.

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Section 4(1)(e) – Is the Litigation Plan Workable?

[198] Subparagraph 4(1)(e)(ii) of the *CPA* requires a representative plaintiff to produce "a plan for the proceeding that sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members of the proceeding."

[199] In my view, the litigation plan at this stage is expected to be a "work in progress" subject to amendment through case management as the case progresses: *Fakhri et al. v Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 at para 77; *Jiang v Vancouver City Savings Credit Union*, 2019 BCCA 149 at para 60.

[200] The plaintiff revised its litigation plan to account for the discontinuance against Google and its implications for pre-trial discovery processes during the certification hearing. It should have been provided earlier. I am satisfied that, at this stage, given the potential involvement of the US District Court in the discovery process, the general reference to the procedures at this stage is appropriate and workable within the context of an action brought by counsel with significant relevant experience and subject to judicial case management.

[201] The defendants say that information about the identity of class members lies with Google. The plaintiff says this information, for notice purposes, could be obtained pursuant to the court's general authority, as exercised in *Sheridan Chevrolet v Denso*, 2021 ONSC 3648 at para 16 [*Sheridan*]. I agree that this would be an appropriate method of obtaining the customer information from Google Canada for notice purposes. If the information lies within the United States, the plaintiff may need to use the same process it intends to pursue to obtain empirical data from Google contained in the United States.

[202] In my view, the same principles I applied with respect to the availability of empirical data for Dr. Brander's methodology apply to this issue if customer information is not available from Google in Canada pursuant to this Court's general powers, as noted in *Sheridan*.

Conclusion

[203] I find that the plaintiff has established that:

a) the pleadings disclose a cause of action;

b) there is an objectively identifiable class;

c) the claims of the class members raise common issues;

d) a class proceeding is the preferable procedure; and that

e) the plaintiff is a suitable representative that has presented a workable litigation plan.

[204] The plaintiff has met the requirements for certification imposed by s 4(1) of the *CPA*.

[205] I accept the common issues as set out by the plaintiff in Schedule "A", and the Notice Provision provided by the plaintiff.

"Thomas J."

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