IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bui v Cargill, Incorporated,* 2026 BCSC 1939

Date: 20261104
Docket: S221365
Registry: Vancouver

Between:

Giang Bui

Plaintiff

And:

Cargill, Incorporated, Cargill Meat Solutions Corporation, Cargill Limited, JBS USA Food Company, Swift Beef Company, JBS Packerland Inc., JBS Canada ULC, Tyson Foods, Inc., Tyson Fresh Meats, Inc., and National Beef Packing Company, LLC

Defendants

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

Before: The Honourable Justice Thomas

Supplemental Reasons for Judgment re: Certification

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Place and Date of Hearing:	Vancouver, B.C. September 11, 2026
Place and Date of Judgment:	Vancouver, B.C. November 4, 2026

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Overview

[1] In *Bui v Cargill, Incorporated*, 2025 BCSC 1870 (the "Certification Reasons"), I determined that:

a) the pleadings in this matter disclosed a cause of action for an upstream civil conspiracy, and a downstream breach of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*] and civil conspiracy; and

b) there was some basis in fact supporting the upstream civil conspiracy and associated derivative claims.

[2] I allowed the plaintiff's application for production of certain civil investigation demands issued by the US Department of Justice (the "CIDs") and a subpoena issued by the New York Attorney General (the "Subpoena") (collectively, the "CIDs and Subpoena"), and adjourned the certification hearing pending disclosure of these documents.

[3] The adjournment provided the plaintiff with the disclosure and an opportunity to supplement the evidentiary record to assist the Court in considering whether "there is some basis in fact supporting the allegations of a downstream conspiracy": Certification Reasons at para 207.

[4] I subsequently invited the parties to also provide submissions on recent guidance from our Court of Appeal regarding the "some basis in fact" standard to be applied in considering s 4(1)(b)-(d) of the *Class Proceedings Act*, RSBC 1996, c 50 [*CPA*].

Relevant Legal Test

[5] The parties agreed that the legal principles set out in the Certification Reasons at paras 61-69, are consistent with recent Court of Appeal authority in its decisions of *Noramco LLC v British Columbia* 2026 BCCA 272 [*Noramco*], *McKinsey & Company, Inc. United States v British Columbia,* 2026 BCCA 284 [*McKinsey*], and *Cleaver v The Cadilliac Fairview Corporation Limited*, 2026 BCCA 353 [*Cleaver*].

[6] In my view, the statements I made in paras 14, 50, and 64 of the Certification Reasons regarding the Court's gatekeeping role at certification must be interpreted in light of the Court of Appeal's recent comments, specifically those made in *Noramco* at paras 32-36 and 99-101 and in *McKinsey* at paras 58-61.

[7] I have found the commentary and application of the legal principles recently provided by our Court of Appeal instructive, specifically with respect to the application of the principle set out by Chief Justice Hinkson in *O'Connor v Canadian Pacific Railway Limited*, 2023 BCSC 1371:

> [262] Put 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": *Trotman* at para. 57, citing *Grossman v. Nissan Canada*, 2019 ONSC 6180.
>
> [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. Thus, whether the one-step or two-step articulation of the test is used, the outcome is the same.

[8] In *McKinsey*, our Court of Appeal agreed directly with above observation of Chief Justice Hinkson, stating:

> [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*.

[56] *Nissan* provides an illustration of the interrelationship between the existence of an issue and its commonality. The central claim alleged a defect in the design of the timing chain mechanism in the engines of certain vehicles. The defendants asserted that the plaintiffs were required to establish some basis in fact that the alleged defect was dangerous as well as common to the vehicles purchased by the class. This Court rejected the notion that the evidentiary support for a common issue in a product liability claim requires evidence that the alleged defect was dangerous. Instead, it considered whether there was sufficient evidence to support the common issues *related to the question of whether there was an engine defect*: at paras. 132, 140.

[57] As I read *Nissan*, evidence was not required to establish that the defect existed *per se* (a merits inquiry); rather, evidence was required as to the nature of the alleged defect in order for the certification judge to assess whether it was common across the class (a some basis in fact inquiry). The same evidence supported both the existence of the defect and its commonality. It included affidavits from two plaintiffs about the problems they experienced with their vehicles, an expert opinion about problems related to timing chain mechanisms and bulletins issued by Nissan relating to these mechanisms. This was sufficient to establish some basis in fact that the issues were common concerning the existence of the alleged defect: see *Nissan* at para. 147.

[58] This reflects the low evidentiary standard that does not involve proof that the facts actually occurred but simply requires minimal evidence that the issue exists to the extent it is relevant to the assessment of commonality. I see this as an accurate description of the meaning of "some basis in fact" in relation to the statutory requirement in s. 4(1)(c) of the *CPA*, which requires the court to assess "whether the claims raise common issues".

[59] As much of the case law demonstrates, the level of evidence required is highly fact specific. In many cases, plaintiffs will be constrained in their ability to provide evidence that is in a defendant's knowledge or possession given the early stage of a certification application. This is particularly important in a case like this, which advances allegations of corporate integration or corporate parent liability and group enterprise liability. Similar allegations grounded the Main action: see *Noramco* at para. 100.

[60] To avoid confusion, I would not define "some basis in fact" in relation to a legislative purpose of rooting out "frivolous and unfounded claims" as discussed in *Jensen* and *Lilleyman*. These terms have particular meaning in other contexts where judges are called on to assess the merits of a claim, such as applications to strike a claim. While I agree that the certification process is a screening exercise, the focus of that process under the *CPA*, consistent with the jurisprudence stemming from *Hollick*, is on the form of the action, not its merits.

[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

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> 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.
>
> [Emphasis in original.]

[9] In *Noramco*, our Court of Appeal set out the "some evidence in fact" threshold that the defendants' argued was required to meet the requirement for certification:

> [69] Second, most of these criticisms turn on a key alleged error in principle. The appellants say the judge erred in not applying what they assert to be a settled test that some basis in fact requires the plaintiff to show: (1) the common issue exists against each defendant, and (2) it is common to each class member's claim. In their submission, a judge must always (appellants' emphasis) first determine whether there is some basis in fact in the admissible evidence for the existence of each common issue against each defendant. Rather than make this determination, they say the judge focused exclusively on whether the alleged issues were common to all Class Members. They contend it is an error for a court to conclude a common issue exists merely by finding it could be decided across class members.
>
> [70] To illustrate the appellants' argument, in their submission, the evidence required to support allegations of misrepresentation, failure to warn, and negligent design would need to:
>
> > (1) be specific to each defendant with respect to each of its products;
> >
> > (2) be specific to what was known or ought to have been known by each defendant at material times about undisclosed risks and overstated benefits associated with opioid use;
> >
> > (3) show each product monograph for each Opioid Product was, at the time, deficient;
> >
> > (4) set out what was represented, disclosed or not disclosed about each Opioid Product by each defendant, when and to whom;
> >
> > (5) demonstrate there was a safer, equally effective pain-relieving medication that could have been made but was not; and,
> >
> > (6) establish each Opioid Product was distributed in quantities that exceeded a legitimate market, including an identification of what a legitimate market was or should be.
>
> [Emphasis in original.]

[10] This proposition was specifically rejected:

> [75] We do not agree with the appellants' primary argument for two principal reasons. First, we do not agree the judge erred in his analysis of the approach he was required to take to determine whether some basis in fact existed to certify the common issues. Second, the alleged error is not the

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> consequence of whether the judge failed to apply a two-step test in deciding whether the certification criteria were satisfied. Rather, 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.

[11] The Court then provided specific 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 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.]

[12] Contrary to the plaintiff's submissions, I am of the view that these comments are not limited to the litigation at issue in *Noramco* but are of general applicability to certification applications.

[13] In *Noramco*, our Court of Appeal spoke directly to the standard required for the commonality assessment when the cause of action is conspiracy:

> [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

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> 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.
>
> [Emphasis added.]

[14] In *McKinsey*, the defendants argued that evidence of conduct in the United States could not form the basis for alleged conduct in Canada:

> [63] As noted above, McKinsey does not challenge the judge's conclusion that the common issues are "common". This appeal rests on one factual issue: whether there is some basis in fact to tie the common issues to McKinsey at all. It submits the judge erred in his application of the evidentiary standard because there is no basis in fact that McKinsey was involved in the promotion of opioids in or for Canada.
>
> [64] In my view, McKinsey takes too narrow an approach to the nature of the claims against it. Whether or not McKinsey performed opioid-marketing services in Canada, the claims against it rely on joint allegations which, as the judge explained, "raise the prospect of McKinsey entities being drawn into liability in Canada due to corporate integration or corporate parent liability in relation to the provision of consulting services that were either directly provided for the Canadian market and/or advice provided for the American market that was implemented across Canada": RFJ at para. 174. In this context, I do not agree with McKinsey that the judge failed to analyze the evidence to determine if it established a basis in fact, as was the case in *Kirk v. Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111. I see no reversible error in the judge's assessment of the evidence here as being sufficient to meet the "some basis in fact" standard.
>
> [65] I accept McKinsey's submission that a plaintiff must do more than point to evidence that occurred in one jurisdiction and plead that the same thing happened in Canada, or had effects in Canada, but this misapprehends the difference between "some basis in fact" and "no basis in fact".

[15] This proposition was considered by our Court of Appeal, who reviewed the relevant jurisprudence and rejected it:

> [68] In contrast to *Lilleyman* and *Hyundai*, the Province's claims in this case are based on what the judge accurately described as "more expansive

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> allegations of agency, common design and civil conspiracy", which as noted above, include allegations that McKinsey developed, recommended and implemented tactics in the U.S. that were also designed to be used, and were used, in Canada: RFJ at paras. 170–172. As the Province submits, these allegations concern McKinsey's background role in developing the strategies and messages behind the alleged misrepresentations. In this context, the Province is not required to provide evidence specific to McKinsey's work with manufacturers or distributors. Rather, expert evidence that marketing strategies are unlikely to differ between the U.S. and Canada, illustrative of this more general claim, is sufficient to satisfy the evidentiary requirement: see *Noramco* at para. 78.

[16] In *Cleaver*, our Court of Appeal made it clear that the Court must have some basis to be satisfied of "the central allegation underpinning the action" or, as Ms. Yates, KC, characterized it: there must be some basis to support the "heart of the alleged misdeed":

> [2] … At the heart of the [certification] judge's decision was her conclusion that the appellants had not established any basis in fact for the central allegation underpinning their action: that the respondents recorded facial images and then created biometric or personal information from those images.
>
> …
>
> [29] In my view, the material before the court provided no basis in fact for the proposition that facial images or biometric and personal information was recorded by the respondents. As that proposition is essential to the claim, the judge was right to deny certification.
>
> …
>
> [31] I wish to emphasize, in saying this, that the problem is not merely a technical one. It is apparent that the appellants' failure to challenge the determination on preferability was not inadvertent.

Application of Legal Principles

The New Evidence

2020 and 2021 CIDs

[17] Cargill and Tyson received three CIDs from the US Department of Justice ("DOJ") in 2020 and 2021 (the "Initial CIDs"). The body of the CIDs stated that they were issued in the course of an:

> … investigation to determine whether there is, has been, or may be a violation of Section 1 of the *Sherman Act* … by conduct, activities, or

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> proposed action of the following nature: Potential coordination by beef packers to reduce fed cattle slaughter, decrease the prices of fed cattle and increase the prices of boxed beef.

[18] Downstream beef products include boxed beef and case ready beef, as defined in the Certification Reasons. The companies were required to provide unit, price, and volume of product information.

[19] In my view, the Initial CIDs were consistent with an investigation into the upstream market and the associated effect that such activity might have on supply and prices in the downstream market. They were not consistent with an investigation into a possible downstream conspiracy in which the defendants were suspected of wrongful conduct directly in the downstream market. The requested information regarding the downstream market focused on determining the effect of the defendants' upstream activities on downstream supply and pricing, not on gathering evidence of any possible participation in a downstream conspiracy, whether in conjunction with (i.e., concurrent with) or independent of an upstream conspiracy.

[20] In September 2025, the DOJ closed this investigation without conducting any investigative depositions of current or former employees or filing any lawsuit alleging that the companies violated federal antitrust or any other law.

2025 and 2026 CIDs

[21] On November 7, the US President posted on social media that he had asked the DOJ to investigate meatpacking companies for driving up beef prices through "illicit collusion, price fixing and price manipulation." He expressed concern that US ranchers were being blamed for the illegal conduct of foreign-owned meat packers.

[22] Minutes later, the US Attorney General reshared the President's post and announced an investigation was underway.

[23] I admitted these posts into evidence. In my view, they illustrate the reason behind the already established principle that courts must be wary of drawing conclusions solely from the fact that a foreign investigation has been commenced:

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Certification Reasons at para 91; *Jensen v Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para 243, aff'd 2023 FCA 89.

[24] On November 18, 2025, Cargill and Tyson received the first of a series of further CIDs issued pursuant to an antitrust investigation (the "Subsequent CIDs"). The Subsequent CIDs were made with respect to an investigation to determine:

> Whether there is, has been, or may be a violation of the antitrust laws by conduct, activities, or proposed action of the following nature: output coordination, price manipulation, and other anticompetitive conduct by and among beef packers.

[25] The requested information sought information exchanged between the parties in civil actions, including copies of depositions, interrogatories, documents, expert discovery transcripts, and expert reports. The civil actions were focused on upstream conspiracies among US beef packing companies and were eventually consolidated into a single multi-district proceeding: *In re: Cattle Antitrust Litigation*, Case No. 0:22-md-03031 (United States) [*Cattle Antitrust*].

[26] In *Cattle Antitrust*, the Court denied two separate motions by the defendants to dismiss the case. The plaintiffs filed a motion to certify, and the matter is in the pre-certification discovery phase. This litigation generated considerable information about the upstream market and the potential effect of activities in this market on downstream pricing.

[27] On November 24, 2025, the government provided another CID to Tyson regarding the closure of a meat processing plant and the associated reduction in cattle processing. It requested information on market conditions for producing and selling downstream beef products after the plant's closure. In my view, this request again focused on upstream activity and its downstream effects, rather than downstream conduct.

[28] On January 2, 2026, the DOJ issued additional CIDs to the defendants under the same investigation. These requests sought more specific information about both the upstream and downstream markets, including:

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a) employee directories and responsibilities for sale of beef products;

b) communications between management and other companies relating to the sale of beef products and upstream production and slaughter issues;

c) trade association memberships relating to sale of beef products;

d) contracts and agreements for the sale of beef products and associated sale information;

e) documents relating to processing plant utilization or capacity; and

f) documents relevant to the relationship between prices paid for cattle, herd size, cattle volume and cattle cycle to the prices of beef products.

[29] These requests go beyond concerns about upstream conduct and its effect on beef product prices in the downstream market; they inquire into downstream conduct, whether concurrent or independent from the upstream market.

Subpoena

[30] Tyson produced the Subpoena issued by the New York Attorney General on April 21, 2022, seeking documents regarding the cost, prices, and terms of Tyson's meat sales to New York retailers. The Subpoena was subject to court proceedings that make clear it was issued to address concerns about Tyson's pricing during the COVID-19 pandemic in New York State. This Subpoena does not indicate that it relates to the broader conspiratorial conduct alleged in these proceedings.

Position of the Plaintiff

[31] Ms. Segal says that the recent commentary by our Court of Appeal supports the conclusion that the information provided and findings made in the Certification Reasons are sufficient to:

> … give the court comfort the s. 45 issue is a meaningful question that can be resolved in common and will not founder at the merits stage.

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[32] In the alternative, she says the additional information shows that the DOJ is investigating anti-competitive activity in the downstream market, which should provide the Court with sufficient comfort to certify the downstream conspiracy allegations.

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Analysis on the Alleged Downstream Conspiracy

Information and Findings in Certification Reasons

[33] In the Certification Reasons, with respect to the factors providing some basis in fact of an upstream conspiracy flowing from the United States, I found the following:

> [100] In my view, the combination of the civil actions, judicial comment on the civil actions, public disclosure of the nature of the alleged civil actions by JBS and Tyson, the involvement of the US antitrust authorities, and the public disclosure by JBS and Tyson of the nature of the information requested by subpoena by the US antitrust authorities provides some basis in fact that there is an investigation into antitrust activity in the beef processing industry in the US involving at least a supply side conspiracy in the fed cattle market potentially impacting the price of beef.

[34] This evidence, in combination with the close linkages between the US and Canadian markets, provided some basis in fact to support certification of an upstream conspiracy:

> [91] In sum, I interpret *Jensen* and *Lilleyman* as standing for the proposition that for foreign jurisdiction evidence to meet the low threshold of "some basis in fact", it must be (1) sufficiently particularized and (2) have some credible link to the conspiracy being pled in Canada.
>
> [92] In this case, we have evidence of the nature of the concerns in the US market that have prompted the civil actions and the regulatory investigation; these concerns are identical to the concerns alleged in the ANOCC.
>
> [93] More importantly, there is evidence indicating that the US market for fed cattle and beef is interrelated with the Canadian market, and that the main meat processors in the US are also active in the Canadian market. Each group of defendants has confirmed that they sold beef or fed cattle in Canada, as well as the interconnectedness of the US and Canadian markets. In addition, both the plaintiff's expert, Dr. Leitzinger, and the defendant's expert, Dr. Johnson, provide some basis in fact supporting the interrelatedness of the US and Canadian beef and fed cattle markets.

[35] I also note that the expert economic evidence provides some factual basis that the underlying economic conditions of the Canadian market are similar to those in the US and conducive to anti-competitive activity.

[36] With respect to the relevance of this evidence to the alleged downstream conspiracy, I stated:

> [101] However, it is unclear from this evidence whether the activity being investigated includes a demand side conspiracy involving anti-competitive activity in the downstream market for beef.
>
> …
>
> [103] In my view, although there are general statements of concern about pricing in the downstream market for beef in the US, the most relevant facts with respect to the downstream market come from the defendant's statements on the scope of the CIDs and the subpoenas contained in their financial filings and affidavits. The defendants' statements indicate that they are under investigation for activities in upstream market for fed cattle and the associated impacts that these acts have on prices in the downstream market for beef. The fact that the scope of the CIDs included both fed cattle and beef markets does not foreclose the possibility of downstream conspiracies.
>
> [104] Based upon my analysis of the relevance of the US Litigation to the existence of a supply side or upstream conspiracy, the CIDs and the subpoenas are also relevant to the existence of a demand side or downstream conspiracy. In my view, it would be inappropriate to determine this issue without their production, which could provide further evidence of the scope of the US concerns and investigation into the downstream market.
>
> …
>
> [107] With respect to any agreements or conspiracy acts in the beef market ancillary to the alleged conspiracy acts in the fed cattle market, or independent of those activities, I have the following concerns:
>
> a) the pleadings of conduct in the beef market are general and lacking in particulars; and
>
> b) the evidence of the investigation by the US DOJ into specific conduct involving the beef market, outside of an effect on price associated with conduct in the fed cattle market, is incomplete.

[37] In my view, there was sufficient basis to infer an upstream conspiracy in the United States, combined with sufficient basis to infer that this activity could exist in the upstream market in Canada. This inference was limited to upstream activity and its potential impact on the downstream price of beef products.

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[38] The pleadings reflect this, setting out a well-articulated, detailed, particularized case alleging an upstream conspiracy in Canada. In my view, my findings regarding the upstream conspiracy are consistent with the recent guidance set out by our Court of Appeal that I referred to earlier.

[39] However, when I apply this guidance to the allegations of a conspiracy in the downstream market "ancillary to" (as I described in the Certification Reasons), which I now more precisely describe as "in conjunction with" the alleged conspiracy acts in the upstream market, it is clear that the basis for the alleged downstream conspiracy presented at the initial certification hearing was insufficient to support certification.

[40] I say this for the following reasons:

a) the information contained in the US civil cases focuses on an upstream conspiracy and the effect of that conspiracy on the downstream price of beef, as opposed to actions taken by the defendants in the downstream market;

b) the information available with respect to the CIDs and Subpoena appeared to have a similar focus, although the full extent and nature of the investigations were unclear; and

c) the pleadings contain detailed particulars of an upstream conspiracy and the alleged impact of these activities on prices in the downstream market, but only vague general assertions of downstream conspiratorial activities.

[41] As I stated in the Certification Reasons at para 18:

> The [Amended Notice of Civil Claim] does not clearly differentiate between the demand side and the supply side of the market regarding the alleged anti-competitive activity. In my view, the pleadings focus on actions involving fed cattle that aim to influence the supply or price of beef. Nonetheless, paras. 79–80 and 102 of the [Amended Notice of Civil Claim] contain general or unparticularized allegations of actions aimed at directly fixing the price of beef independent of actions taken with respect to fed cattle.

[42] The Amended Notice of Civil Claim pleads as follows:

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> 79. During the Class Period, the Defendants and their co-conspirators successfully manipulated the relationship between the prices of fed cattle and Beef in North America. As a result, while the price of fed cattle dropped, the Defendants' fixing of the price and restriction of supply or production of Beef caused Beef prices to rise to elevated, anti-competitive levels. Further, the Defendants' margins on the sale of Beef were inflated by the combination of supply side constraints and demand side price fixing.
>
> 80. The Defendants and their unnamed co-conspirators knew that their unlawful scheme and conspiracy would unlawfully increase the price at which Beef would be sold from the price that otherwise would be charged on a competitive basis. The defendants and their unnamed co-conspirators knew or should have known that their unlawful scheme and conspiracy would injure purchasers of Beef in Canada (including British Columbia) and elsewhere. The Defendants' conduct inflated the price paid by Class Members for Beef.
>
> …
>
> 102. JBS, Cargill, National Beef and Tyson are competitors or potential competitors in the Beef meatpacking market. During and throughout the Class Period, they conspired, agreed or arranged to fix, maintain, increase, or control the price for the supply of a product (Beef) and fix, maintain, control, prevent or lessen the production or supply of that product. Thus, the Defendants have breached section 45 of the *Competition Act*.

[43] In order for the Court to determine "whether there is a rational connection between the class as defined and the asserted common issues" (*Hollick v Toronto (City)*, 2001 SCC 68 at para 19; *McKinsey* at para 44), in my view the Court must have, utilizing the terminology proposed by Ms. Segal, some "comfort" that the proposed common issue raises a meaningful question the Court can answer in common.

[44] As such, when considering our Court of Appeal's recent guidance on the some basis standard, this means the Court must have some basis to be satisfied that there is, in the words of our Court of Appeal, "a colourable claim that advances the litigation" (*McKinsey* at para 61) of "the central allegation underpinning the action" (*Cleaver* at paras 2, 29). In other words, the Court must have some basis to be satisfied that a colourable claim lies at the heart of the alleged misdeed.

[45] Considering the foregoing, the information provided and findings made in the Certification Reasons did not provide me with some basis to be satisfied that the

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allegations of a downstream conspiracy have some basis or raise a meaningful question that the Court could resolve in common, as required for certification.

Additional Information Provided in the CIDs and Subpoena

[46] The Subsequent CIDs extend beyond activity in the upstream market and its effect or impact on prices in the downstream market to activity directly in the downstream market.

[47] However, unlike the upstream market concerns in the Initial CIDs, the DOJ provides no particulars or specifics in the Subsequent CIDs about its downstream market concerns. The DOJ simply noted it was investigating:

> Whether there is, has been, or may be a violation of the antitrust laws by conduct, activities, or proposed action of the following nature: output coordination, price manipulation, and other anticompetitive conduct by and among beef packers.

[48] The DOJ then issued very broad requests for information to the companies in both the upstream and downstream markets.

[49] In my view, the most recent DOJ investigation appears focused on general, nonspecific allegations tied to broad information requests across both the upstream and downstream markets. This lack of particularity is reflected in the Subsequent CIDs.

[50] My concerns about the basis for the alleged downstream conspiracy are highlighted by a comparison with the some basis I found for the alleged upstream conspiracy. The upstream conspiracy is based on detailed facts and particulars. The downstream conspiracy is based on vague, general allegations stemming from a DOJ investigation against companies for which I have found some basis of coordinated conspiracy activity in the related upstream market.

[51] I am cognisant of our Court of Appeal's endorsement in *McKinsey* at para 61 with the view of Justice Matthews view 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.
>
> [Emphasis added.]

[52] Allegations of conspiracy, by their nature, generally raise matters that are appropriately dealt with in common. However, a conspiracy pleading, coupled with some evidence of commonality, does not invariably satisfy the some basis threshold. As our Court of Appeal noted in *Noramco* at para 84, theoretical commonality alone is insufficient to certify a common issue.

[53] On this point, Ms. Segal submits the following:

> It would be well beyond the some basis in fact standard to draw inferences as to whether the DOJ is more or less interested in either part of that investigation. The fact that downstream conduct is part of the investigation is enough to establish some basis in fact on the standard set out in *Noramco* and *McKinsey*. That there continues to be an active DOJ investigation into "price manipulation" and "price fixing" among "beef packers" confirms there is some basis in fact that price-fixing arrangements in the downstream market "might or could have been made, grounded in inferences."
>
> [Emphasis added.]

[54] I do not agree with the plaintiff's submission that the Court is required to simply take the evidence (in this case, the Subsequent CIDs) at face value with no further scrutiny. On the contrary, conspiracy is a cause of action where our Court of Appeal in *Noramco* stated that the Court must pay particular attention to the basis supporting the central allegation in assessing whether the Court is sufficiently satisfied that a meaningful common question exists:

> [81] … 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*.
>
> [Emphasis added.]

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This satisfaction may be grounded in inference, and can be made based on illustrative or generalized expert evidence: *Noramco* at paras 78, 80.

[55] In my view, the Court is required 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 and not mere speculation: *McKinsey* at para 42; *British Columbia v Apotex Inc.*, 2025 BCSC 92 at para 589. This review focuses on the certification criteria, not the factual basis of the claim, but it must still inquire into the nature of the alleged wrongdoing to satisfy the Court with that there is some basis for a meaningful question that can be answered in common: *McKinsey* at para 44.

[56] I find it instructive to compare my conclusions in this matter with the Court of Appeal's conclusions in *Noramco* and *McKinsey*.

[57] In *Noramco*, the Court found the province had tendered the minimal evidence necessary to infer a basis for its pleaded claims. This evidence included expert evidence to support the central allegation of “a common design within and between corporate families who acted in concert and across the industry to contribute to [the opioid] crisis” (paras 107-108), such as interconnections between defendants through corporate relationships, cooperation in industry-related activities, and ties through the marketing, promotion, and distribution of opioid products (para 154).

[58] In *McKinsey*, the requirement for some basis of commonality was met when the evidence identified “numerous tenable links in the evidence between McKinsey’s American and Canadian affiliates in relation to its opioid work and the possibility of McKinsey building on its American work product to make progress on behalf of client drug companies in the Canadian opioid market”: para 33. This evidence included descriptions by McKinsey itself of its commercial practices, evidence of McKinsey’s involvement with certain opioid companies’ activity in the Canadian market, and expert evidence that the marketing principles for pharmaceuticals were generally similar between the two markets: paras 28-31. Even though the evidence linking

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McKinsey to the activity of opioid companies in the Canadian market was “scant,” the Court of Appeal agreed these “tenable links” provided some basis, on more than a “symbolic scrutiny of the evidence,” that the allegations in the Canadian market could be resolved in common: para 69.

[59] Comparing *Noramco* and *McKinsey* to the case at bar illustrates why the allegations of a downstream conspiracy do not meet the some basis threshold. In the Certification Reasons, I found some basis for:

a) interlinkages between the American and Canadian markets; and

b) collusive, conspiratorial conduct between the defendants in the related upstream Canadian market.

The new evidence the plaintiff provides consists of a United States investigation focused on general, non-specific allegations in both the upstream and downstream markets. This new investigation contrasts sharply with the previous United States investigation, which was based on specific allegations in the upstream market.

[60] Our Court must ensure it does not certify conspiracy cases against defendants solely because they participate in a particular industry: *Noramco* at para 84. I acknowledge, as the Court of Appeal did in *Noramco* at paras 80-81, that “much of the evidence necessary to address the merits of alleged common issues may well be unavailable to plaintiffs before discovery … [and] … may come to light only after certification.” However, there still must be some basis, grounded in inference, that a conspiracy might or could have occurred to conclude that the claims of the class members raise common issues within the meaning of s 4(1)(c) of the *CPA*.

[61] On the evidence before me, inferring that the defendants might or could have engaged in a downstream conspiracy would amount to the Court impermissibly allowing speculation to satisfy the minimal basis required for certification: *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58 at para 70.

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Disposition of the Alleged Downstream Conspiracy

[62] The plaintiff has failed to satisfy me that there is some basis to infer a possible downstream conspiracy. Accordingly, the downstream conspiracy allegations do not raise a meaningful question that could be resolved in common. In other words, I am not satisfied that the downstream allegations can "proceed on a class basis without foundering at the merits stage": *McKinsey* at para 46, citing *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 104; *Moiseiwitsch v Canadian National Railway Company*, 2025 BCSC 2377 at para 114.

Additional Issues

[63] I have found that:

a) There is no legal basis to plead that an upstream conspiracy violates s 45 of the *Competition Act*;

b) There is a legal basis to plead a civil conspiracy based on the tort of predominant purpose and unlawful means for an upstream conspiracy;

c) The allegation of civil conspiracy in the upstream market raises a meaningful question that can be answered in common against the defendant subsidiaries and their parent companies;

d) The general allegations of downstream conspiracy contained in the Amended Notice of Civil Claim are sufficient to support a viable cause of action;

e) The general allegations of downstream conspiracy do not raise a meaningful question that can be answered in common; and

f) The additional claims of fraudulent concealment, unjust enrichment, disgorgement, aggravated and punitive damages, interest, and breaches of the *Civil Code of Québec*, CQLR c CCQ-1991 are derivative of the civil conspiracy claim and can likewise be answered in common, but are specifically limited to issues deriving from the upstream civil conspiracy.

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[64] Based on these findings:

a) Common Issues 1-5 as set out in Schedule A are not certified as common issues.

b) Common Issue 5 is to be amended to limit it to the allegation of civil conspiracy in the upstream market.

c) The notices set out in Appendix A and B to the plaintiff's Proposed Litigation Plan set out in Schedule B are to be amended in accordance with these reasons.

d) The defendants have the right to make further submissions on the amended common issues and notices.

[65] I ask that the parties arrange a case management conference before me at their convenience.

"Thomas J."

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