

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bui v. Cargill, Incorporated*,  
2025 BCSC 1870

Date: 20251023  
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*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Thomas

## **Reasons for Judgment re: Certification**

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**Overview**

[1] The plaintiff, Jiang Bui, seeks to certify his action as a class action.

[2] Mr. Bui claims that the defendants conspired to fix prices and limit the beef supply, leading to higher prices for consumers. The proposed class includes all individuals or entities in Canada who have purchased raw beef for resale or personal use since January 1, 2015, excluding certain products and purchases from food service establishments.

[3] Dr. Jeffrey Leitzinger, an economist, supports the plaintiff's claims by stating that methods exist to determine overcharges and calculate damages across the distribution chain.

[4] The defendants are major corporations in the North American meatpacking industry. They consist of Cargill Incorporated, Cargill Meat Solutions Corporation and Cargill Canada ("Cargill"), JBS USA Food Company, Swift Beef Company, JBS Packerland Inc. and JBS Canada ULC ("JBS"), Tyson Foods Inc. and Tyson Fresh Meats Inc. ("Tyson"), and National Beef Packing Company LLC ("National Beef"). They are involved in purchasing, slaughtering and processing cattle into beef products, and then selling those products.

[5] The plaintiff has reached a preliminary settlement with JBS and does not seek certification against them. The defendants are under investigation by the US Department of Justice ("US DOJ") for similar antitrust issues, which may impact the Canadian proceedings.

[6] There is a parallel class action in Quebec, and the plaintiff's counsel asserts that they will coordinate efforts to advance claims for all Canadian class members efficiently.

[7] The defendants focus on four issues in arguing that the matter is not appropriate for certification:

- a) the pleadings are limited to an upstream conspiracy which may be actionable in the United States but is not actionable in Canada;
- b) there is no factual basis or evidence capable of supporting the proposed common issue of a conspiracy; and
- c) there is no economic methodology capable of establishing or quantifying any harm associated with such a conspiracy; such that
- d) there is no basis in fact that a class action would be a preferable procedure over individual determinations.

**Certification Requirements**

[8] Section 4(1) of the *Class Proceedings Act*, R.S.B.C. 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.

[9] 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*].

[10] Certification criteria are applied generously, aiming to promote the fundamental goals of class actions: behaviour modification, judicial economy, and access to justice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 109.

[11] Subsection 4(1)(a), which requires the pleadings disclose a cause of action, 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* at para. 63.

[12] 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] 1 S.C.R. 441, 1985 CanLII 74 (SCC) at para. 14.

[13] Regarding ss. 4(b)–(e), 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.

[14] While at the certification stage, a plaintiff must demonstrate a cause of action that is unlikely to fail and must show some basis in fact to satisfy the remaining s. 4(1) criteria, “a deep dive into the evidence is neither necessary nor warranted”: *Chow v. Facebook, Inc.*, 2022 BCSC 137 at para. 9 [*Chow*]. Although certification is generally a low hurdle, it presents a hurdle nevertheless, and must serve as a “meaningful screening device”: *Pro-Sys* at para. 103. A judge hearing a certification application plays an important gatekeeping role to ensure that only

claims in the common interest of class members are advanced, and to “weed out claims of dubious merit early in the certification stage”: *Chow* at paras. 10, 45.

**Section 4(1)(a) – Cause of Action**

**The Pleadings**

[15] The amended notice of civil claim (“ANOCC”) refers to three distinct products:

- a) “fed cattle” are cows that are ready to be slaughtered and processed. It takes time and expense to create fed cattle. Once a calf is born, fed, housed and grows to reach the fed cattle classification, the cow becomes perishable.
- b) “boxed beef” is fed cattle that has been processed and prepared for sale by the beef processor to first tier purchasers such as manufacturers of frozen food, meat wholesalers and grocery wholesalers.
- c) “case ready beef” is fed cattle that has been processed and prepared for sale by the beef processor to retailers and restaurants at a premium over boxed beef.

[16] Fed cattle is purchased by beef processors from cattle producers.

Transactions involving fed cattle occur on the upstream or supply side of the beef market.

[17] Boxed beef and case ready beef are fed cattle processed by meat processors. Transactions involving these products occur on the downstream or demand side of the beef market. The ANOCC defines boxed beef and case ready beef as “beef”.

[18] The ANOCC 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 ANOCC contain general or unparticularized allegations of actions aimed at directly fixing the price of beef independent of actions taken with respect to fed cattle.

[19] The relevant conspiracy pleadings are as follows:

THE CONSPIRACY

70. The acts alleged under this heading are, collectively, the “Conspiracy Acts”.

71. During the Class Period, the Defendants conspired and/or agreed with each other to fix, maintain, increase or control the price of Beef as well as fix, maintain, control, prevent or lessen the production or supply of Beef. The conspiracy was intended to, and did, affect the price and production or supply of Beef sold in Canada, including British Columbia.

72. The Defendants intended to agree to and perform the Conspiracy Acts and knew or ought to have known that the likely effect of the Conspiracy Acts would be to fix, maintain, increase or control the price for the supply of Beef as well as fix, maintain, control, prevent or lessen the production or supply of Beef in the North American market.

73. Starting in 2015 in response to pressure on Beef margins, and throughout the Class Period, senior executives and employees of the Defendants, acting in their capacities as agents for the Defendants, engaged in communications, conversations, and attended meetings with each other at times and places, which are unknown to the Plaintiff (the “Communications”).

74. During the Class Period, the Communications:

- (a) were conducted secretly, in person, by telephone, and by email, text and other forms of electronic communication;
- (b) involved the exchange of private and competitively sensitive information regarding the supply of fed cattle and the production and sale of Beef;
- (c) involved the exchange of information about the current and future operations of their meatpacking plants with each other;
- (d) were conducted for the purpose of implementing, monitoring and enforcing adherence to the agreed upon prices of fed cattle and Beef, volumes of Beef produced or supplied and markets;
- (e) permitted the Defendants and their unnamed co-conspirators to restrain the volume of fed cattle they processed and thus the Beef they produced or supplied, and to increase the prices they charged for Beef with the result of

75. As a result of the Communications, the Defendants and unnamed co-conspirators unlawfully conspired and/or agreed to reduce and manage their respective slaughter volumes, thereby fixing, maintaining, lessening and controlling the production or supply of Beef, while at the same time fixing, maintaining, increasing or controlling the price of Beef sold in Canada and elsewhere.

76. In particular, the Defendants fixed, maintained, lessened or controlled the supply or production of Beef through the following acts:

- (a) periodically agreeing to reduce the number of cattle slaughtered so as to reduce their production or supply of Beef;
- (b) agreeing to reduce slaughter capacity by closing or idling slaughter plants, running plants at reduced hours, operating plants at lower chain speeds and scheduling unnecessary and/or coordinated maintenance shutdowns;
- (c) agreeing to restrain from expanding slaughter and Beef processing capacity;
- (d) agreeing to control or reduce their purchases of cattle on the cash market; and
- (e) coordinating the timing of purchases, bid amounts, and the regions and feedlots where they would bid for fed cattle, thus lowering the supply of fed cattle and the production or supply of Beef.

77. Because the price of fed cattle in the cash market strongly influences the price of fed cattle in the North American market generally, the Defendants and their coconspirators successfully fixed, reduced or controlled the supply of fed cattle, and thus the production or supply of Beef, during the Class Period.

78. In furtherance of the conspiracy, the Defendants and their co-conspirators intended to, and in fact did, allocate sales, territories, customers or markets for the production or supply of Beef by limiting their respective affiliates' ability to purchase fed cattle in the North American market and to sell the Beef they produced into the North American market.

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.

81. During the Class Period, senior executives and employees of Cargill USA and JBS USA, their subsidiaries or affiliates, were in the position to, and did, direct or influence the policies of Cargill Canada and JBS Canada respectively (the "Canadian Subsidiaries") from outside of Canada.

82. During the Class Period, the Canadian Subsidiaries participated in and furthered the objectives of those Conspiracy Acts entered into outside of Canada by knowingly modifying their competitive behaviour in accordance with instructions received from their respective parent companies or affiliates.

The Canadian Subsidiaries acted as their agents in carrying out the conspiracy and are liable for such Conspiracy Acts.

83. The Conspiracy Acts alleged in this claim to have been done by each Defendant were authorized, ordered, and done by each Defendant's officers, directors, agents, employees, or representatives while engaged in the management direction, control or transaction of its business affairs.

84. Relying on the higher price umbrella set by the Defendants, the non-conspirator Beef meatpacking operators were able to, and did, maximize their profits by charging higher prices for Beef than they would have in a competitive market. The non-conspirator meatpacking operators' conduct in charging higher prices was a direct response to the higher prices for Beef caused by the Defendants' conspiratorial conduct and exercise of collective market power. But for the conspiracy, the Defendants would have charged lower, competitive prices for Beef, and the non-cartel meatpacking operators would have needed to follow those lower prices or risk losing market share.

85. During the Class Period, Class Members who directly and indirectly purchased Beef processed by the Defendants suffered damages measured as the difference between the actual prices paid by them and the "but for" prices that they would have obtained had there been a competitive market for Beef. The Defendants were aware and intended that the alleged conspiracy would cause Class Members to pay supra-competitive prices for Beef.

86. During the Class Period, Class Members who directly and indirectly purchased Beef processed by non-conspirator meatpacking operators ("Umbrella Purchasers") suffered damages measured as the difference between the actual prices paid by them and the "but for" prices that they would have obtained in a competitive market. The Defendants were aware and intended that the alleged conspiracy would result in Umbrella Purchasers paying supra-competitive prices for Beef during the Class Period.

...

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*.

### **Does a Cause of Action Exist for an Upstream Conspiracy?**

[20] Under s. 45(1) of the *Competition Act*, R.S.C. 1985, c. C-34 it is a criminal offence for any person to conspire, agree or arrange with a competitor, in respect of a product, to:

- a) fix, maintain, increase or control the price for the supply of the product;

- b) allocate sales, territories, customers or markets for the production or supply of the product; or
- c) fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

[21] The defendants say s. 45 of the *Competition Act* was deliberately amended in 2010 to limit its application to agreements between competitors to fix prices, allocate markets or restrict output relating to “the production or supply of” a good or service. Section 45 has no application to agreements between buyers relating to their purchase of a good, such as fed cattle, even if that agreement may have downstream effects. Instead, the *Competition Act* provides that any agreements between competitors that do not fall into the enumerated categories of *per se* criminal conduct expressly set out in s. 45 are subject to civil review under s. 90.1 of the *Competition Act*, based on whether the agreement is likely to prevent or lessen competition substantially in any market.

[22] These submissions parallel the dicta of Justice Sharma’s decision in *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183 at paras. 37–78 [*Latifi*]; and as summarized by our Court of Appeal in *Latifi v. The TDL Group Corp.*, 2025 BCCA 45 [*Latifi BCCA*]:

[15] On November 9, 2021, the respondent’s application to strike the amended notice of civil claim, brought pursuant to R. 9-5(1)(a) of the *Supreme Court Civil Rules*, succeeded in part. Finding the judgment in *Mohr v. National Hockey League*, 2021 FC 488, to be persuasive, the chambers judge concluded that s. 45 of the *Competition Act* creates an offence if competitors act in concert to affect “the supply” or “the production or supply” of the product and does not apply to purchasing agreements.

[16] She held:

[78] I conclude, for the reasons expressed by the Federal Court, that it is plain and obvious that the plaintiff’s claim that the No-hire clause violates s. 45 is bound to fail. I agree with the Federal Court that s. 45 cannot apply to situations where the competitors of a product are not also the same entity who supply or produce that product. This conclusion is supported by the plain wording of s. 45, buttressed by its legislative history. This forecloses the ability of the plaintiff to rely on s. 45 in this case.

[17] For that reason, the unlawful means conspiracy claim also failed, there being “no viable claim of unlawful conduct, a necessary prerequisite to pleading civil conspiracy of unlawful means”: paras. 103, 116. Similarly, the unjust enrichment claim was struck as the contractual obligations between TDL and its franchisees provided a juristic reason for any benefit obtained.

[23] In my view, our Court has determined that upstream conspiracies fall outside of s. 45. To the extent that such conspiracies may impact the downstream market, recourse lies pursuant to s. 90.1 and is not available to the plaintiff for private prosecution pursuant to s. 36. To the extent that this factual scenario differs from *Latifi*, in my view, Sharma J.’s rationale is persuasive, determinative and applicable to these circumstances.

[24] The plaintiff says that *Mohr v. National Hockey League*, 2021 FC 488 [*Mohr*], aff’d 2022 FCA 145, leave to appeal to SCC ref’d 40426 (20 April 2023), leaves the door open to the application of the *Competition Act* to hardcore cartel agreements in the supply or upstream market amongst competitors of a product in a downstream market:

[43] By their express terms, those provisions do not apply to the purchase or other acquisition of a product, although I do not exclude the possibility that paragraph 45(1)(c) may apply to a supplier boycott or other “hard core cartel” agreement among competitors in a downstream market to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product in respect of which they compete. The agreements alleged in the Amended Statement of Claim are plainly not of this type.

[25] In my view, on its face, *Mohr* supports the position of the defendants as it stands for the proposition that s. 45 does not apply to upstream agreements amongst competitors in a downstream market because the upstream product (hockey players or fed cattle) is different than the downstream product (hockey entertainment business or beef).

[26] The plaintiff argues that *Latifi* and *Mohr* are distinguishable to the case at bar because they both involved impugned agreements that were public and about the purchase of labour required to make the product that the defendants competed with each other to sell. The circumstances in those cases differ markedly from the what

the plaintiff alleges a secret supply side agreement to fix the supply and price of beef.

[27] The factual differences between agreements at issue in *Latifi, Mohr*, and conspiracy pled by the plaintiff do not persuade me that the legal principles articulated in *Latifi* and *Mohr* are inapplicable here. In my view, the inapplicability of s. 45 to upstream or supply-side conspiracies does not change based on the publicity or secrecy of the alleged conspiratorial conduct.

[28] The relationship between upstream and downstream conspiracies was considered by Justice Horsman, as she then was, in *Williams v. Audible Inc.*, 2022 BCSC 834 [*Williams*], aff'd 2023 BCCA 475, which dealt with a restrictive agreement for the provision of audiobooks by Audible to Apple. Of significance was the fact that the downstream agreement dealt with the same product that was being sold in the upstream market:

[118] Before concluding on this issue, I must address two matters that were a theme of Apple's submissions on the *Competition Act*. First, there is Apple's heavy reliance on *Mohr* and *Latifi*, and the orders made in those cases striking claims that were founded on an alleged breach of s. 45. While *Mohr* and *Latifi* are helpful in a general sense in their review of the legislative history and evolution of s. 45 of the *Competition Act*, both cases are factually distinguishable from this case. In both cases, the Courts held that s. 45(1), on its plain wording, extends only to agreements between competitors in the production or supply of a product, and not to agreements between buyers for the purchase of a product. In contrast, in the present case, the agreement in issue—the Restrictions on Audible—is an agreement between competitors in relation to the supply of a product.

[29] In my view, the consistent interpretation given to s. 45 is that it does not apply to upstream markets involving inputs to downstream markets whose products are derived from these inputs. In order for a claim to be actionable under s. 45, the plaintiff would have to establish downstream anti-competitive activity ancillary (or independent) to the alleged upstream conspiracy acts to bring the conduct within the scope of s. 45.

[30] The plaintiff has not provided specific allegations of such conduct. The detailed allegations all deal with purchases of fed cattle and the subsequent impact

that conduct in the upstream market has on the price of beef in the downstream market. What the plaintiff alleges is a quintessential upstream conspiracy which in my view falls outside of s. 45. To allow it to be treated as a s. 45 offence would be contrary to the clear language of the *Competition Act*, its legislative history, and its subsequent interpretation by the courts.

**Does a Cause of Action Exist for a Civil Conspiracy?**

[31] This does not end the matter. The plaintiff also alleges that the defendants are liable for the tort of civil conspiracy.

[32] Civil conspiracy may take the form of predominant purpose conspiracy or unlawful means conspiracy.

[33] Predominant purpose conspiracy occurs where (a) the predominant purpose of the defendant's conduct is to cause injury to the plaintiff using either lawful or unlawful means, and (b) the plaintiff does in fact suffer loss caused by the defendant's conduct: *Pro-Sys* at para. 74. Where the defendant's conduct is lawful, if the defendant acts with the objective of injuring the plaintiff, the lawful acts become unlawful: *ibid*. A plaintiff pleading two predominant purposes is not fatal to a certification application: *Latifi* at paras. 86-101.

[34] To meet the legal test for predominant purpose conspiracy, the plaintiff must prove the following on a balance of probabilities:

- i. an agreement or concerted action between two or more persons;
- ii. with the predominant purpose of causing injury to the plaintiff; and
- iii. overt acts committed that cause damage to the plaintiff.

(*Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 125.)

[35] Harm must be the “predominant purpose” of the agreement or concerted action, not merely an ancillary purpose or a resulting effect: *Latifi v. The TDL Group Corp.*, 2024 BCSC 832 at para. 42, citing *Pro-Sys* at paras. 74–5.

[36] Unlawful means conspiracy is derived from the tort of unlawful means. An unlawful means conspiracy is “parasitic” in that it must be founded on actionable conduct. Where the evidence does not support a breach of the *Competition Act*, an unlawful means conspiracy may be founded upon a predominant purpose civil conspiracy involving the upstream or supply market: *Latifi BCCA* at para. 18.

[37] While a predominant purpose conspiracy is sufficient to ground a claim for unlawful means, it is unclear whether unjust enrichment alone is a sufficiently “unlawful” act to bring the upstream or downstream conspiracy within the scope of the unlawful means civil conspiracy.

[38] In my view, a similar potential cause of action based predominant purpose and/or unlawful means civil conspiracy involving conduct in the upstream or supply market is raised by the ANOCC. Given the generous interpretation to be given to the pleadings at this stage, I am not satisfied that it is plain and obvious that the plaintiff’s allegations of civil conspiracy are bound to fail: *Live Nation Entertainment, Inc. v. Gornel*, 2023 BCCA 274, leave to appeal to SCC ref’d, 40930 (4 April 2024) at para. 63; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17.

**Are the Allegations Establishing a Downstream Conspiracy too Vague to Support a Cause of Action?**

[39] The pleadings also contain allegations of downstream conspiracy. At para. 79 of the ANOCC, the plaintiff says that:

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.

[40] The defendants say that the plaintiff’s allegations concerning downstream conspiracy are so vague and general that they amount to mere speculation and conjecture on any alleged agreement. Accordingly, it is plain and obvious that the claims cannot succeed and should be struck.

[41] The defendants primarily rely on *Jensen v. Samsung Electronics. Co. Ltd.*, 2021 FC 1185 [*Jensen*], aff'd 2023 FCA 89, leave to appeal to SCC ref'd, 40807 (11 January 2024). In *Jensen*, the Federal Court dismissed the plaintiff's certification application for a conspiracy class action because the pleadings did not provide sufficient material facts as to the existence of an unlawful agreement between the defendants: at paras. 117, 123–124. Specifically, the pleadings did not contain “material facts as to how and when an agreement could have been formed and entered into between the defendants, what if anything could have been agreed upon between the defendants, any meeting of the minds with regard to the commission of the alleged conspiracy offence, or any overt acts undertaken by the defendants in furtherance of an alleged conspiracy”. At minimum, the pleadings ought to have provided the “how” and “what” could give rise to the defendants' liability. The Federal Court concluded because the pleadings lacked sufficient particularity on the alleged wrongful acts, it was plain and obvious that the claim could not succeed.

[42] The plaintiff denies the applicability of *Jensen* and relies instead on *Crosslink v. BASF Canada*, 2014 ONSC 4529, another case where the pleadings did not specify any agreement, or actionable acts or omissions. Justice Goodman nonetheless found that requiring the level of particularity sought by the defendants at the certification stage would “set a virtually impossible standard for plaintiffs to meet in a price-fixing conspiracy case” because such conspiracies are “secretive in nature, with the details of the conspiracy largely in the hands of the conspirators”: at para. 27.

[43] The plaintiff also says that pleadings and practice before the Federal Court are not necessarily applicable to the procedure in British Columbia. Rather, in BC, particulars such as “when, where or through whom any agreements were reached” may not be necessary at the certification stage. Assuming the facts setting out the alleged conspiracies are true, failure to plead the level of specificity desired by the defendants is not fatal; such specificity will be met following disclosure and discoveries through the production of further particulars. The plaintiff relies on

*Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 [*Valeant*], leave to appeal to SCC ref'd, 40556 (25 May 2023) at paras. 53–63.

[44] In *Valeant*, our Court of Appeal summarized and affirmed the “functional approach” that courts must take in determining the adequacy of pleadings at the certification stage. Courts must ask “[w]hether on a fair reading of the pleadings, a defendant can identify what the [plaintiff] alleges it has done wrong?”: at para. 61. The Court of Appeal also highlighted the difference between a pleading’s lack of particularities and lack of material facts; the former is not fatal at the certification stage, the latter is: at paras. 62–63.

[45] General allegations of a conspiracy, accompanied by a sufficient evidentiary basis, are adequate to defeat an application for particulars until after discovery: *Kitimat General Hospital Society v. Air Products Canada Ltd.*, 1997 CanLII 4296 (BCSC) at paras. 44–46 [*Kitimat*]; *Steelhead LNG Limited Partnership v. Arc Resources Ltd.*, 2022 BCCA 128 at para. 63. A plaintiff in a conspiracy action is only required to adduce “some evidence, even if very little, in order to require the defendant to answer”: *Kitimat* at para. 44, citing *Tour-Mate Technologies Corp. v. Syntronix Systems Ltd.*, [1993] B.C.J. No. 599 (S.C.), 1993 CanLII 2250 at p. 7.

[46] In circumstances where information tending to prove or disprove the conduct alleged in pleadings is better known to the defendant than the plaintiff, it is impractical for the plaintiff to know the specifics of the conduct it alleges and for the pleadings to contain a high level of specificity: *Kitimat* at paras. 44–46.

[47] There is no bright line between evidence, material facts, and general allegations. In circumstances such as these, where information concerning the specifics of the alleged conduct lie solely in possession of the defendants, the specificity required of the plaintiff’s pleadings shifts towards the more generalized end of the spectrum at this stage in the proceedings.

[48] Based on my review of these cases, I am applying the following principles:

- a) I am limited to examining the pleadings, and applying the interpretative principles set out in the certification requirements section of these reasons;
- b) the pleadings will be subject to a “some basis in fact” criteria pursuant to 4(1)(b)–(e), but not with respect to the 4(1)(a) assessment; and
- c) in these circumstances, it is appropriate to view the burden on the plaintiff at the general allegation end of the spectrum with the right of the defendants to demand further particulars and the plaintiff to refuse to provide such particulars if they can establish some evidence supporting the allegations.

[49] In applying these principles, the demand side conspiracy allegations found in paras. 79–80 and 102 of the ANOCC, when read in conjunction with the particularized allegations of supply side conspiracy, establish:

- a) sufficient generalized allegations to support a pleading of a downstream or demand side conspiracy in conjunction with or ancillary to a supply side conspiracy; and
- b) a standalone pleading of a downstream or demand side conspiracy.

[50] I am cognizant of the gatekeeping concerns expressed by the Federal Court in *Jensen* which required more than generalized allegations. However, in my view, in these circumstances, the main gatekeeping role should be exercised under the certification criteria in subsections 4(1)(b)–(e). This approach will allow the Court to consider the evidence and factual circumstances which support the underlying pleadings.

[51] I note in *Jensen*, the plaintiff relied on news articles that Chinese DRAM manufacturers were under investigation for price-fixing in China to support their allegations that a global conspiracy for price-fixing existed and was affecting the Canadian market. However, there was no evidence indicating how a price-fixing investigation with a clear territorial scope supported and inference that the same

conspiratorial conduct was underway in Canada, or of the interconnectedness of the Chinese and Canadian DRAM markets.

**Conclusions**

[52] I have made the following findings:

- a) there is no legal basis to plead that an upstream or supply side 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 or supply side conspiracy; and
- c) the general allegations of downstream or demand side conspiracy contained in the ANOCC are sufficient to support a viable cause of action, in these circumstances.

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

[53] Section 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*].

[54] In *Jiang* at paras. 82, 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.

[55] The plaintiff at para. 5 of the ANOCC defines the proposed class as:

All persons or entities in Canada who purchased for resale or personal use, between January 1, 2015 and the present (“Class Members”), the raw portion of cattle carcasses intended for human consumption (“Beef”) excluding Beef Products and Beef purchased from the food service industry.

“Beef Products” means those products that contain Beef as one ingredient among others except where all non-Beef ingredients have been introduced through the processes of mechanical blade/needle tenderizing, brine injection, massaging, aging, chemical/enzyme tenderizing, vacuum tumbling, marination and/or seasoning.

[56] There is some evidence indicating that approximately 90% of Canadians eat beef and that there are about 30,000 meat or food service wholesalers, manufacturers, restaurants, grocery and other food industry beef retailers in Canada. This is clearly a broad proposed class.

[57] The proposed class appears to be objectively identifiable on its face, as purchasers of beef will be able to self-identify based on the class definition. Indirect purchasers will be able to identify whether the meat they have purchased fits within the definition of beef or is excluded because it is either a beef product or was purchased from the food service industry. This is consistent with the principles summarized in *Jiang* at paras. 88–92.

[58] The defendants say that the plaintiff has not proposed a workable methodology capable of dealing with claims of proposed class members who purchased beef from non-defendants (“Umbrella Purchasers”), and as such the definition should be amended to exclude such purchasers from the proposed class.

[59] I will deal with this issue later in my reasons.

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

[60] The common issues are set out in Schedule A of the ANOCC. The defendants raise two concerns with respect to the common issues. They say the plaintiffs have not established:

- a) any basis in fact of the alleged conspiracy;
- b) a “sufficiently credible or plausible” economic model to “offer a realistic prospect of establishing that an overcharge was passed on to the class members”. This includes the defendants’ concerns that the plaintiff has not proposed a workable methodology for dealing with Umbrella Purchasers; and
- c) some basis in fact supporting the inclusion of parent companies as defendants;
- d) some basis in fact for unjust enrichment;
- e) some basis in fact for aggravated and punitive damage; and
- f) some basis in fact for a claim of disgorgement.

**Some Basis in Fact of the Alleged Conspiracy**

***Legal Principles***

[61] I agree with the plaintiff that price fixing cases, by their nature, deal with common legal and factual questions concerning the existence, scope and effect of the alleged conspiracy. Class members have a common interest in proving the facts and circumstances pertaining to the conspiratorial conduct. These are central and overriding issues for all members of the class: *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (QL), 2005 CanLII 8751 (O.N.S.C.), aff’d [2003] OJ No 868 (QL), 2003 CanLII 30349 (O.N.C.A.) at para. 34; *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148 at para. 267.

[62] The plaintiff says the most persuasive British Columbia decisions establish that the some basis in fact requirement is limited to whether the conspiracy can be determined on a common basis, as opposed to whether there is some basis in fact establishing the very existence of the conspiracy.

[63] In my view, the allegations in this case fall within this general paradigm such that the existence of a conspiracy is a common issue to all class members as set out in Schedule A.

[64] The defendants rely on other British Columbia decisions that they say focus on the court's obligation to perform a gatekeeping function in class action litigation to eliminate expensive and costly claims that have little or no merit or possibility of success at the certification stage. Applying the some basis in fact test to ensure an underlying factual basis and merit to a cause of action is essential to the performance of this gatekeeping role. They say that there is no basis in fact for the alleged conspiracy and that the complexity of the market for fed cattle would make it impractical to implement such a conspiracy.

[65] There has been divergent authority on this issue in British Columbia. The recent cases of *Mann-Campbell v. JUUL Labs Canada, Ltd.*, 2025 BCSC 771 at paras. 227–238 and *British Columbia v. Apotex Inc.*, 2025 BCSC 92 at paras. 576–593 [*Apotex*] have considered and summarized the authorities referred to me by the parties on this issue.

[66] Like my colleagues, I find the comments of Hinkson C.J.B.S.C., as he then was, in *O'Connor v. Canada Pacific Railway Limited*, 2023 BCSC 1371 at paras. 239–263, and his application of these principles to common issues at paras. 270–282, to be instructive.

[67] I will apply the following principles in assessing the sufficiency of evidence with respect to the common issue of the alleged conspiracies, proposed by Justice Brundrett in *Apotex* at paras. 586–589, 593:

[586] Courts in British Columbia have generally not found it useful to split the commonality analysis into two steps. In *Nissan* at para. 132, the Court of Appeal rejected the need for “two distinct categories of evidence,” some evidence that there is a common defect and some evidence that the alleged defect is dangerous. The Court directed that the inquiry should focus on the language of the common issue that is proposed and whether there is some evidence that supports the argument that it is a common issue across members of the class: *Nissan* at para. 133. The purpose of the requirement that there be some basis in fact to support the common issues is to provide the certification judge with some level of confidence that certification will be of practical benefit when, in the future, the claims reach trial, as opposed to being simply a procedural complication for claims that are not truly common. It also helps the judge determine if a class proceeding is a preferable procedure: *Nissan* at para. 139.

[587] Most recently, in *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127, the Court of Appeal expressed the approach in the following terms:

[33] For the remaining criteria in s. 4(b)–(e), the plaintiff must present sufficient evidence to show ‘some basis in fact’ that the requirements for certification are met: *Hollick* at para. 25. This does not involve an assessment of the merits. Thus, for example regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred: *Pro-Sys* at para. 110. The purpose of the ‘some basis in fact’ requirement is to ensure that that the action can proceed on a class basis without “foundering at the merits stage” because the certification requirements are not met: *Pro-Sys* at para. 104.

[34] The evidentiary threshold that the plaintiff must meet on a certification hearing is a low one: “some basis in fact is to be contrasted with *no* basis in fact”: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 104. This evidentiary requirement must be understood in the context of the CPA scheme, which envisions that applications for certification will be brought at the early stages of the proceeding: *Nissan v. Mueller*, 2022 BCCA 338 at para. 136. As the merits are not being argued on certification, the record does not have to be exhaustive: *Fischer* at para. 41. While the defendant is entitled to respond to the plaintiff with its own evidence, the court cannot engage in any detailed weighing of conflicting evidence: *Sun-Rype* at para. 68; *Fischer* at para. 43.

[588] In *Bowman*, Justice Matthews concluded that the two-step evidentiary test is not appropriate for every common issue that might be sought to be certified in a given case. While there must be common issues to certify a class proceeding, their existence is determined by whether they are live issues of fact or law, which is not always an evidentiary matter. There must be some evidence of the commonality of a proposed common issue. That evidence will often also go to its existence, but if it does not, the existence can be supported by the pleadings or the law: at para. 139.

[589] As Hinkson C.J.S.C. alluded to in *O'Connor*, there may well be little substantive difference in breaking the test down into two steps as long as the Court remains mindful that the merits of the case are not in issue. In that case, this Court adopted a more functional approach while recognizing that some basis in fact for class-wide commonality requires more than mere speculation:

[261] In considering the authorities above, regardless of whether it is called a one- or two-step test, the plaintiff's burden is the same. He must show some basis in fact that the issues are common to the class. He need not prove on a balance of probabilities that the defendants actually caused or contributed to the Wildfire. However, as stated in *Hollick* at para. 25, he must show some basis in fact that the claims raise common issues, "other than the requirement that the pleadings disclose a cause of action."

[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.

...

[593] These authorities provide that for the commonality test in s. 4(1)(c) of the *CPA*, the court must consider the language of the common issue that is proposed, and whether there is some basis in fact, as opposed to no basis in fact, that supports the argument that the issue is a common across members of the class: *Nissan* at para. 132; *Mentor Worldwide LLC* at para. 33. The underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis: *Pro-Sys* at paras. 108, 110.

[68] The question informing the commonality assessment of common issues is whether "allowing the action to proceed as a class action will avoid the duplication of fact-finding or legal analysis": *Williams* at para. 135, citing *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39.

[69] At its core, the common issues analysis is procedural; that is, whether a class action is the appropriate procedure to adjudicate and remediate the harms alleged: *Apotex* at para. 586; *Pro-Sys* at paras. 101–102.

***Case Theory and Supporting Evidence***

***Upstream or Supply Side Conspiracy***

[70] The plaintiff has provided detailed pleadings setting out the basis for an upstream or supply side conspiracy for fed cattle whose purpose and effect is to impact the price of beef.

[71] The evidence of upstream conspiracy is based upon litigation in the United States and investigations by state Attorney Generals and the Department of Justice.

***US Cattle/Beef Litigation***

[72] There are several civil class actions in the US dealing with cattle/beef proceedings that have been consolidated into a single multi-district litigation file (the “US Litigation”). These cases deal with plaintiffs whom sell cattle, along with consumers who purchase beef either directly or indirectly from meat processors, which include two of the defendants in this action.

[73] The allegations considered, as set out in the motions to dismiss, indicate that the alleged conspiracy is an upstream or supply side conspiracy similar to the conspiracy acts alleged in this action. The US Litigation does not appear, on its face, to raise issues of a downstream or demand side conspiracy for beef. The defendants note that in the US, unlike Canada, supply side conspiracies are actionable under the US equivalents of the *Competition Act*.

[74] In the second motion to dismiss, there was evidence from an employee of a JBS subsidiary (whom is a named defendant in this action) who was told by a superior that JBS and their co-defendants had “expressly agreed to periodically reduce its purchase and slaughter volumes to reduce the prices they would pay for fed cattle.” According to this witness, the superior employee reported that “higher-ups” at JBS, including at JBS’s head office in the United States, were aware and acting in furtherance of the agreement.

[75] The meat processing defendants have produced over 3,500,000 documents over the course of the US Litigation. As of June 24, 2024, 75 depositions have been

conducted and 55 more have confirmed deposition dates. The current depositions have generated 10,000 pages of transcripts. It is expected that 300–400 depositions will be conducted by January 2025. Most of the documents and the depositions are subject to confidentiality provisions or orders.

[76] Decisions from prior, related certification litigation involving other parties may be useful to the courts adjudicating related certification proceedings. The purpose of certification proceedings is to determine to proper form and structure of the proposed class action litigation. Related prior actions provide valuable evidence of the issues and procedural challenges likely to arise in the matter currently before the court: *Mayer v. Merchant Law Group LLP*, 2025 BCSC 1106 at paras. 35–40.

[77] The decisions may also be used to provide some evidence to support a finding of some evidence of fact with respect to evidence presented and findings made of the court. Whether the facts are relevant to the proceedings are a different issue.

[78] The plaintiff relies on the following evidence adduced in connection with the US Litigation to support its certification application:

- a) a letter from the US State Attorney Generals to the US DOJ;
- b) Tyson’s form 10-Q quarterly reports from 2023 and 2024;
- c) JBS’s 2023 form 10-Q quarterly report from 2023; and
- d) civil investigative demands (“CIDs”) sent by the Anti-Trust Division of the US DOJ to entities within the JBS, Cargill, Tyson, and National Beef corporate families.

The defendants contest the admissibility of evidence from the US Litigation (in addition to their objections to the admissibility of decisions of foreign jurisdictions).

***May 5, 2020, Letter from U.S. State Attorney Generals to DOJ***

[79] This letter from the Attorney General for Colorado, Missouri, Montana, and North Dakota requests the US DOJ to investigate the meat processing industry and expresses a desire to collaborate with the federal authorities on this issue:

We write to express our concerns regarding market concentration and potential anticompetitive practices by the meat packers in the cattle industry. We urge the United States Department of Justice ("DOJ") to investigate the state of competition in this industry and the dynamics that are depriving cattle ranchers and American consumers of the benefits of a competitive cattle industry.

Antitrust concerns about the cattle market are nothing new. Competition issues arising from agricultural markets existed long before the COVID-19 pandemic and will persist long after we defeat our current crisis. The U.S. beef processing market is highly concentrated, with the four largest beef processors controlling 80 percent of U.S. beef processing. In this highly concentrated industry, meat packers have achieved sizeable profit margins. Cattle ranchers, however, who for generations have supplied our nation's beef, are squeezed and often struggle to survive. Consumers, moreover, do not realize the benefits from a competitive market. In short, with such high concentration and the threat of increasing consolidation, we have concerns that beef processors are well positioned to coordinate their behavior and create a bottleneck in the cattle industry-to the detriment of ranchers and consumers alike.

In a competitive industry, rivals compete against each other for upstream supplies and to provide a higher quality and lower priced product to consumers. In oligopolistic industries, by contrast, firms can engage in tacit-or even express-collusion, providing artificially low prices to suppliers (e.g., farmers and ranchers) and inflating prices to consumers. In the beef industry-with the top four companies accounting for over 80 percent, nationwide-there are signs of such a dynamic at work; notably, the disparity between the price of live weight cattle and the retail cost of boxed beef sold to consumers is a sign of a market that lacks full and fair competition. Consider, for example, that live cattle futures recently experienced deep declines, while both the price of boxed beef and consumer demand remain healthy, especially as consumers navigate these unprecedented times.

***Tyson's Form 10-Q Quarterly Reports***

[80] Tyson's 2024 report contains a summary of the beef antitrust litigation, where it indicates that the civil actions commenced against it in the US are based upon alleged anti-competitive acts in the downstream market for fed cattle and the impact that these acts have on prices in the upstream market for beef.

[81] In its 2023 report, Tyson stated that it had received a subpoena dated April 21, 2022, from the New York Attorney General's Bureau of Consumer Frauds & Protection seeking information regarding the sales, prices and production costs of beef products. Tyson was unable to agree with the New York Attorney General's office on the appropriate scope of the subpoena, and, as of August 3, 2022, the parties were litigating the issue before a New York state court.

***The Defendant JBS's USA's Form 10-Q Quarterly Report for 2023***

[82] JBS provided similar information with respect to the civil actions commenced against it in the US as was provided by Tyson.

[83] JBS provided the following information about a subpoena that it had been served with:

In December 2020 and October 2021, JBS USA received civil investigative demands ("CIDs") from the Antitrust Division of the DOJ. The CIDs request information related to the fed cattle and beef packing markets. We are cooperating with the DOJ in producing documents and information pursuant to the CIDs. The Offices of the Attorneys General for multiple states are participating in the investigation and coordinating with the DOJ.

***The JBS, Tyson and National Beef Corporate Families***

[84] The antitrust division of the US DOJ sent CIDs to entities within each of the JBS, Cargill, Tyson, and National Beef corporate families.

***Position of the Defendants***

***Foreign Jurisdiction Evidence is Irrelevant and Non-Probative***

[85] The defendants say that evidence from the US Litigation does not satisfy the some basis in fact standard because evidence from foreign jurisdictions cannot be used to establish anti-competitive activity in Canada. They argue that evidence of activity in the US market is irrelevant.

[86] The defendants rely on two cases: *Jensen*:

[235] That said, I have nonetheless reviewed the plaintiffs' evidence on the China Investigation in detail, and I find that the documents provided do not offer the minimal evidentiary basis required to support the existence of an

alleged agreement in breach of section 45. In other words, the news articles on the China Investigation do not amount to some basis in fact that the plaintiffs' first proposed common issue on liability exists in fact as they do not provide the required minimal evidentiary basis for the existence of an unlawful conspiracy to restrict DRAM supply or to indirectly increase DRAM prices in Canada, under Canadian law.

...

[243] For all these reasons, I find that the evidence on the China Investigation does not amount to some basis in fact constituting evidentiary background for the proposed common issue put forward by the plaintiffs with respect to a breach of section 45 and the existence of an alleged criminal conspiracy to restrict DRAM supply and to consequently increase DRAM prices under Canadian law. Evidence regarding a foreign government's investigation cannot establish a basis in fact for a conspiracy offence in Canada, when there is no evidence on the actual nature of the investigation and on the specific anti-competitive behaviour being investigated; no evidence or findings from the foreign regulators; no evidence that the scope of the investigation includes or extends to Canada; and no evidence on the foreign law and on whether the anti-competitive behaviour investigated in the foreign country, and possibly sanctioned in that country, is also conduct and behaviour that would constitute an illegal agreement under Canadian law.

And *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606 [*Lilleyman*]:

[78] Turning to the motion judge's application of that test, I will not repeat my earlier description of the reasons why the motion judge found that the appellant had failed to satisfy this minimal evidentiary standard. As explained above, the nub of the difficulty identified by the motion judge was that, although the appellant had tendered a huge volume of evidence concerning conduct in the U.S. regarding the U.S. retail tuna market, there was no evidence to support the claim that this conduct affected the Canadian market. As for the opinion of the plaintiff's expert claiming that the market conditions for a price-fixing cartel in Canada existed, the motion judge found that her evidence contradicted itself since she totally misunderstood the true state of market conditions in Canada. Applying her expertise to the correct factual underpinnings revealed that the market conditions in Canada were not conducive to the existence of a price-fixing conspiracy for the sale of tuna.

[87] In my view, *Jensen* and *Lilleyman* do not stand for a general principle that foreign antitrust investigations cannot be used as evidence of corresponding anti-competitive conduct in Canadian markets. Additionally, the facts and evidence led in both *Jensen* and *Lilleyman* are distinguishable from this proceeding.

[88] In *Jensen*, the foreign jurisdiction evidence consisted of news articles reporting on investigations of Chinese DRAM manufacturers by the Chinese antitrust

authorities. The articles were vague about the alleged anti-competitive conduct being investigated by the Chinese authorities. The plaintiffs did not adduce evidence from the Chinese antitrust agency itself respecting its investigation, findings, or any subsequent regulatory action taken. Additionally, the news articles specified that the investigation had a limited territorial scope; that is, the authorities were focused on DRAM businesses in China and prices in China. Nothing in the foreign jurisdiction evidence supported the existence of a global price-fixing conspiracy that could have spillover effects in the Canadian market, as the plaintiffs alleged.

[89] In *Lilleyman*, the plaintiff relied on the existence of a price-fixing conspiracy in the US tuna market as the “some basis in fact” of the existence of the same conspiracy in Canada, notwithstanding the fact that:

- a) the structure of the Canadian market differed greatly than the US market;
- b) the two markets were not closely intertwined; and
- c) several of the defendants in the US proceedings were not suppliers in the Canadian market.

[90] The pleadings also did not explain how the US conspiracy would have spilled over into the Canadian market, given the disconnect between the markets and the different structure of the markets.

[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.

***Plaintiff's Proposed Evidence is Hearsay and Inadmissible***

[94] The defendants also say that the evidence of foreign antitrust investigations is hearsay and inadmissible for establishing some basis in fact of such activity in Canada. I disagree.

[95] The following principles apply to the admissibility of evidence, including media reports at a certification application, as set out in *Lam v. Flo Health Inc.*, 2024 BCSC 391 at paras. 163–166:

- a) a certification application is an interlocutory application such that the relevant rules of evidence apply;
- b) whether media and other articles are admissible to establish some basis in fact requires some objective evidence of the reliability of the information contained therein, which depends on:
  - i. whether the article comes from an official website from a well-known organization;
  - ii. whether the information is capable of being verified; and
  - iii. whether the source is disclosed so the objectivity of the person (or organization) posting the material can be assessed; and
- c) even evidence of “double hearsay” which hints at the existence of admissible evidence can be admitted to support the existence of evidence that might be available to support the allegations: see also *Tietz v. Affinor Growers Inc.*,

2022 BCCA 307, leave to appeal to SCC ref'd, 40458 (25 May 2023) at para. 107.

[96] The defendants say that the evidence concerning the US Litigation and information contained in the judicial consideration of the US Litigation are not admissible for evidence of the facts alleged by the plaintiff. In my view, the defendants present an overly narrow view of the some basis in fact requirement with respect to evidence which may support the existence of evidence establishing the allegations of a conspiracy. The defendants' position is also inconsistent with the low bar for evidence at the certification stage.

[97] This evidence, in my view, provides some probative value with respect to whether some evidence exists of a conspiracy and potential particulars of such a conspiracy. This evidence does not exist in a vacuum and is supported by the evidence of the existence of an investigation of similar allegations brought by the US DOJ and the concerns raised by the state Attorney Generals.

[98] In my view, all of the evidence listed earlier in these reasons is admissible with respect to some basis in fact test with respect to the existence of a conspiracy.

[99] Given my findings with respect to the admissibility of the US evidence, in my view, the factual evidence of upstream conspiracy in the US is relevant to the existence of similar activity in Canada.

***Summary of Admissible Evidence***

[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.

[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.

***Downstream or Demand Side Conspiracy***

[102] The defendants say that there is no evidence of a downstream conspiracy with respect to the pricing or supply of beef in Canada. They have denied their participation in the alleged conspiracy and provided evidence that supports an inference that the market, despite its concentration, is not conducive to such conduct.

[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.

***Application of Legal Principles to the Theory and Supporting Facts***

[105] In assessing whether there is some basis in fact for a common issue, I must "consider the language of the common issue that is proposed, and whether there is

some basis in fact, as opposed to no basis in fact, that supports the argument that the issue is common across members of the class”: *Apotex* at para. 583.

[106] In my view, given the nature of dispute between the parties over the existence of a conspiracy, the evidence submitted by both sides, and the nature of the pleadings, the test is satisfied with respect to the upstream or supply side alleged conspiracy acts in the market for fed cattle and the potential impact of that activity on the demand side or downstream market for beef. My finding is based on:

- a) the detailed nature of the pleadings; and
- b) the evidence supporting similar supply side activity in the US, given the interlinkages between both the defendants’ operations and the beef markets in Canada and the US.

[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.

[108] I am satisfied that there is some factual basis, greater than no evidence, for the existence of evidence supporting the allegations in the fed cattle market in Canada, which might affect the beef market. However, for the reasons elaborated on below, the issue of the alleged conduct in the beef market should be deferred until further documents have been provided by the defendants.

***Application for Additional Documents or Discovery***

[109] On July 15–17, 2024, prior to the certification hearing, the plaintiff brought an application, for amongst other things:

- a) full disclosure of the information disclosed in the US Litigation by the defendants; and
- b) cross-examination of the defendants who denied participating in the alleged conspiracy.

[110] In my view, the disclosure sought by the plaintiff would have included a copy of the CIDs and subpoenas received from the New York Attorney General seeking information regarding the sales, prices, and production costs of beef product and the CIDs made by the US DOJ (the “CIDs and Subpoenas”). These demands likely would provide evidence of the scope of the investigation in the US market and whether it extends to concerns about conspiratorial conduct in the downstream market.

[111] My reasons were published as *Bui v. Cargill Incorporated*, 2024 BCSC 1364. At that application, the plaintiff argued that evidence related solely to the merits of the action is inadmissible at the certification stage because the court is prohibited from weighing the merits of the action at that stage in the proceedings.

[112] Conversely, the defendants argued that the law in British Columbia requires the court to make a “threshold determination” of the merits of the action when assessing whether the certification criterion under s. 4(1)(c) is satisfied.

[113] I adjourned the application to the certification hearing on the basis that:

- a) the resolution of the application would require a determination of the proper legal test to apply to s. 4(1)(c); and
- b) such a determination will require a complete factual matrix which, in this case, will only be presented and argued during the certification hearing.

[114] The plaintiff now renews his application for disclosure of the defendants' documents produced over the course of the US Litigation. In the alternative, given the immense number of documents that would be produced and the timing of the application at the end of the certification hearing, the plaintiff requests limited production of the CIDs and Subpoenas.

[115] The defendants oppose the application. They say that an order for the production of the CIDs and Subpoenas is inappropriate for four reasons:

- a) the documents are irrelevant;
- b) the certification hearing has already been argued and allowing additional document production at this time would result in the plaintiff splitting his case to the prejudice of the defendants;
- c) the plaintiff is seeking different documents than those sought in his initial application; and
- d) producing the documents at this stage would further delay the proceedings.

***Relevance***

[116] I have already determined that the CIDs and Subpoenas, which provide some evidence of the scope of the US investigation into the beef industry, are relevant documents.

[117] At this stage in the proceedings, an application for the scope of documents in the plaintiff's initial demand is clearly too broad and extensive. However, limiting the application to the CIDs and Subpoenas provides a more focused and manageable alternative.

***Timing of Application***

[118] The timing of the application for production of the CIDs and Subpoenas made by the plaintiff is consistent with my earlier ruling. It was only after a full argument that I was in a position to properly assess the plaintiff's application.

[119] In my view, the concerns raised by the defendants of case splitting can be addressed by providing them with the liberty to apply to provide additional evidence in addition to further argument regarding the impact of the CIDs and Subpoenas on certification.

***Nature of Documents Sought***

[120] The defendants say that the plaintiff's application is inappropriate because the plaintiff now seeks documents that are different from those sought in the initial application.

[121] It is true that the plaintiff did not seek the CIDs and Subpoenas in his initial application. However, the plaintiff seeks these documents as a workable compromise that would allow relevant evidence to be presented without excessive document production or cross-examination. In my view, this is not inappropriate, but rather a sensible solution to a complicated problem. The limited documents sought are a way to avoid the broad, and frankly unworkable, request set out in the initial application.

***Scope of Production and Stage of the Proceedings***

[122] The defendants say that the order would necessitate the submission of additional documents and evidence from the defendants to contextualize the CIDs and Subpoenas properly. The defendants would also need to present a thorough argument and possibly additional affidavit evidence, as they contend that the CIDs and Subpoenas are extensive and are being challenged by them. This would likely lead to additional applications from both parties and further delay.

[123] I do not accept that the defendant's concerns that production of the CIDs and Subpoenas will require additional affidavit evidence, or likely lead to additional applications for cross-examinations, for production of documents by the plaintiff, and/or for further responses by the defendants that would inevitably derail the hearing.

[124] The defendants' argument underemphasizes the fundamental issue that the evidentiary burden faced by the plaintiff is not proof on a balance of probabilities, but rather some basis in fact.

[125] These reasons will resolve the majority of the issues relevant to certification. The CIDs and Subpoenas and related evidence (if any) will only impact the downstream or demand side conspiracy allegations, which will be dealt with subsequent to the production and resolution of the evidentiary issues arising from the production of these documents.

[126] In my view, the defendants' concerns can be managed through case management and applications once the CIDs and Subpoenas have been produced.

***Ruling on Application for Production of CIDs and Subpoenas***

[127] In my view:

- a) the timing of the plaintiff's application is consistent with my earlier ruling;
- b) the CIDs and Subpoenas are relevant and producible by the defendants; and
- c) the production of the documents can be managed through case management and, if necessary, further applications.

***Authority for Proceeding in this Manner***

[128] I find authority for adjourning the application to allow for further document production in cases such as *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 at paras. 79–81; *N&C Transportation Ltd. v. Navistar International Corporation*, 2016 BCSC 2129 at paras. 31–33, and *Chalmers v. AMO Canada Company*, 2009 BCSC 689 at para. 53.

[129] The continuation of the hearing will be limited to the introduction of the CIDs and Subpoenas, any associated evidence ruled to be admissible, and argument. In my view, this evidence will likely only impact the issues related to certification of the alleged downstream conspiracy. However, if the parties believe there is a more

general application for this evidence, they may apply to expand their argument prior to the continuation of the certification hearing.

### **Ability to Establish Damages through Economic Modelling**

#### ***General Principles***

[130] 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*, 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": at para. 113. 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 particular case in question; and
- c) of the availability of the data to which the methodology is to be applied.

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

[131] In *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, leave to appeal to SCC ref'd, 38784 (19 December 2019), at para. 104 [*Ewert*], our Court of Appeal 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 met as long as there is some evidence that information will be available to do so.

***Methodology Proposed by the Plaintiff***

[132] Dr. Leitzinger, an economist, provides a report that (1) analyzes the fed cattle and beef markets in Canada and their interrelationship with the markets in the United States and (2) sets out a methodology for creating an econometric model to identify and quantify any overcharge associated with the alleged anti-competitive acts.

[133] Dr. Leitzinger's report first notes as follows. In paras. 49–55, he sets out various economic conditions and factors relevant to the fed cattle and beef market, which include high seller concentration and entry barriers. These factors, combined with published estimates of demand elasticity for beef, give rise to a market environment in which coordinated behaviour limiting competition would be expected to result in inflated prices (“overcharges”). Dr. Leitzinger opines that overcharges would be passed down through each level of the distribution chain: at para. 56.

[134] Dr. Leitzinger goes on to identify six economic methods could be used to identify the existence of overcharge, and then describes how each model would be applied to the market for fed cattle and beef and what data would be required to apply the models: at paras. 56–66).

[135] Afterwards, he identifies several models that could be used depending on the available data to isolate and quantify overcharges at the direct purchaser level. He accounts for price changes arising from factors outside of conspiratorial activity using the “before-during approach”, “yardstick approach” or “prediction-model approach”. Each approach is dependent on the available data and the nature of the activity impacting the prices for beef or fed cattle (at paras. 67–78).

[136] Dr. Leitzinger opines that existing studies can be used to calculate the quantum of overcharge passed on by direct purchasers to indirect purchasers in the beef market. In addition, he suggests that one can calculate the overcharge based on pricing data throughout the beef distribution chain to directly calculate the amount of overcharge at each stage, down to the indirect purchasers. This method would be

dependent on obtaining pricing information from the defendants and class members: at paras. 79–80.

[137] Finally, in his reply report, Dr. Leitzinger opines that overcharge from third-party sellers of beef can be calculated by accessing the price data from third-party sellers to Umbrella Purchasers or through inference by comparing the defendants' pricing information to general market information: at paras. 47–49.

[138] The plaintiff says that at certification all that is required is:

- a) a viable method of establishing overcharge and pass-through;
- b) the quantification of the overcharge in subsequent levels of the distribution chain; and
- c) some evidence of the existence of data necessary to do the above.

***Position of the Defendants***

***The Methodology is not Sufficiently Grounded in the Facts***

[139] The defendants raise three issues with respect to Dr. Leitzinger's report:

- a) Dr. Leitzinger is not an expert in the industry;
- b) Dr. Leitzinger's report is not sufficiently grounded in the facts; and
- c) Dr. Leitzinger does not provide a methodology to quantify damages attributable to Umbrella Purchasers.

***Dr. Leitzinger is not an Expert in the Beef Industry***

[140] The defendants note that Dr. Leitzinger is not an expert in the industry and was unaware of or ignored fundamental aspects of the industry in his proposed theoretical models.

[141] In Dr. Leitzinger's report, he spends considerable time setting out his understanding of the fed cattle and beef industry. It is true that he is not an expert in

the beef industry. However, his description of the industry is consistent with the features described by the defendants in their affidavit evidence. In addition, the criticisms offered by Dr. Johnson that Dr. Leitzinger is unaware of or overlooked important factors in the markets are adequately addressed by Dr. Leitzinger in his reply report. For example, Dr. Leitzinger responds to:

- a) Dr. Johnson’s criticism that he overlooked the impact of culled cattle: at para. 19;
- b) Dr. Johnson’s criticism that the cattle cycle would preclude the ability to measure overcharge: at para. 43; and
- c) Dr. Johnson’s criticisms that labour shortages and the COVID-19 pandemic would preclude the ability to measure an overcharge: at paras. 44–45.

[142] Dr. Leitzinger’s report provides a detailed review of the cattle and beef markets in Canada. He also responds to the issues raised by the defendants as best he can, given the stage of the proceedings and the fact that the defendants are in possession of much of the relevant information. In my view, the steps taken by Dr. Leitzinger in familiarizing himself with the cattle and beef markets is consistent with what was required by our Court of Appeal in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at paras. 67–68 [*Infineon*].

***The Methodology has not been Applied to Fed Cattle or Beef Markets***

[143] The fundamental difference between the position of the plaintiff and the defendants is the meaning of the term “grounded in the facts”. Dr. Leitzinger has proposed a number of methodologies but has not yet obtained the data, much of which he opines will be available from the defendants and third parties. Therefore, he is not in a position to suggest how the models will be impacted by various nuances of the beef and cattle market.

[144] The defendants say that Dr. Leitzinger’s methodology fails to address how it will deal with factors specific to the fed cattle and beef markets, and as such, it is not

sufficiently grounded in the facts. The defendants argue that since Dr. Leitzinger has not yet done his analysis—or even obtained the data he opines is available—to determine which of his proposed methods would be a suitable economic model to quantify damages, his methodology is not sufficiently grounded in the facts of the case. They emphasize the following answer he provided when cross-examined on his affidavit:

Q Right. And so I'm asking you is – am I to understand from your opinion in paragraph 62 that a simple visual inspection of price patterns could allow an economist in this case to estimate overcharges, or do you need something more?

A. I haven't – I haven't done the analysis yet in this case. I'm not in a position to tell you where in this range of potential analytical approaches, from visual inspection of price patterns to statistical analysis, will – will be – where within that range one will need to go in order to understand what was happening with price here.

...

A ... I don't know that even in my second report I – I gave a definitive sort of prescription as to how one would measure the conspiracy effect in a regression model. There are a variety of ways to do it and – of which would involve an indicator variable, and some of which would not.

[145] Dr. Leitzinger's opinion at this stage is that various economic methodologies could be used to quantify damages, but the specific pricing model cannot be designed until the data is obtained from the defendants and third parties. In para. 7 of his reply report, Dr. Leitzinger notes:

... his [Dr. Johnson's] report also includes claims that economic methods I described for identifying overcharges would fail because of confounding factors and lack of data. As I explain below, these claims are premature. At this early stage, I have yet to propose the details of the statistical models or other analyses that I described in my Report for showing overcharges, including in that regard the means by which confounding factors or data limitations (if any) would be resolved. These claims, if intended to convey some sort of broad inability to use economic methods to account for these factors and data issues, are also simply wrong. Much of what economists do through the kinds of analyses I described (statistics, econometrics, etc.) is designed to identify relevant effects despite confounding factors, even when they are "complex". In addition, my Report describes a number of data sources relevant to the issues at hand. I disagree with Dr. Johnson's claims regarding likely data problems.

[146] Dr. Leitzinger’s opinion is supported by reference to other studies in which econometric models have been formulated in the beef and cattle industries.

[147] In *Ewert*, our Court of Appeal discussed the nature and specificity of economic evidence required at certification:

[94] In *Chadha*, the plaintiffs had been unsuccessful “because they did not present the evidentiary basis for a certifying court to be satisfied that loss as a component of liability could be proved on a class-wide basis”: *Chadha* at para. 65. The nature of the evidentiary basis required of a plaintiff was taken up by this Court in *Infineon*.

[95] *Infineon* was also an action that sought to recover overcharges alleged to have occurred because of price-fixing agreements. The certification judge concluded that the damage claim could not be tried as a common issue. As a result, although the allegations of unlawful conduct could be determined as common issues, individual issues relating to loss and damage would predominate and a class action would not be the preferable procedure for resolution of the claims.

[96] This Court reversed the decision and certified the action as a class proceeding. The Court held (at para. 63) that in reviewing the evidence of methodology for proving loss, the certification judge had “set the bar for the [plaintiff] too high”. The standard of proof that had to be met by a plaintiff seeking to include liability for loss as a common issue was described in this way:

[68] The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. ...

[97] This standard was approved by the Supreme Court of Canada in *Microsoft* in the Court’s discussion of expert evidence in indirect purchaser class actions at paras. 114–126. Paragraph 68 of *Infineon* was referred to with approval at paras. 116 and 126 of *Microsoft*, and the judgment of Rothstein J. summarized the standard to be met in this way:

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

[98] It was the last sentence of para. 118 that was of concern to the certification judge in the case at bar, which led him to conduct a close examination of Dr. Boyer's evidence concerning the availability of the data he anticipated he would need for his regression analysis. The judge was not satisfied that Dr. Boyer had ascertained the existence of the evidence he anticipated being available. The question is whether, to use the phrase from *Infineon*, he set the bar for the plaintiff too high.

...

[104] I take from this that some basis in fact is to be contrasted with no basis in fact (as in *Chadha*). It is required that a plaintiff lead some evidence that there is a plausible and realistic methodology to establish loss on a class-wide basis, but where the methodology consists of an econometric model, it is not necessary to build the model or identify with precision what information will be used to populate the model, as long as there is some evidence that information will be available to do so.

#### **Application to the Judgment under Appeal**

[105] In the case at bar, the plaintiff led opinion evidence that an econometric model utilizing a regression analysis could be constructed to establish loss on a class-wide basis. Such a methodology has been accepted as sufficient by this Court in *Infineon* and by the Supreme Court of Canada in *Microsoft*. The certification judge appears to have concluded that Dr. Boyer's responses to the objections of Dr. Israel were sufficient to establish the plausibility of the model. However, he rejected the methodology because Dr. Boyer had not confirmed that the data he referred to in his affidavit was in fact available. In my opinion, this goes beyond what is required to raise a common issue, and sets the bar too high for a plaintiff at the very early certification stage of the litigation.

[106] Certification applications under the *CPA* are dealt with prior to the discovery process. Dr. Boyer referred to this data source in his first affidavit:

117. It should be possible to obtain a number of documents as well as a significant amount of data on the pricing and costing of Vehicle Carrier Services from the defendants themselves (contracts or records of sales), at the time of pre-trial discovery. ...

[107] It is in my view reasonable that an economist requiring data to use in a model of the kind contemplated would not try to determine the availability of all the data required before ascertaining how much of the information can be obtained from the defendants. In his second affidavit, Dr. Boyer referred to the availability of data based on evidence filed by the defendants from Dennis DesRosiers, the president of a company that provides research and consulting services to the automotive industry:

6. Mr. Desrosiers' affidavit provides interesting elements of information on the structure of the automobile industry value chain as well as data on the automobile markets of interest. I understand from Mr. Desrosiers' affidavit that the automobile industry is a data rich, mature and well researched industry, regarding its manufacturing operations, its value chain structure, its product differentiation characteristics, and its pricing strategies. This is quite comforting to

expect that this wealth of data will be available from the different sources at the discovery step of this class action. ...

[108] The underlying issue is the extent to which a plaintiff must prepare the case at the time of the certification application. This issue arose in *Infineon*, where the plaintiff's expert had expressed a belief that the necessary data for his analysis would be available from various sources. This Court explained the issue in terms very similar to the circumstances at bar:

[51] Turning to "pass-through", he [the plaintiff's expert] said, "[e]stimation of pass-through of cost increases is commonly done and well-established methods for estimating pass-through exist". Again, he said, he would rely on statistical regression analysis.

[52] He said the necessary data for his analysis would be available from the respondents' business records, from the information available in the U.S. class actions and criminal proceedings, from industry trade associations, from private information-vendors and consultants focusing on the electronics industry, and from import and export information collected by Statistics Canada.

[53] The respondents led factual evidence from five witnesses, a market research consultant and four employees or former employees of respondents. In essence, their evidence was that the markets for DRAM are very complicated, that DRAM is used in different ways in many different products, that some DRAM emanates from manufacturers other than the respondents, that it is difficult to determine the origin of the DRAM in any given product, that not all respondents sold DRAM directly into British Columbia during the class period, and that the pricing of DRAM is influenced by a multitude of factors.

[54] The appellant made no attempt to challenge this factual evidence with contrary evidence or by cross-examination of the deponents. As I understand him, counsel for the appellant considered any such attempt would be ineffective in the absence of a full factual investigation, aided by oral and documentary discovery, which he considered would not be economically viable at the pre-certification stage of the litigation and which, in any event, would be beyond the permissible scope of pre-certification discovery. In the latter regard, he referred to the fact that s. 2 of the *CPA* prescribes a short 90-day time limit for bringing a certification application, which implies that extensive pre-certification discovery is not contemplated ...

[55] The respondents' expert, Margaret F. Sanderson, based her opinion in part on the factual evidence provided by the other defence witnesses. She opined essentially that, while what Dr. Ross [the plaintiff's expert] proposed could be done in theory, it was not possible as a practical matter to assess harm on a class-wide basis given the complexities in the DRAM market described by the other defence witnesses. As for an assessment of aggregate gain or aggregate damages arising from the illegal conspiracy, she said the amount of data required for Dr. Ross' approach is "enormous" and much of it is not publicly available ...

[56] Dr. Ross responded that the assessment of the extent of pass-through would require simplifications and approximations but, he said, this is true of all economic analyses of markets. ... He confirmed his belief that the necessary data would be available to him from the sources he identified.

[109] In *Infinion*, this Court went on to deal with this issue by articulating the “credible or plausible methodology standard” and pointing out (at para. 65) that the evidentiary burden necessary to show “some basis in fact” is “not an onerous one – it requires only a ‘minimum evidentiary basis’: *Hollick*, at paras. 21, 24–25”. The expert’s “belief that the necessary data would be available to him from the sources he identified” was sufficient: paras. 56, 67–68. The action was certified.

[110] In *Microsoft*, Rothstein J. referred (at para. 124) to the evidence that regression analysis could be employed to establish loss at the indirect purchaser level and concluded that, “[i]mplicit in this evidence is that the data necessary to apply the methodologies in Canada is available”. No further evidence of the availability of data was necessary. This conclusion is not consistent with the approach of the certification judge in this case that there are two separate requirements as reflected in his sub-headings, “[t]he proposed methodology” and “[a]vailable data”, that must be met for certification purposes.

[148] The concerns raised by the defendants in this case parallel the position of the defendants in *Cygnus Electronics v. Panasonic*, 2018 ONSC 2312 [*Cygnus*]. In that case, the defendants agreed that a “regression analysis is a recognized econometric and statistical tool” but argued that the expert for the plaintiff’s proposed approach was too generic, amounting to nothing more than a promise to “do the math”: para. at 46. The expert had not yet built the model he had proposed to calculate damages because, prior to discovery, the extent of the data was unknown and he expected the defendants to be in possession of the data required to guide the regression analysis: at paras. 45–46.

[149] The Ontario Superior Court of Justice denied the motion to strike, finding the method proposed by the plaintiff’s expert to suffice at this stage in the proceedings:

[52] Thus, Dr. Reutter proposes the use of a multiple regression model as a means to isolate and estimate the overcharge. He explains that approach and leaves open the prospect of modification to capture other potential causes of increased costs. He provides various formulae which, at this stage in the proceeding, are necessarily rudimentary. A regression analysis is a recognized econometric and statistical method. This is not a case where Dr. Reutter has eschewed conventional modelling for an unproven model that is not recognized or accepted by economists.

[150] In my view, Dr. Leitzinger has reviewed the relevant information concerning the cattle and beef market and determined what data is required, that the data is available, and that the data, when reviewed by standard econometric modelling, would be able to establish an overcharge and pass-through and quantify the overcharge in subsequent levels of the distribution chain.

[151] I agree with the plaintiff that the defendants' criticism that Dr. Leitzinger's proposed methodology is "untethered from the actual facts of the case" is unfair and inapplicable to this situation. The defendants' criticism overlooks the preliminary stage of the proceedings and the standard of proof required by the plaintiff to establish a "credible or plausible methodology": *Pro-Sys* at para. 118. At this stage in the proceedings, it is inappropriate to hold Dr. Leitzinger's proposed methodologies to a "robust or rigorous standard": *Apotex* at para. 528.

[152] My findings are consistent with other class action certification proceedings where the proposed methodology was no more developed than what the plaintiff has presented here, and where the availability of data was suspected but not yet proven to be available.

[153] In *Cygnus*, as discussed above, the application judge was satisfied with the proposed model because it consisted of a "standard" regression analysis—an accepted and widely used modelling technique and not a proprietary, unproven one developed by the expert: at para. 52. Dr. Leitzinger has proposed six workable methodologies that are well-established methods for calculating figures necessary to establish class-wide loss, such as overcharge and pass-through.

[154] Our Court of Appeal in *Infineon* likewise concluded that statistical regression analysis is "capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases": at para. 68.

[155] Dr. Leitzinger's assertion that he believes the data required for the model exists likewise meets the standard for a plausible and credible methodology. In *Infineon*, the plaintiff's expert expressed a similar belief that necessary data would

be available to him from the sources he identified: at paras. 56, 67–68. It is “fundamentally unfair” to subject what is a preliminary expert opinion to a high degree of scrutiny at the certification stage, when the plaintiff has not had the opportunity to access the information required for expert analysis: *Infineon* at para. 67. Access to this necessary information can only come through discovery.

[156] The plaintiff’s proposed methodology uses commonly accepted statistical models. I am not prepared to find that neither the lack of available data at the certification stage nor Dr. Leitzinger’s belief in the availability of data impairs the plausibility or credibility of the model when the availability of data is something that can only be determined once the parties have entered discovery.

***There is no Methodology to Quantify Umbrella Purchasers***

[157] The defendants say that the plaintiff has not provided any methodology for establishing class-wide causation of loss to purchasers of beef from non-defendants.

[158] The plaintiff says this is a fundamental misreading of Dr. Leitzinger’s report, as losses attributable to purchases from direct purchasers from non-defendants can be calculated in the same economic model used to estimate losses attributable to the defendants.

[159] The fact that the same econometric method used to calculate overcharge by the defendants can be used for non-defendants who sell to Umbrella Purchasers is recognized by the defendants’ expert, Dr. Johnson. At paras. 104–107 of Dr. Johnson’s report, he notes that Dr. Leitzinger’s model would need to establish overcharges to direct purchasers of non-defendant beef, which would require data from the non-defendant beef suppliers.

[160] In cross-examination, Dr. Leitzinger disagreed that it would be necessary to obtain this information. He opined that it might be possible to use total market numbers to back out the impact of non-defendant beef sellers such that individual data may not be required from them. Additionally, he suggested that it might be

possible to use pricing information to directly measure the overcharge such that individual demand elasticities may not be necessary.

[161] In his third report, Dr. Leitzinger notes the possibility that demand elasticities calculated in academic literature for the beef industry in Canada and the United States could be utilized to calculate overcharge and passthrough. In my view, Dr. Leitzinger enumerates potential data sources; however, the appropriateness of the data and the model utilized cannot be finalized until data is reviewed and the model constructed.

[162] I reject the assertion that Dr. Leitzinger has not provided a viable theory to quantify damages suffered by Umbrella Purchasers. The model for Umbrella Purchasers utilizes the same model used to calculate overcharges from the defendants. The reason for this is straightforward: the Umbrella Purchasers are purchasing substitute products. This is implicitly recognized by Dr. Johnson who focuses on his concerns over the availability of data and the need to calculate individual elasticities for each type and grade of beef.

[163] This is not a situation, such as *David*, in which the claim against umbrella purchasers concerned products that did not compete against each other. Additionally, Justice Morgan appeared to reject the proposed economic model to calculate damages to umbrella purchasers for policy reasons, not because the proposed economic model could not quantify the impact on umbrella purchasers:

[93] For that matter, if consumers across Canada spend more on food they will eventually have less to spend on automobiles. In a complex market economy, there is literally no limit to the potential impact of a staple commodity whose price is fixed on non-market terms.

[94] It is for this reason that Justice Brown restricted his “rising tide” approach to umbrella claims in which a cartel’s conduct is alleged to affect the market for the subject product and its true competitors. Otherwise, price fixing, which in its nature deviates from the market’s law of supply and demand in establishing prices, might ultimately impact not just on the subject product but the entire market economy.

[95] Theorists have long contemplated this phenomenon of economic interdependence as an aspect of general equilibrium theory, which seeks to explain the circumstances in which Pareto optimal pricing and a general state of equilibrium will exist across markets: Gerard Debreu, *Theory of Value: An*

*Axiomatic Analysis of Economic Equilibrium* (New York: John Wiley & Sons, Inc., 1959), at p 98. In short, the theory holds that “the economic system is a whole in which all of the parts are connected and react on one another. An increase in the income of the producers of commodity A will affect the demand for commodities B, C, etc. and the incomes of their producers, and by their reaction will affect the demand for commodity A”: Antoine Cournot, *Researches into the Mathematical Principles of the Theory of Wealth*, Nathaniel Bacon, trans. (New York: The Macmillan Company, 1837), p. 127.

[96] Where a foundational resource or a staple food product is concerned, the impact will likely be broadly inflationary. Just as a cartel’s historic manipulation of the price of oil impacted on a wide range of far-flung and ostensibly unrelated industries, a cartel’s manipulation of the price of packaged bread will predictably impact on a wide range of ostensibly unrelated foods: Christopher J. Neely, “How Much Do Oil Prices Affect Inflation?” (2015) Econ. Res. No. 10 (Fed. Res. Bank of St. Louis); Frederick Furlong and Robert Ingenito, “Commodity Prices and Inflation” (1996) Econ. Rev. 28-29.

[97] In the interconnected world of consumer economics, the Plaintiffs allege far too much when they make damages claims based on the cost of non-substitutable or non-directly competitive products. There may well be a case for regulatory intervention in the case of market failure with a reverberating economic impact across multiple sectors: see Edward Iacobucci, Michael Trebilcock, and Huma Haider, *Economic Shocks: Defining a Role for Government* (Policy Study No. 35, C.D. Howe Institute, 2001), p. viii. But the regulatory function of adjusting broadly impactful economic activity is different than the judicial function of righting wrongs, including in the class action context.

### **Some Basis in Fact for Inclusion of the Parent Companies**

[164] The defendants say that the parent companies, Cargill Incorporated and Tyson Foods Inc., do not have any direct involvement in the beef industry and therefore should not be defendants in this action.

[165] The plaintiff alleges both parent companies and their Canadian subsidiaries of participating in the alleged conspiracy acts. At para. 84 of the ANOCC, the plaintiff alleges that the defendant’s Canadian subsidiaries furthered the alleged conspiracy acts by modifying their competitive behaviour in response to instructions from their respective parent companies, acting as the parent companies’ agents in carrying out the alleged conspiracy.

[166] The plaintiff also says that there is no evidence to suggest that the defendant parent companies are not engaged generally in the business of selling beef in Canada. Cargill Incorporated “provides food, agriculture, industrial and risk management products and services”. Tyson Foods Inc., through its direct and indirect subsidiaries, processes and markets beef around the world. Additionally, Tyson Foods Inc. reported in its financial filings that it is under investigation in the United States related to its operations in the beef packing market.

[167] I agree with the plaintiff that the defendant’s affidavit evidence does not support the blanket statements that they have no involvement in the Canadian beef market. However, that is not the test to be satisfied.

[168] As set out in my reasons; I have found that there is some basis in fact of parallel conduct in the United States and of an interrelationship between the markets for beef and cattle between the two countries. I am satisfied that this provides a sufficient basis in fact to draw the inference that the parent companies are involved in a joint enterprise with their subsidiaries at this stage in the proceedings.

[169] I find support for this conclusion in *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499 at paras. 30–32 [*Kirsh*]. *Kirsh* concerned a conspiracy class action concerning conspiracy with respect to the side effects of medications. The claim was brought against the company with the rights to market the product and Canada and the parent company. The parent company remained a named defendant despite the lack of specificity of the claims against it in the pleadings.

[170] Where a defendant company has independent management within Canada, direct decision-making of the parent company cannot be assumed: *David v. Loblaw*, 2021 ONSC 7331, at para. 32 [*David*]. I am satisfied that the plaintiff’s pleading that the defendant parent companies instructed the Canadian subsidiaries to modify their behaviour in furtherance of the alleged conspiracy, to be sufficient at this stage to keep the parent companies as named defendants.

[171] If, later on in the proceedings, it becomes apparent that the defendant parent companies were not the “fully involved co-conspirators” contemplated in *David*, then it may be appropriate to remove them as named defendants.

### **Some Basis in Fact for Unjust Enrichment**

[172] The plaintiff also pleads unjust enrichment. Unjust enrichment is a standalone cause of action consisting of three elements:

- a) an enrichment of the defendant;
- b) a corresponding deprivation of the plaintiff(s); and
- c) an absence of a juristic reason for the enrichment.

(*Pro-Sys* at para. 85; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 82 [*Alberta Elders*]).

[173] Typically, the benefit must be conferred specifically and directly onto the defendant; the claim must be based on more than “incidental blow-by” or “secondary collateral benefit”: *Pro-Sys* at para. 87, citing *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, 1992 CanLII 21 (SCC) at p. 797. However, in both *Alberta Elders* and in *Pro-Sys* the Supreme Court of Canada found that unjust enrichment may be possible where the benefit was indirect and was passed on by a third party.

[174] The juristic reason analysis proceeds in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. Doing so establishes a *prima facie* case under the juristic reason test: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44 [*Garland*].

[175] Second, the defendant may rebut the *prima facie* case by showing the court another reason to deny recovery; that is, why the enrichment should be retained notwithstanding the absence of an established juristic reason: *Garland* at para. 45. In conducting this analysis courts should have regard to:

- a) the reasonable expectations of the parties; and

- b) public policy considerations.

In considering these two factors, courts may find it appropriate to recognize a new category of jurisdiction reasons: *Garland* at para 46.

[176] Recognized categories of juristic reasons include a contract, a disposition of law, a donative intent, and other valid common, equitable, or statutory obligations: *Garland* at para. 44.

[177] The juristic reason analysis is flexible, allowing courts to expand categories of juristic reasons as circumstances require and deny recovery where to allow it would be inequitable: *Garland* at para. 43.

[178] The plaintiff argues that the defendants have been unjustly enriched by the receipt of the overcharge, while class members have suffered a corresponding deprivation in the amount of the overcharge.

[179] The plaintiffs also say that because the enrichment and deprivation arose from the alleged conspiracy, an unlawful act, there is no juristic reason available to deny recovery. Likewise, the defendants cannot rely on any contracts they say were the source of the overcharge because such contracts are void for any or all of the following reasons:

- a) the contracts are prohibited by statute, entered into with the object of committing an act prohibited by statute, and/or require performance of an act prohibited by statute;
- b) the contracts contravene common law; or
- c) the contract run afoul of public policy considerations such as restraint of trade.

[180] The defendant denies that any such enrichment or deprivation occurred. At all material times the price that the defendants received for beef products was dictated by market forces. In any event, the defendant argues that any enrichment received

was too incidental or collateral to constitute unjust enrichment. Alternatively, there is a juristic reason for any enrichment in the form of valid and enforceable contracts for the purchase and sale of beef. In any event, the defendants argue that because the claim for unjust enrichment is predicated on causation of loss, and there is no basis in fact supporting the existence of that loss, then there is no basis in fact supporting the unjust enrichment claim either.

[181] I am not satisfied that the plaintiff's unjust enrichment claim has no basis in fact. The plaintiff has pled some evidence of a methodology capable of quantifying the loss experienced to the class. It is safe to infer that the loss experienced by the plaintiff was passed onto the defendants as the manufacturer and retailer of beef products. Therefore, there is some basis in fact that the defendants were enriched by the alleged conspiracy and the plaintiffs sustained some corresponding deprivation as the consumers of beef products. At this stage it is not appropriate to decide whether the enrichment, if any, was too indirect or corollary for the unjust enrichment claim to succeed.

[182] The question of whether the contracts are void should not be resolved at the certification stage: *Pro-Sys* at para. 88.

#### **Some Basis in Fact for Claim of Aggravated and Punitive Damages**

[183] Aggravated and punitive damages are the court's mechanism for expressing its outrage at the egregious conduct of the defendant. They are available to punish misconduct that is "so malicious, oppressive, and high-handed that it offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 (S.C.C.) at para. 196.

[184] The test for punitive damages is whether the misconduct "represents a marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36.

[185] Punitive damages may be properly certified as a common issue because the focus is on the conduct of the defendants rather than the effect of that conduct on the plaintiffs: *Rumley v. British Columbia*, 2001 SCC 69 at para. 34 [*Rumley*].

[186] The plaintiff argues that the defendant's alleged conspiratorial conduct constitutes "high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, and in contumelious disregard of" the rights of the proposed class members.

[187] Furthermore, the appropriateness and quantum of punitive damages is a certifiable issue because those determinations can be made based solely on the evidence of the defendant's conduct, which will be available to the common issues judge. The plaintiff's submissions focus not on the evidence supporting the existence of the defendants' conduct giving rise to the appropriateness of punitive or aggravated damages, but instead on the appropriateness of determining this issue at trial, once a full record of the defendants' conduct is before a trial judge for determination. The plaintiff relies on several cases including *Stanway v. Wyeth Canada Inc*, 2011 BCSC 1057, aff'd 2012 BCCA 260 at para. 58; *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at para. 31; and *Rumley* at para. 34. All of these cases predate the string of cases relied upon by the defendants.

[188] The defendants oppose the appropriateness of punitive or aggravated damages as a certifiable issue. The defendants point to several cases where courts have required some evidence of "high-handed, oppressive, or malicious" conduct at the certification stage in order to satisfy the some basis in fact standard.

[189] It is an error to certify punitive damages as a common issue based solely on the allegations contained in the pleadings: *MacKinnon v. Pfizer Canada Inc.*, 2022 BCCA 151 at paras. 5–7.

[190] In *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307, our Court of Appeal upheld a decision of the chambers judge to refuse to certify punitive damages as a

common issue because there was no basis in fact in the record capable of warranting an award of punitive damages.

[191] In *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 [*Kirk*], relied upon by the defendants, the pleadings did not allege any conduct which could be described as a marked departure from ordinary standards of decent behaviour. Rather, the pleadings alleged that the defendant made a mistake, and the mistake carried disastrous consequences for those affected. Therefore, punitive damages could not be certified as a common issue.

[192] *Kirk* is distinguishable from the case before me because the pleadings do not allege that the defendants made a mistake. Rather, the pleadings contain numerous paragraphs of detailing allegations of a years-long, intentional conspiracy.

[193] In my view, the alleged conspiracy acts, the existence for which the plaintiff has pled evidence sufficient to meet the some basis in fact standard, constitutes conduct capable of warranting an award of punitive or aggravated damages.

#### **Some Basis in Fact for Claim of Disgorgement**

[194] Disgorgement is an alternative remedy for certain forms of wrongful conduct and not a standalone cause of action: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 27, 31 [*Atlantic Lottery*]. Courts will only prescribe disgorgement as a remedy where the underlying wrongful conduct has been made out. The appropriateness of disgorgement as a remedy for unlawful conduct is typically reserved for determination at trial: *Atlantic Lottery* at para. 107.

[195] Therefore, I decline to make a finding on this matter and will reserve its determination for trial. Given my earlier finding that the common issues of predominant purpose and unlawful means conspiracy are certifiable, the availability of disgorgement as a remedy for those causes of action is similarly certifiable.

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

[196] The main thrust of the defendants’ concerns on preferability is tied to their arguments that there are no common issues, which I have already addressed.

[197] 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. Judicial economy would not be served if class members had to litigate the causes of actions individually.

[198] The defendants argue that it might be more economical for some of the large direct purchasers of beef to bring an action individually. In my view, this position requires an evidentiary basis supporting a realistic alternative to a class proceeding. The defendants’ assertions fall short of this requirement, and even if they did not, the availability of a small number of individuals to bring civil actions does not undermine the preference for a class proceeding that would meaningfully advance the litigation for all class members.

**Section 4(1)(e) – Is the Representative Plaintiff Suitable?**

**Residency**

[199] The defendants say that the representative plaintiff does not expressly indicate that he is a resident of British Columbia at the time the proceeding was commenced.

[200] In my view, this is an overstatement; the representative plaintiff affirms that his address is in Vancouver, BC. In my view, this is sufficient to satisfy the requirement of s. 2(1) of the *CPA*. If I was not satisfied that s. 2(1) had been satisfied I would have provided leave to provide a supplemental affidavit on this point.

**Litigation Plan**

[201] Section 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.”

[202] 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. The litigation plan is consistent with the principles set out by Justice Church in *Hay v. Mundi 910 Victoria Enterprises Ltd.*, 2022 BCSC 2127:

[120] In my view, the defendants’ submission does not reflect the standard of scrutiny of a litigation plan that is required at the certification stage in British Columbia. As set out in the decision of this Court in *Fakhri et al. v. Alfalfa’s Canada Inc. cba Capers*, 2003 BCSC 1717 at para. 77 [*Fakhri SC*], aff’d 2004 BCCA 549, a litigation plan is to be assessed as follows:

[77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[121] The British Columbia Court of Appeal, in the recent decision of *Jiang v. Alfalfa’s Canada Inc.*, 2019 BCCA 149, considered the decision in *McCracken* and concluded that it did not propose closer scrutiny of the litigation plan than suggested in *Fakhri SC*. Hunter J.A. noted at para. 60, that he preferred the standard set out in an earlier decision of the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, 2004 CanLII 45444 (C.A.) at para. 95, which provided that:

[95] ... The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings can be addressed under the supervision of the case management judge once the pleadings are complete.

[122] When assessed on this standard, the proposed litigation plan sets out a workable method of advancing the proceeding and notifying class members, including a clear notice plan, a plan for the litigation steps leading to the common issues trial, and procedures to deal with individual issues at various stages of the proceeding. The individual procedures can be amended as the case progresses and once counsel has more information about the size of the class and the nature of harm to all class members.

[203] In my view, the requirements of s. 4(1)(e) of the *CPA* have been met. I am satisfied that Mr. Bui is a suitable representative plaintiff.

**Conclusion**

[204] I find that the plaintiff has established that the pleadings disclose a cause of action, there is an objectively identifiable class, the claims of the class members raise common issues, a class proceeding is the preferable procedure, and that he is a suitable representative plaintiff.

[205] Mr. Bui has met the requirements for certification imposed by s. 4(1) of the *CPA*.

[206] I have determined that the defendants are required to produce the CIDs and Subpoenas to the plaintiff. I order that they do so.

[207] I adjourn the certification hearing to permit further production of documents so that I can determine whether there is some basis in fact supporting the allegations of a downstream conspiracy.

[208] The continuation of the certification hearing will be limited to the introduction of the CIDs and Subpoenas, any associated evidence ruled admissible, and argument. In my view, this evidence will likely only affect issues related to the Certification of the alleged downstream conspiracy. However, if the parties believe there is a broader application for this evidence, they may apply to expand their argument before the continuation of the certification hearing.

[209] Matters pertaining to common issues and notice will be addressed following the subsequent certification hearing.

“Thomas J.”