Federal Court of Appeal | Cour d'appel fédérale

Date: 20230608

Docket: A-314-21

Citation: 2023 FCA 89

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

CHELSEA JENSEN and LAURENT ABESDRIS

Appellants

and

SAMSUNG ELECTRONICS CO. LTD., SAMSUNG SEMICONDUCTOR INC., SAMSUNG ELECTRONICS CANADA, INC., SK HYNIX INC., SK HYNIX AMERICA, INC., MICRON TECHNOLOGY, INC., and MICRON SEMICONDUCTOR PRODUCTS, INC.

Respondents

Heard at Toronto, Ontario, on November 2, 2022.

Judgment delivered at Ottawa, Ontario, on April 28, 2023.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
WOODS J.A.

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AMENDED REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellants seek to overturn a decision rendered by Justice Gascon (the Motion Judge) of the Federal Court (*Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 (Reasons)) denying the certification of a class action. At its core, this appeal raises the issue of a judge's role in a

certification motion hearing and to what extent a judge may consider the evidentiary basis for the claim when certifying a class action.

[2] For the reasons that follow, I would dismiss the appeal.

I. Background

[3] The appellants, Ms. Jensen and Mr. Abesdris, are indirect end-consumers of Dynamic Random Access Memory chips (DRAM). DRAM is a kind of semiconductor memory chip that is used in most computer products, including cell phones and laptops that allows information to be electronically stored and retrieved. The appellants allege that the respondents breached sections 45 and 46 of the *Competition Act*, R.S.C., 1985, c. C-34 (the Act) by conspiring through direct communications in private meetings and through public statements – or "signalling"- to each other, in order to suppress the global supply of DRAM and increase DRAM prices from June 1, 2016 to February 1, 2018. The appellants seek compensation in the amount of $1,000,000,000 on behalf of all persons or entities in Canada who purchased DRAM or products containing DRAM that were manufactured or sold by the respondents.

[4] The respondents are all manufacturers of DRAM chips and are estimated to manufacture between 96% and 98% of the world's DRAM. The respondents are Samsung Electronics Co. Ltd., Samsung Semiconductor Inc. and Samsung Electronics Canada Inc., SK Hynix Inc. and SK Hynix America, Inc. and Micron Technology, Inc. and Micron Semiconductor Products, Inc.

[5] In February 2019, the appellants brought a motion to certify the action as a class proceeding and it was argued in October 2020. In the judgment under appeal issued on November 5, 2021, Justice Gascon dismissed the motion. In fulsome and thorough reasons, he found that the pleadings disclosed no reasonable cause of action and that there was no basis in fact for the existence of the common issues.

[6] There is no dispute between the parties that Rule 334.1 of the *Federal Courts Rules*, S.O.R./98-106 governs class proceedings in the Federal Courts. Rule 334.16 provides that a class action shall be certified if the following conditions are met: (a) the pleadings disclose a reasonable cause of action; (b) there is an identifiable class of two or more persons; (c) the claims raise common questions of law or fact; (d) a class proceeding is the preferable procedure for just and efficient resolution of those common questions; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class.

[7] In their amended statement of claim, the appellants allege that the respondents breached sections 45 and 46 of the Act, thereby opening the door to a statutory right of private action to recover damages suffered as a result of that criminal conduct pursuant to section 36 of the Act. In a nutshell, section 45 makes it a criminal offence for competitors to conspire, agree or arrange to fix prices, allocate markets or restrict output. As for section 46, it provides that it is a criminal offence for a corporation carrying on business in Canada to implement a directive or other communication from a controlling person outside Canada for the purpose of giving effect to a conspiracy entered into outside of Canada that, if entered into in Canada, would have been in

contravention of section 45. The full text of these provisions is reproduced in the Annex to these reasons.

[8] The appellants identified six common issues on which basis the proceedings should be certified. These issues are:

i) Did the Defendants, or any of them, breach section 45 of the Act?

ii) Did the Defendants, or any of them, breach section 46 of the Act?

iii) Did the Class members suffer loss or damage as a result of the Defendants' conduct contrary to any provision of Part VI of the Act?

iv) Are the Class members entitled to recovery of their loss or damage pursuant to section 36 of the Act and, if so, in what amount or amounts?

v) Are the Defendants, or any of them, liable to pay pre-judgment interest and post-judgment interest pursuant to sections 36 and 37 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and, if so, in what amount?

vi) Should the full costs of investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on an aggregate basis pursuant to section 36 of the Act and, if so, in what amount?

[9] The appellants supported their motion for certification with several affidavits including one from each of the proposed representative plaintiffs and one from class counsel, to which 54 exhibits were attached including articles about an investigation by the Chinese antitrust regulator, public statements made by the respondents and documents from the trade associations in the DRAM industry. The appellants also introduced into evidence the expert report and the

reply expert report of Dr. Hal Singer, an economist. As for the respondents, they submitted as exhibits to an affidavit financial documents and transcripts of various earnings calls and investor calls involving them, and the expert evidence of Dr. Israel, an economist, in response to Dr. Singer's report.

[10] At the certification hearing, the respondents argued that the appellants failed to meet their burden because the respondents' conduct does not constitute a criminal violation of the Act and does not amount to an actionable conspiracy under section 45 or an unlawful foreign directive under section 46. Accordingly, the respondents argued that the amended statement of claim did not disclose a reasonable cause of action, and that the issues identified by the appellants are not common issues because the appellants failed to provide a basis in fact for the existence of the respondents' liability or harm issues.

II. The Impugned Decision

[11] In his opening remarks, the Motion Judge noted that similar class actions to the case at bar were dismissed both in the United States (*In re Dynamic Random Access Memory (DRAM) Indirect Purchase Litigation*, Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, U.S. District Court, Northern District of California, November 24, 2020) and in Québec (*Hazan c. Micron Technology Inc.*, 2021 QCCS 2710): Reasons at paras. 28-35. In both cases, the courts found that the plaintiffs' allegations fell short of alleging a plausible cause of action based on conspiracy, and that the evidence was insufficient to establish, even summarily, the existence of the alleged conspiracy. Both of these cases have been upheld on appeal since the decision of the Federal Court was issued: see *In re Dynamic Random Access Memory (DRAM)*

Indirect Purchaser Antitrust Litigation, 28 F (4th) 42 (9th Cir. 2022) and *Hazan c. Micron Technology Inc.*, 2023 QCCA 132. Of course, Justice Gascon acknowledged that these precedents were not binding on him despite the fact that they relate to the same factual background, if only because the law relating to class actions and the standard to certify such a proceeding in these jurisdictions are not the same (and, in the case of the U.S., the legal regime governing conspiracy and antitrust practices is also different).

[12] Justice Gascon also remarked that the appellants do not allege a typical price-fixing conspiracy, but rather a conspiracy to suppress the supply of DRAM that has allegedly resulted in an increase in prices of these goods: Reasons at paras. 36-47. He could find no precedent for a class action which alleges a breach of section 45 through output suppression. The Motion Judge went on to say that it is extremely rare to find a class action where the existence of the conspiracy is in dispute and challenged at the certification stage; that distinguishes, in his view, the present case from *Infineon Technologies AG v. Option consommateurs* (2013 SCC 59, [2013] 3 S.C.R. 600) [*Infineon*], in which the conspiracy to fix the price of DRAM was admitted to.

[13] After reviewing the general principles applicable to the certification process (Reasons at paras. 54-62), which are not in dispute in this appeal, Justice Gascon focused his analysis on the three requirements that were challenged by the respondents, namely the reasonable cause of action, the existence of common issues of law or fact, and the preferable procedure for the just and efficient resolution of the common issues. Because I agree with most of Justice Gascon's reasoning on these three questions, I will summarize his findings in some detail.

[14] With respect to the reasonable cause of action, Justice Gascon held that the appellants had not adequately pleaded the essential elements of an offence under sections 45 and 46 of the Act, namely, the existence of an unlawful agreement. In particular, the appellants failed to plead "material facts showing that the [respondents] entered into an agreement to suppress the supply of DRAM" under section 45: Reasons at para. 69. Since such an agreement is the central requirement underlying the respondents' claim in damages, he concluded that "this radical defect is fatal to their cause of action": Reasons at para. 69.

[15] The Motion Judge briefly reviewed the test for the cause of action criterion, which is essentially the same as that applicable on a motion to strike: is it "plain and obvious", assuming that the facts pleaded are true, that the pleadings disclose a reasonable cause of action: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 at para. 63 [*Pro-Sys*]; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at para. 20; *Canada v. John Doe*, 2016 FCA 191, [2016] F.C.J. No. 695 (QL) at para. 23 [*John Doe*]; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420 at para. 14 [*Atlantic Lottery*]; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295 at para. 27 [*Godfrey*]; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17 [*Imperial Tobacco*]; *Canada v. Greenwood*, 2021 FCA 186, [2021] F.C.J. No. 1006 (QL) at para. 91; *Canada (Attorney General) v. Jost*, 2020 FCA 212, 332 A.C.W.S. (3d) 25 at para. 29 [*Jost*]. To fail at this stage of the test, therefore, the claim must be "bereft of any possibility of success": *Wenham v. Canada (Attorney General)*, 2018 FCA 199, [2018] F.C.J. No. 1088 (QL) at paras. 33, citing *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013

FCA 250, [2014] 2 F.C.R. 557 at para. 47; *Lin v. Airbnb, Inc.*, 2019 FC 1563, 15 A.C.W.S. (3d) 642 at para. 28.

[16] For this criterion, the Motion Judge noted that the analysis is limited to the pleadings. Even if no evidence can be considered, the party seeking certification must plead facts sufficient to support a legally recognized cause of action. In that respect, he pointed to Rules 174 and 181 of the *Federal Courts Rules*, which establishes that parties must plead material facts and provide particulars of every allegation. Specifically, the Motion Judge noted that material facts "cannot be simply constituted of bald assertions of conclusions": Reasons at para. 77, citing *John Doe* at para. 23; *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, [2015] F.C.J. No. 1245 (QL) at para. 27 [*Mancuso*]; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, [2010] F.C.J. No. 898 (QL) at para. 34. While the conditions for certification must be applied broadly and flexibly, "the Court cannot go so far as to presume the existence of an element that is essential to the establishment of a cause of action": Reasons at para. 76.

[17] Summarizing the jurisprudence on that issue, the Motion Judge stressed that the normal rules of pleading apply to no lesser extent to class actions as they do for any action. As he stated at paragraph 79 of his Reasons, "…in order for allegations in pleadings to be considered as material facts, they must be supported by sufficient particularization, and must not be bare assertions or conclusory legal statements based on assumptions or speculation": Reasons at para. 79, citing for that proposition *Das v. George Weston Limited*, 2017 ONSC 4129, [2017] O.J. No. 3542 (QL) at para. 17, aff'd 2018 ONCA 1053, [2018] O.J. No. 6742 (QL) at para. 74.

[18] In the same vein, he also emphasized that there are limits to the presumption that allegations of fact are true. The presumption will apply only when the facts alleged are sufficiently precise and tangible to ensure that they truly support the existence of the right claimed; in other words, allegations based on mere speculations and assumptions will not be assumed to be true: Reasons at paras. 81-82. The Motion Judge also agreed with the respondents that in the case at bar, the documents referred to in the appellants' pleadings formed an integral part of their claim and can be considered as incorporated by reference. That being said, the Motion Judge acknowledged that, at the certification stage, his role is not to determine whether the appellants have correctly interpreted them, but only to ascertain whether, on a plain reading, the documents referred to in the pleading actually say what the appellants allege they say: Reasons at para. 86.

[19] Justice Gascon then proceeded to give an overview of the Act, and more specifically of sections 36, 45 and 46 upon which the amended statement of claim is grounded. Pursuant to section 36, the appellants must establish that the respondents' conduct satisfies all constituent elements of section 45 or 46, the loss or damage suffered, and the causal link between the loss or damage and the criminal offence. Section 36 confers a right of private action to any person who has suffered loss or damage as a result of conduct in breach of the criminal provisions of the Act, without the need of there having been a criminal conviction or even an investigation. The elements of the prohibited criminal conduct, and the criminal intent, must still be proven.

[20] For a conspiracy to be established under section 45, it must be shown that a person: (1) conspires, agrees or arranges; (2) with a competitor of that person with respect to a product or

service; (3) to do any of the three things mentioned in subsection 45(1), namely, fix prices; allocate sales, territories, customers or markets; or control output. As a result of amendments to the Act adopted in 2009, there is no need to prove actual or likely anti-competitive effects or harm to competition in a market. As for section 46, it criminalizes the implementation of foreign directives in Canada to give effect to a conspiracy entered into outside Canada that if entered into in Canada, would have been in contravention to section 45.

[21] Next, Justice Gascon reviewed the law relating to section 45, and in particular examined the requirement for an agreement to be established, as this is the main constituent element of that criminal offence. He writes that a "meeting of the minds" between two or more unaffiliated persons who are competitors is the crucial element of the offence, and he accepts that such an agreement can be inferred from circumstantial evidence. Critically, he goes on to add that "even if there is no direct evidence of an agreement, there must at least be some indirect or circumstantial evidence of some type of communications between the parties in order for an agreement to be inferred": Reasons at para. 98. In other words, "[a] conscious but independent adoption of a uniform or parallel course of action by different parties, without such a meeting of the minds, assent, promise or coordination among them is not an agreement contemplated by the conspiracy provision": Reasons at para. 102.

[22] Having summarized the legal framework, the Motion Judge then assessed the amended statement of claim and found that it "does 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": Reasons at para. 117.

[23] To reach that conclusion, the Motion Judge considered the general statements made by the appellants on the alleged conspiracy (statement of claim at paras. 5, 61-62, 129 and 135), the allegations of direct private communications between the respondents (statement of claim at paras. 5 and 102) and meetings between the respondents at the industry's trade organizations (statement of claim at paras. 5, 51-52, 71 and 102-103). He found all such allegations to be "vague, brief and conclusory" (Reasons at para. 130), and consequently lacking material facts which reflect that there was any kind of agreement.

[24] Justice Gascon was equally unconvinced by the appellants' allegations that the respondents engaged in public statements from which conspiracy can be inferred (statement of claim at paras. 6, 56-101). The Motion Judge found that such statements do not amount to an agreement under section 45, and that they were misquoted and read out of context by the appellants. Far from supporting any allegation of supply restriction or conspiracy, the documents relied on by the appellants rather show, in his view, conduct in furtherance of unilateral and independent commercial behaviour.

[25] In the end, the Motion Judge found that the appellants' pleadings did not disclose a reasonable cause of action under section 45, and that their action was doomed to fail. That being the case, the Motion Judge similarly found that the pleadings could not disclose a reasonable cause of action for breach of section 46 since it also requires a conspiracy. Moreover, the

pleadings were defective because they essentially amounted to a mere recitation of the language contained in section 46.

[26] Turning to the common issues requirement, the Motion Judge considered the six questions identified by the appellants, namely: (a) the existence and scope of the alleged conspiracy and the respondents' liability under sections 45 and 46 (first and second issues); (b) the allegations of loss and harm flowing from the alleged wrongful acts (third and fourth issues); and (c) the follow-on interest and investigation costs (the fifth and sixth issues). Relying on the Ontario Superior Court decision in *Crosslink v. BASF Canada* (2014 ONSC 4529 at para. 51) [*Crosslink 2*], the appellants alleged that the first two issues can be determined solely with regard to the conduct of the respondents and without reference to the individual class members. Moreover, the appellants argue that deciding these questions would advance each class member's claim and therefore meet the common issue requirement.

[27] After having briefly summarized the jurisprudence relating to the commonality requirement, which in his view requires that the certification judge "determine whether there are indeed common questions stemming from facts that are relevant to all the class members" (Reasons at para. 188), the Motion Judge addressed the appellants' contention that the some-basis in fact standard requires only that they show some basis in fact for the commonality of the proposed common issues (a so-called "one-step approach"), rather than having to show some basis in fact that the proposed common issues (1) actually exist in fact, and (2) can be answered in common across the entire class (the "two-step approach").

[28] The Motion Judge rejected the appellants' contention that the requirement to lead some evidence for the existence of the common issue itself would infuse a merits analysis in the certification test. Despite some uncertainty in the law, he expressed the view that the two-step approach has been applied by the vast majority of the courts and that the decision of the Supreme Court in *Pro-Sys* did not change the law in that respect. He stressed, however, that the two-step approach is not a merits-based test, that a court should not resolve conflicting facts and evidence at the certification stage, and that the some-basis in fact standard sets a low evidentiary standard for the appellants. In his view, the two-step approach is the only one consistent with the underlying filtering objectives of certification:

> …The certification requirements, however low they may be, were not meant to authorize class actions to proceed on the basis of the commonality of a non-existent proposed common issue. A non-existent or fictitious issue has no more basis or justification because it happens to be common to a group of plaintiffs. A cause of action with no factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or millions. It would be ironic that a plaintiff's action could be certified as a class proceeding simply because there is some basis in fact on the commonality of an issue for the class members, without any basis in fact for the issue claimed to be common.
>
> Reasons at para. 214

[29] Applying the two-step approach, the Motion Judge first reviewed the appellants' evidence and found that it failed to satisfy the minimal evidentiary basis required to support their common issues concerning liability. More particularly the Motion Judge found the evidence did not support a finding that the respondents were parties to a coordinated restriction of DRAM supply and made an agreement in breach of section 45 of the Act.

[30] Since section 46 is an extension of section 45, he came to the same conclusion that there is no basis in fact for that second proposed common issue. He added that there is not a scintilla of evidence on the other main constituent elements of a foreign directive in breach of section 46. On that basis, he opined that there was no need to deal with the other proposed common issues identified by the appellants; as he stated, if there is no evidence and basis in fact on conduct and liability, and for the existence of an alleged conspiracy, the proposed common issues relating to the alleged harm or loss, or to interest or investigation costs, cannot be certified. Given the absence of certifiable common issues, the Motion Judge concluded that a class action could not be the preferable procedure for the resolution of the appellants' claims.

III. Issues

[31] In my view, this appeal raises the following two questions:

A. Did the Motion Judge err in finding that the statement of claim does not plead a reasonable cause of action?

B. Did the Motion Judge err in finding that the appellants have failed to provide some basis in fact for the proposed conspiracy-related common issues?

IV. Analysis

[32] There is no doubt that the usual appellate standard of review applies to decisions of a trial judge in matters of pleadings: *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2015] F.C.J. No. 503 (QL) at para. 19; *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, [2016] 1 F.C.R. 246 at para. 8. As a result, questions of fact and

questions of mixed fact and law are reviewable on the standard of palpable and overriding error, whereas questions of law and questions of law that can be extracted from questions of fact and law will be reviewed on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*].

[33] The appellants and the respondents joined issue over the standard of review with respect to the first question. The appellants argued that the assessment of the reasonable cause of action requirement is a pure question of law reviewable on the correctness standard, whereas the respondents are of the view that in this case, the issue lies not so much on the requirements of the asserted cause of action (a question of law), but on whether the pleaded facts satisfy these requirements (a question of mixed fact and law).

[34] Having carefully reviewed the case law submitted by both parties in their reply and sur-reply memoranda, I come to the conclusion that the applicable standard of review in the particular circumstances of this case is the palpable and overriding standard.

[35] The appellants rely on the decision of the Supreme Court of Canada in *Godfrey*, as well as on this Court's decision in *John Doe* and numerous provincial appellate courts decisions, for the proposition that "whether a pleading discloses a reasonable cause of action is a question of law, reviewable on the standard of correctness" (Appellants' Reply Memorandum at para. 6). In my view, this is an inaccurate and distorted reading of the case law.

[36] In most cases, determining whether a pleading discloses a cause of action involves essentially the identification of the proposed cause of action and whether it is cognizable in Canadian law. This was precisely the case in *Godfrey*, where the issue was whether "umbrella purchasers" (i.e., purchasers of products manufactured and supplied by someone other than the defendants, but who allege that the defendants' price-fixing conduct raised the market price of the product) have a cause of action under paragraph 36(1)(*a*) of the Act. As the majority stated at paragraph 61 of its reasons, this was a question of statutory interpretation. It was clear that if the answer to that question was positive, the facts pleaded made out the claim; in that context, whether umbrella purchasers had a cause of action was undeniably a question of law reviewable on a standard of correctness (*Godfrey* at para. 57).

[37] The same was true in all the other cases referred to by the appellants in their reply memorandum (footnotes 5 to 10), and in the *John Doe* decision of this Court upon which the appellants rely extensively. At issue in that case was whether the statement of claim disclosed a reasonable cause of action for breach of contract, negligence, breach of confidence, intrusion upon seclusion, publicity given to private life and breach of the right to privacy under sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*. These issues were first and foremost of a legal nature, and it is in this context that must be read the comments of the Court relied upon by the appellants. In that context, the Court stated that the assessment of the reasonable cause of action criterion differs from the last four certification criteria because it "involves essentially legal reasoning, that is, whether the applicable legal criteria to make out a certain claim have been met": *John Doe* at para. 30. Other cases of this Court are to the same effect: see *King v.*

Canada (Attorney General), 2010 FCA 122, [2010] F.C.J. No 634 (QL) at para. 5; *Jost* at paras. 21, 47-48; *Bauer v. Canada*, 2018 FCA 62, 289 A.C.W.S. (3d) 880 at para. 7.

[38] In some instances, however, the question to be resolved is not so much whether the alleged cause of action is indeed a valid cause of action, but rather whether the pleaded facts, assuming they are true, satisfy the requirements of the asserted cause of action. Even if facts are to be taken as pleaded and need not be proven with evidence, they must still be considered and capable of supporting the cause of action. As this Court stated in *John Doe* (at para. 23), "[w]hile the facts alleged are assumed to be true, they must still be pleaded in support of each cause of action. Bald assertions of conclusions are not allegations of material fact and cannot support a cause of action". That second part of the analysis is not a legal question, but a question of mixed fact and law reviewable on the palpable and overriding error standard.

[39] In the case at bar, there is no dispute as to the first part of the test: a breach of sections 45 or 46 of the Act clearly triggers the section 36 cause of action. What is at stake is whether the facts, as pleaded in the statement of claim, support the cause of action. It is very clear from the jurisprudence that this second part of the analysis does not raise a pure question of law. Nowhere did the Supreme Court state, in *Godfrey* or elsewhere, that the overall determination of whether a pleading discloses a reasonable cause of action is a pure question of law. That question must be broken down into two parts: (1) whether the alleged cause of action exists in law, and (2) whether the pleaded facts can ground the cause of action. That second part of the question is clearly not a pure question of law.

[40] It is true that in *John Doe*, this Court did not spell out explicitly these two parts of the test. As explained above, the inquiry about the reasonable cause of action requirement in that case revolved for the most part around the existence at law of the alleged causes of action. That did not prevent the Court, however, from dismissing some of the causes of action on the ground that they were not supported by the pleaded facts. At paragraph 45, for example, the Court stated that there was "a total lack of any material facts" to support the pleading of an alleged breach of contract, and that it was "in and of itself a sufficient basis to dismiss that cause of action". Similarly, the Court found that the alleged tort in publicity given to private life and of intrusion upon seclusion should have been rejected because they were not supported by any material facts: *John Doe* at paras. 53, 56 and 58.

[41] Most recently, the Ontario Court of Appeal drew the same distinction between the legal and factual components of the reasonable cause of action requirement in *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 2022 A.C.W.S. 3647. At paragraph 29, the Court wrote:

> As framed by the plaintiffs' arguments, the motion judge's assessment of the defamation claim was not a pure legal analysis. It required the application of the legal standard of the modern, flexible approach to defamation pleadings to an assumed set of facts, a question of mixed fact and law. At their core, the plaintiffs' submissions did not require the motion judge to determine whether Mr. Siudak's pleadings disclosed a known and tenable cause of action but, rather, whether the known cause of action was pleaded with sufficient particulars to satisfy the modern, flexible approach to defamation pleadings. The motion judge's analysis therefore attracted a deferential standard.

[42] In light of the above, I agree with the respondents that the decision of the Motion Judge to dismiss the appellants' certification motion on the basis that the statement of claim does not disclose a reasonable cause of action is reviewable on the deferential standard of palpable and overriding error, as it rests on the Motion Judge's finding that the pleaded facts do not satisfy the

requirements of the asserted cause of action, as opposed to the existence of that cause of action in Canadian law.

[43] On the second question, the parties are in agreement that the applicable standards of review are those set out in *Housen*. As a result, the identification by the Motion Judge of the test to determine whether there is a basis in fact for the proposed common issues is a question of law to be reviewed on the correctness standard. The application of that test to assess whether the claims' proposed class members do raise common issues is a mixed question of fact and law, to be reviewed on the standard of palpable and overriding error: see *John Doe* at paras. 29-31; *Horseman v. Canada*, 2016 FCA 238, 271 A.C.W.S. (3d) 707 at para. 4; *Condon v. Canada*, 2015 FCA 159, [2015] F.C.J. No 803 (QL) at para. 7 [*Condon*].

A. *Did the Motion Judge err in finding that the statement of claim does not plead a reasonable cause of action?*

[44] The crux of the appellants' argument on appeal is that the Motion Judge improperly considered the merits of the case and stepped beyond his more limited role in a certification motion. Stressing that no evidence may be considered and that the pleadings must be read as a whole, the appellants submit that the Motion Judge erred in applying too high a standard in his analysis. More particularly, the appellants claim that the Motion Judge imposed an inflated standard of particularity, failed to read the pleadings as a whole, failed to presume the pleaded facts were true, and failed to consider the evidence.

[45] The appellants argue that their pleadings met each and every one of the requirements to plead a conspiracy established by the jurisprudence: a description of the parties and their relationship; the agreement between the defendants to conspire; the purpose or objects of the conspiracy; the overt acts alleged to have been done by each of the alleged conspirators in furtherance of the conspiracy; and finally, the injury and damage occasioned as a result. In their view, the Motion Judge's finding that the statement of claim is "too sparse in detail" and does not contain a sufficient description of an unlawful agreement is premised on too high a standard of particularity: Reasons at para. 117. The appellants submit that their pleadings were sufficiently detailed to allow the respondents to identify the agreement in question. When stating that the appellants should have provided material facts to support who was in attendance, what was discussed and whether there was any meeting of the minds at the alleged meetings at trade association events, the Motion Judge applied a virtually impossible standard, claim the appellants. Not only would these details be unavailable to the appellants, but they would emerge during the discovery stage because the alleged conspiracy is secret in nature.

[46] The appellants further submit that instead of assessing the pleadings "as a whole", the Motion Judge considered individual allegations and dismissed them gradually. The appellants argue that in approaching the pleadings in a piecemeal way, the Motion Judge failed to consider allegations which he had previously dismissed when assessing a new part of the pleadings leading to incorrect conclusions, including that the appellants pleaded no more than conscious parallelism.

[47] The appellants argue that Justice Gascon limited the presumption of truth by mischaracterizing material facts and refusing to presume the appellants' allegations as true. First, he misapplied the requirement of particularity, by applying it to individual paragraphs rather than to the pleadings as a whole, and so ignored individual facts that he believed were not sufficiently particular. Next, the appellants argue that Justice Gascon misapplied the test for the reasonable cause of action analysis. In their view, he dismissed the allegation that "the defendants met and communicated with each other among their senior executives, directly and indirectly, in person, over the phone, and at meetings of the industry's various trade organizations" as vague, brief and conclusory because he applied the requirement for authorization of a class action in Québec (as elaborated by the Supreme Court in *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, [2019] 2 S.C.R. 831 and *Infineon*, instead of those applying in the Federal Court: Appellant's Memorandum of Fact and Law at para. 62; Reasons at para. 130. Finally, the appellants take issue with the Motion Judge when he claimed that material facts "cannot be simply constituted of bald assertions of conclusions" or "bare allegations": Reasons, at paras. 77 and 82. In their view, bare allegations of fact are precisely the desired content of pleadings given that Rule 174 prohibits the inclusion of evidence in the pleadings; as a result, material facts can only be rejected as conclusory when the plaintiff pleads only a legal conclusion without pleading the material facts.

[48] Finally, the appellants argue that the Motion Judge considered evidence when determining if the pleadings disclose a reasonable cause of action despite clear guidance from this Court which prohibits doing so. The appellants argue that the Motion Judge overstepped his role by evaluating the incorporated documents in detail to determine if the appellants'

interpretation of them was correct. Moreover, the Motion Judge required an evidentiary basis for the material facts that is prohibited in a motion for certification.

[49] In my view, none of these arguments can succeed and the Motion Judge did not err in finding that the appellants failed to plead a cause of action for conspiracy. In so concluding, Justice Gascon identified the applicable legal principles, and he made no overriding or palpable error in applying them. I also wholeheartedly agree with his general approach with respect to certification motions, which is best captured by the following paragraph of his Reasons:

> [292] I do not dispute that the class actions are a specific procedural vehicle for litigants and that a certification motion is not the place to focus on the substance and merits of a contemplated class action. However, the certification stage nonetheless remains an important gate-keeping mechanism which must operate as a "meaningful screening device" and which shall not be treated as a "mere formality" (*Desjardins* at para 74; *Oratoire* at para 62; *Pro-Sys* at para 103). Contrary to what the Plaintiffs appeared to suggest, for a court to conduct a rigorous review of a plaintiff's certification motion and to scrutinize with care the allegations, the material facts and the evidence put forward by a plaintiff on a certification motion does not amount to delving into the merits of the case. As the [Supreme Court of Canada] frequently stated, it is rather part of the courts' expected role and duty to do more than a rubber-stamping and symbolic review of proposed class actions at the certification stage, and to be satisfied that the certification requirements are effectively met.

[50] In their memorandum, the appellants claim that the Motion Judge, despite stating the legal test accurately, nevertheless did launch a full-blown merits analysis. In the very first paragraph of their memorandum, they write that the Motion Judge approached the truth of the conspiracy allegation as "the determinative issue", relying for that proposition on his finding that "[t]he formation and existence of the section 45 conspiracy" was "the central issue in dispute between the parties": Reasons at paras. 5-6. In my view, this is an unfair and distorted reading of the Motion Judge's Reasons. When read in its totality, it is clear that paragraph 5 of the Reasons

is focused on the common issues and stressed the unusual character of the appellants' claim, as is made clear from a reading of the paragraph in its entirety:

> The formation and existence of the section 45 conspiracy alleged by the Plaintiffs are the central issue in dispute between the parties, as this core allegation drives the Plaintiffs' pleadings and provides the backdrop for their proposed common issues. I pause to observe that this is highly unusual in competition law class actions brought under sections 36 and 45 of the Act. In the vast majority of those cases, whether the claims raise common issues concerning an alleged conspiracy is typically not in dispute. The main battleground is instead with respect to the proposed common issues relating to the consequences of the alleged wrongful acts, namely whether there is some basis in fact in the record that the alleged loss or harm can be established on a class-wide basis. More often than not, it revolves around whether there is a credible and plausible methodology to establish loss or harm on a class-wide basis. Not surprisingly, the parties have indeed spent a fair amount of their written and oral submissions on this point.
>
> (emphasis in the original)

[51] Contrary to the appellants' submissions, the Motion Judge undisputedly applied the correct "plain and obvious" legal test, the very same test that they advocated at paragraph 58 of their factum. Relying on the jurisprudence of the Supreme Court (*Atlantic Lottery* at para. 87; *R. v. Imperial Tobacco* at para. 23) and of this Court (*Condon*), the Motion Judge stated the criterion as follows:

> In order to reject a certification motion on the cause of action requirement, the Court must be convinced, while assuming that the pleaded facts are true, that it is plain and obvious that a claim does not exist or has no reasonable chance of success. For this criterion, no evidence may be considered and the analysis is limited to the pleadings…
>
> Reasons at para. 70

[52] In applying this test, the Motion Judge was appropriately guided by Rules 174 and 181, pursuant to which a pleading is to contain a concise statement of the material facts (but not the evidence) on which a party relies, and the particulars of every allegation it contains. Reviewing

the jurisprudence on the plain and obvious test, especially with respect to the requirements of sufficient particulars, the presumption that allegations of fact are true, and the contents of the pleadings, the Motion Judge then stated the following well-established principles:

a) A plaintiff must plead material facts in sufficient detail to support the claim and the relief sought. In order for allegations in pleadings to be considered as material facts, they must be supported by sufficient particularization when required and must not be bare conclusory assertions or bald legal statements based on assumptions or speculations: Reasons at paras. 75 and 79;

b) The facts alleged in the pleading are presumed to be true. However, this presumption does not extend to matters which are manifestly incapable of being proven, to matters inconsistent with common sense, vague generalization, opinion, conjecture, bare allegations, bald conclusory legal statements, or speculation that is unsupported by material facts: Reasons at paras. 81-82;

c) Documents referred to in the pleadings, whether it is through direct quotes, summaries or paraphrases of the documents, are incorporated by reference and will be considered part of the pleading if they are central enough to the claim to form an essential element or integral part of the claim itself or its factual matrix: Reasons at paras. 85, 87;

d) If the documents referred to in the pleadings do not actually say what the plaintiff alleges they say, or if the plaintiff has ascribed a meaning to those paraphrases and quotes that is not consistent, on a plain reading, with the documents from which they originate, the court cannot consider these allegations as material facts. The certification judge's task is not to look at these documents in detail to determine whether or not the plaintiff has correctly interpreted them, but can determine whether the references made by the plaintiff

accurately reflect what has been expressly stated in the documents: Reasons at paras. 86-87.

[53] The Motion Judge then turned to the legal framework, and noted that the only cause of action advanced by the appellants was a claim for damages under section 36 of the *Competition Act*, flowing from a breach of sections 45 and 46 of that Act: Reasons at paras. 29-31.

[54] It is undisputed between the parties and well-established at law that the gravamen and basic threshold requirement of a criminal conspiracy is an agreement between the alleged conspirators: see, for example, *United States of America v. Dynar*, [1997] 2 S.C.R. 462, 1997 CanLII 359 at paras. 87 and 177; *R. v. Proulx*, 2016 QCCA 1425, [2016] Q.J. 11393 at para. 32. It is on that basis that the Supreme Court found, in *Atlantic Sugar Refineries Co. Ltd. et al. v. Attorney General of Canada*, [1980] 2 S.C.R. 644, 1980 CanLII 266 (at p. 657) [*Atlantic Sugar*], that deliberate parallel conduct ("conscious parallelism") does not amount to a tacit agreement and therefore is not illegal. As noted by the Motion Judge, conscious parallelism, which he defines as "the act of independently adopting a common course of conduct with an awareness of the likely response of competitors or in response to the conduct of competitors" (Reasons at para. 104), falls short of conduct prohibited by section 45 of the *Competition Act*. The same is true of "signalling", which can be described as the communication by competitors to one another through public statements, of their intent not to compete for market share.

[55] In other words, unilateral conduct is not sufficient; there must be some form of agreement between the co-conspirators, involving an offer or invitation and some conduct from which

acceptance of the offer may be inferred. The case law cited by the Motion Judge in support of that proposition is unambiguous: see *Godfrey* at para. 190 (Côté J., dissenting but not on this point); *R. v. Cominco Ltd.*, 1980 CanLII 3865 (AB KB), (1980) 46 C.P.R. (2d) 154 (Alta. Sup. Ct.); *R. v. Aluminum Co. of Canada Ltd.*, (1976) 29 C.P.R. (2d) 183, 1976 Carswell 94 (Que SC); *R. v. Canada Cement Lafarge Ltd.*, (1973) 12 C.P.R. (2d) 12, 1973 CarswellOnt 1031 (Ont. Prov. Ct.); *R. v. Canada Packers Inc.*, 1988 CanLII 3796 (AB KB), 19 C.P.R. (3d) 133 (Alta. QB).

[56] Applying these principles, the Motion Judge came to the conclusion that the statement of claim, even if read generously, did not set out material facts establishing whether, how and when an agreement could have been entered into between the respondents, and what (if anything) was agreed upon. Nor was he able to discern any meeting of the minds with regard to the commission of the alleged conspiracy or any overt acts undertaken by the respondents in furtherance of an alleged conspiracy.

[57] The appellants submit that the Motion Judge applied an inflated standard of particulars, impossible to meet in the context of an offence that is secretive in nature. They relied for that proposition, as they did before the Motion Judge, on *Crosslink v. BASF Canada*, 2014 ONSC 1682 (Div. Ct.), 54 C.P.C. (7th) 111 [*Crosslink 1*] and on *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646, 320 A.C.W.S. (3d) 547 [*Mancinelli*], which both involved alleged price-fixing conspiracies. In both cases, the Court cautioned against setting too high a standard to meet in a context where the details of the conspiracy are largely in the hands of the conspirators. This is clearly a valid concern, and courts should be weary to impose rules as to the sufficiency of

pleadings that could "become instruments of oppression in the hands of those who have knowledge of material facts at the expense of those who seek to rely on those facts without, however, having the means of knowing those facts so as to be able to plead them with specificity": *Enercorp Sand Solutions Inc. v. Specialized Demanders Inc.*, 2018 FCA 215, [2018] FCJ No 1179 (QL) at para. 36.

[58] Subsection 45(3) of the Act addresses that issue. It clearly states that a Court may infer the existence of an agreement from circumstantial evidence, even in the absence of any evidence of "direct communication" between the parties to the alleged conspiracy. The Motion Judge was very much alive to that challenge, and explicitly referred to that provision: Reasons at para. 98. That being said, and as the Motion Judge noted, even in a conspiracy case, there are specific requirements with respect to pleadings, and when there is no direct evidence of an agreement, the plaintiff must still plead material facts and full particulars of an agreement based on indirect or circumstantial evidence of some form of communication between the alleged conspirators such that an agreement can be inferred.

[59] As the Supreme Court stated in *Atlantic Sugar* (at pp. 656-657), an agreement can be reached as a result of the tacit acceptance of an offer, but that offer must still have been communicated. Individual conduct is not caught by section 45 of the Act. For section 45 to be met, there must be an offer or invitation and some conduct from which it can be inferred that the offer has been accepted. I find three paragraphs of the Motion Judge's Reasons particularly illuminating in this respect, and because of their critical nature for his overall findings it is worth reproducing them in full, despite their length:

[144] That said, I agree that the Plaintiffs could allege and demonstrate the existence of an agreement between competitors with circumstantial evidence, and that simultaneous public conduct, conscious parallelism or public signalling could be used in conjunction with other evidence to establish the existence of an unlawful agreement under section 45. These are the "facilitating practices" referred to by the Competition Bureau in the CC Guidelines. However, factual allegations relying on circumstantial evidence require material facts enabling the Court to infer that an impermissible agreement may exist. In other words, the allegations and factual foundation of circumstantial events must go to the establishment of an agreement, and to the conduct of the parties. The Plaintiffs cannot simply allege general observed changes in prices without any material facts relating to the conduct of the Defendants. Here, there are strictly no allegations and no material facts, let alone any evidentiary basis, of any "facilitating practices" in terms of conduct by the Defendants – such as sharing competitively sensitive information on production, capacity or prices; coordination between the Defendants; or activities assisting in the monitoring of each other – that could point to circumstantial evidence of an agreement.

[145] Second, and more importantly, the documents referred to or paraphrased in the pleading do not say what the Plaintiffs claim they say in the Statement of Claim, and the allegations of agreement flowing from them cannot therefore be considered as true. It goes without saying that the Court cannot accept as true allegations that are manifestly incorrect or false. When read accurately, I conclude that the Public Statements relied on by the Plaintiffs do not offer material facts to support any allegation of an agreement between the Defendants to suppress DRAM supply, or even to support any suppression, restriction or limitation of supply as such. In fact, in most instances, the Plaintiffs' allegations emanating from the Public Statements misrepresent what those documents effectively say. I agree with the Defendants that the Plaintiffs manufactured allegations of a conspiracy from extracts and documents that simply do not suggest any agreement between the Defendants nor any coordinated suppression of supply. The statements alleged in the Statement of Claim stop well short of giving rise to a reasonable inference of collusion. These statements, all of which are presented as reflecting what was said during earnings calls or at industry conferences, instead constitute the individual Defendants' indications of their own future conduct, descriptions of their own past conduct and their respective predictions of industry trends.

[146] In other words, further to my review of the documents referred to in the pleadings, I find that the extracts and documents relied on by the Plaintiffs do not suggest any conspiracy, and that the Plaintiffs' statements allegedly summarizing their contents are twisting the facts to fit an appearance of conspiracy. The Statement of Claim essentially invents a fictitious scenario of intent, communications and coordination between the Defendants that does not exist in or flow from the documents the Plaintiffs claim to paraphrase. I do not find any material facts, nor any evidentiary foundation, supporting the possible existence of an agreement, of a meeting of the minds or of a mutual understanding between

> the Defendants. Nor are there allegations of overt acts by any of the Defendants that may suggest any form of two-way communications or course of conduct from which the acceptance of an offer could be reasonably inferred. There are only extracts showing what the state of mind and thinking of each separate Defendant was. In the extracts and documents relied on by the Plaintiffs, each Defendant sets out and explains its own policy and approach, with reference to what others are doing. These are examples of a competitive industry at work, where the competitors follow and are aware of what is happening in the market. The observation by one industry player that its view of the industry is not very different from the views of other industry players (see, e.g., Micron's statements in the Statement of Claim, at paras 91-92) does not support any inference of an otherwise illegal agreement.

[60] I note that in the two cases cited by the appellants in support of their argument that the Motion Judge applied too high a standard with respect to the level of detail required to ground a valid cause of action, the statements of claim were much more particularized than in the case at bar. In the *Crosslink* cases, for example, the statement of claim alleged that senior executives and employees of each of the defendants engaged in telephone conversations and meetings with each other, as a result of which they agreed to the price at which each defendant would sell its products, and to the volume that each company would supply to its customers: *Crosslink 1* at para. 75. It was also alleged that in furtherance of the conspiracy, representatives of the defendants met secretly to discuss prices and volumes of sales, implemented coordinated price increases, allocated the volumes of sales, customers, and markets, agreed to refrain from bidding or to submit intentionally high, complementary and non-competitive bids for particular supply contracts, exchanged information regarding the prices and volumes of sales for the purpose of monitoring and enforcing adherence to the agreed-upon prices, volumes of sales and markets, instructed members of the conspiracy not to divulge the existence of the conspiracy, took active steps to conceal the unlawful conspiracy from their customers, the authorities, and the public, and disciplined any corporation that failed to comply with the conspiracy: *Crosslink 1* at para.

75. On that basis, the Court granted the motion to certify a class proceeding, but nevertheless noted that the pleadings were "sparse in detail" despite the particulars of the defendants' conduct found in the pleadings: *Crosslink 1* at para. 76. As we see from the analysis of the Motion Judge, and as he commented in dismissing the analogy with *Crosslink 1*, the particulars of the agreement in that case were nevertheless much more detailed than in the case at bar: Reasons at paras. 169-171.

[61] The same is true in *Mancinelli*. In that case, the plaintiffs claim that the defendants communicated directly with each other to carry out the conspiracy through chatrooms which they identify by their names. They allegedly use this mode of communication to coordinate the prices offered to customers, to exchange confidential customer information, and formed these chatrooms with the specific intent of colluding with others to manipulate the market. The eighteen groups of financial institutions were alleged to have improperly shared confidential client and proprietary trading information, coordinated trading to influence the foreign exchange foreign currency market rates, monitored the conduct of co-conspirators to ensure secrecy and compliance with the conspiracy; used code names and intentionally misspelled words to evade detection; and agreed to "stand down" by holding off buying or selling currency to benefit co-conspirators: *Mancinelli* at para. 78. Moreover, the conduct of the defendants had been the subject of criminal and regulatory investigations in the United States, United Kingdom and elsewhere: *Mancinelli* at para. 80. The appellants are no doubt right to point out, as did the Ontario Superior Court of Justice in that case, that plaintiffs cannot be required to meet a virtually impossible standard in a price-fixing conspiracy, which is secretive in nature. Yet the

Court also said that it is necessary to set out discretely the particulars of each co-conspirator (which was done here), and added the following:

> A recitation of a series of events coupled with an assertion that they were intended to injure the [sic] insufficient, and it is not appropriate to lump some or all of the defendants together into a general allegation that they conspired to injure the plaintiff. If the plaintiff does not, at the time of pleading have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim.
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> *Mancinelli* at para. 142

[62] The amended statement of claim that is at issue in the present case is to be contrasted to those that were under scrutiny in these two cases. After a careful review, the Motion Judge found that even if read generously, the amended statement of claim did not contain material facts with respect to the alleged agreement: see above, at para. 22 of these reasons. He came to that conclusion on the basis of his meticulous reading of the amended statement of claim. He grouped the various allegations into four separate headings: (a) general statements; (b) direct private communications; (c) trade association meetings; and (d) public statements.

[63] Before turning to the allegations of direct private communications and "signalling", the Motion Judge first looked at the general statements found in five paragraphs of the amended statement of claim. He noted that for the most part, these statements are no more than "bald assertions of conclusory facts", with no allegations of material facts going to the formation or even the existence of an agreement to fix or increase the prices for DRAM or to suppress DRAM supply, and with no factual underpinnings: Reasons at para. 123. Indeed, he found that the conspiracy claims contained in the appellants' general statements essentially mirror the language of the Act, with no material facts supporting the possible existence of two-way communications

or course of conduct from which an agreement or a conspiracy between the respondents could be inferred.

[64] I agree with the Motion Judge that such allegations are insufficient to disclose a reasonable cause of action, particularly with respect to very serious legal claims of an unlawful conspiracy. It would be very unfair to expect the respondents to defend against such vague allegations. The jurisprudence is replete with admonitions that conspiracy allegations must be particularized with respect to the acts alleged against each of the co-conspirators: see, for example, *Mancuso* at para. 18; *David v. Loblaw*, 2021 ONSC 7331,160 O.R. (3d) 33 at para. 33 [*Loblaw*]; *Mancinelli* at paras. 142-143.

[65] The Motion Judge next considered the pleading's allegations of direct communications among the respondents. In fact, the amended statement of claim contains only one such allegation, and is to the effect that the respondents "met and communicated with each other, directly and indirectly, over the phone and in person" (amended statement of claim at para. 5). As the Motion Judge noted, there are no material facts backing up this allegation, and the allegation appears to be based entirely on pure speculation. Once again, I agree with the Motion Judge that in the absence of any material facts, the mere allegation that alleged co-conspirators have met and communicated is insufficient to plead a section 45 conspiracy or a meeting of the minds to engage in conduct proscribed by the Act.

[66] The same is true of the trade association meetings of which the respondents are members. In various paragraphs of the amended statement of claim (see paras. 5, 51-52, 71 and 102-103),

the appellants allege that the respondents met and communicated with each other at scheduled meetings of different trade associations and industry organizations, and that DRAM prices increased in the months or years following these meetings. Yet there are no allegations, let alone any material facts, that the respondents actually met and agreed on anything further to those alleged meetings, or suggesting the establishment of an agreement to restrain the supply of DRAM or to increase DRAM prices. As the Motion Judge stated, " [t]hrowing out a list of scheduled meetings of trade associations is not sufficient to allege the existence of an agreement, especially when there are no material facts to support who was in attendance, what was discussed, and whether there was any meeting of the minds": Reasons, at para. 135. Trade associations serve many useful and legitimate functions, and mere attendance at scheduled events of those organizations cannot amount to a reasonable inference of conspiracy. An opportunity to collude is not sufficient, in the absence of any material facts that the alleged co-conspirators agreed on anything.

[67] The gist of the appellants' allegations focus on public statements made by the respondents. The Motion Judge first noted that "public signalling", which he describes as being nothing more than "information being communicated unilaterally by a market participant", is a form of unilateral conduct that is not a recognized cause of action under section 45 of the Act: Reasons at para. 142. He then reviewed the appellants' allegations and found that the respondents' public statements failed to supply material facts that would support or suggest a conspiracy, because the appellants "misquoted, selectively quoted and mischaracterized" the statements attributed to the respondents: Reasons at para. 141. The Motion Judge came to that conclusion after having read the entirety of the documents from which the public statements

were taken by the appellants. When read in their context, I agree with the Motion Judge that the impugned statements stop short of giving rise to a reasonable inference of collusion, and rather constitute an indication of the respondents' own future conduct, and their respective predictions of industry trends. Such behaviour is consistent with unilateral conduct and conscious parallelism, and is not an indication of a conspiracy or of an agreement. Moreover, the fact that the increase in supply during the Class Period lagged behind the growth in demand is not the same as an allegation that the respondents intended or committed to limit or restrict supply.

[68] In coming to that conclusion, the Motion Judge was very conscious of the fact that his task was not to assess the merits of the evidence. Yet he could not accept at face value the appellants' allegations without at least making sure that the appellants' allegations and the public statements referred to were a fair representation of what was actually said by the respondents, in the context of the documents from which they were drawn: Reasons at para. 160. Once stripped of their misquotes, selective quotes, mischaracterizations, distortions, and misrepresentations, the appellants' references to the public statements in the amended statement of claim amounted to no more than allegations of parallel conduct and were a far cry from the possible existence of an agreement.

[69] On the basis of the foregoing, I am of the view that the Motion Judge did not err when he concluded that the amended statement of claim, even if read generously, did not disclose a reasonable cause of action under section 45 of the Act. There is no proper allegation on the main constituent element of a conspiracy, namely the possible existence of an agreement between the respondents. The test for a reasonable cause of action is low, as the Motion Judge acknowledged,

but it cannot be so low as to be devoid of any meaning. If the requirement that the pleadings must reveal a reasonable cause of action is to be more than perfunctory, it cannot be satisfied when the main element of an alleged conspiracy is absent. As the Motion Judge stated in his conclusion on this part of his Reasons:

> If pleadings such as the Statement of Claim could be sufficient to meet the reasonable cause of action threshold and to certify a competition law class action based on a section 45 conspiracy, it would essentially mean that Canadian plaintiffs could file class actions on the simple observation of parallel pricing or supply decisions by competitors, or of simultaneous price increases of a certain magnitude, coupled with a bald, speculative statement that the competitors in the industry must have conspired to arrive at that, without more. (…) This, in my view, would turn section 45 on its head, and strip away from this cornerstone provision of the Act what is now its most essential and central element, namely, the conduct of the alleged conspirators.
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> Reasons at para. 174

[70] In the absence of any error of law, the decision of the Motion Judge is entitled to a high degree of deference, and this Court will intervene only if his assessment of the criteria set out in Rule 334.1 is plainly wrong. At its core, the appellants argue that the Motion Judge should only have applied a symbolic scrutiny. I have explained why this view is erroneous and does not find support in the law. As stated in *Pro*-Sys (at para. 103), the certification process is a "meaningful screening device", and if it is to retain that function, the analysis must be more than superficial. I therefore find that the appellants' attempt to challenge the Motion Judge's findings of fact under the cover of a question of law must fail.

B. *Did the Motion Judge err in finding that the appellants have failed to provide some basis in fact for the proposed conspiracy-related common issues?*

[71] The appellants argue that the Motion Judge improperly considered the merits of the case in assessing if there is some basis in fact for the proposed conspiracy-related common issue, applied the wrong legal test in his assessment, and that there is some basis in fact for the appellants' common issues.

[72] First, in considering if there were common issues, Justice Gascon asked if there was some basis in fact to support that the common issues (1) actually exist in fact, and (2) can be answered in common across the entire class. The appellants acknowledge that the current state of the law is unclear, but encourage this Court to reject what they call the two-step test because it invites a prohibited merits analysis. In applying the two-step test, the appellants argue, the Motion Judge was led to a merits analysis to determine if there was a basis in fact to support their allegations. They argue that this type of analysis is expressly prohibited by the Supreme Court as a result of its decisions in *Pro-Sys* and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545.

[73] The appellants argue that the Motion Judge erroneously conflated the standard of proof and the object of proof. The appellants state that they agree that the some basis in fact standard applies as the standard of proof but that the Motion Judge misunderstood their argument to be in relation to the object of proof. They rely heavily on one sentence in *Pro-Sys* where the Court stated (at para. 110): "In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to

establishing whether these questions are common to all the class members". In their view, a fair reading of that statement makes clear that the Supreme Court referred to the object of proof, and not to the standard of proof, as the Motion Judge would have it, and ruled out any consideration of the merits at the certification stage. In their view, requiring evidence or proof of an allegation is impossible without requiring that a party prove that allegation.

[74] The appellants further contend that applying the two-step test defeats the object of class proceedings, because it adds "an additional shield against accountability" by requiring proof of secret wrongdoing. According to the appellants, if proof is required of secret wrongdoing, competition law class actions would be precluded in the absence of regulatory inquiries or an admission of wrongdoing by the targeted corporations.

[75] Finally, the appellants argue that there is some basis in fact to conclude that the class members' claims raise the issues that the Motion Judge rejects. They claim that Justice Gascon made an extricable error in principle by assessing each category of evidence in isolation instead of considering the appellants' evidence in its totality.

[76] In my view, the Motion Judge committed none of the errors alleged by the appellants, either in law or in fact.

[77] Considering first the proper approach to assessing commonality, I fail to see how it can seriously be argued that a judge could determine whether the claims of the class members raise common questions of law or fact without first deciding whether there is some basis in fact for the

very existence of each common issue. The so-called "two-step approach" adds nothing to the requirement spelled out in *Hollick v. Toronto (City),* 2001 SCC 68, [2001] 3 S.C.R. 158 [*Hollick*] that there must be common questions stemming from facts relevant to all class members. That case, it will be remembered, involved a proposed environmental class action stemming from the pollution emanating from a landfill site. After reiterating that class representatives must show some basis in fact for each of the certification requirements set out in section 5 of the Ontario *Class Proceedings Act, 1992*, the Court considered the complaints records from putative class members obtained from the Ministry of Environment and Energy that had been submitted by the appellant, and concluded that the "some basis in fact" test had been met.

[78] While the Court in that case did not express the test in terms of one or two steps, it is very clear that in practice, the "some basis in fact" test has a dual component: first that the putative class members must have a claim, or at the very least some minimal evidence supporting the existence of a claim, and second some evidence that the common issue is such that its resolution is necessary to the resolution of each class member's claim. As the Court stated, it was very clear that at least one aspect of the liability issue, i.e., whether the respondents emitted pollutants into the air, was common to all those who had claims against the respondents: *Hollick* at para. 19. But the difficult question was "whether each of the putative class members does indeed have a claim – or at least what might be termed a "colourable claim" – against the respondent": *Hollick* at para. 19.

[79] Much as they did before the Motion Judge, the appellants claim that the two-step approach invites or implies a merits analysis. Nothing can be further from reality. Assessing

whether the claim made by putative class members is genuine, even if asserted in common by a number of claimants, is entirely distinguishable from an examination of its merits. In that respect, I wholeheartedly agree with the Motion Judge's answer to the appellants' argument:

> 211. I do not dispute that, at the certification stage, the evidence presented to support certification of a common issue must not be assessed in regard to the action's merits. The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. Nor should the certification judge enter into a weighing of conflicting evidence with respect to the merits of the claim. However, applying the two-step approach does not mean that the courts engage in the weighing of evidence and enter into a consideration of the merits when dealing with the common issues criterion. It is still the some-basis-in-fact standard that applies, not the balance of probabilities standard. And it is not disputed that some basis in fact is a "relatively low evidentiary standard" (*Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*] at paras 57, 61). The low evidentiary standard, however, needs some factual underpinning, and an absence of evidence or mere speculation will not be enough (*Sun-Rype* at para 70).
>
> 212. There is a fundamental difference between weighing the merits of the claim (which the courts cannot do at certification) and determining whether some minimal evidence exists to support the existence of the claim (i.e., the two-step test). Under the two-step approach, some evidentiary foundation is needed, but not an exhaustive record upon which the merits of the case will be argued. The standard requires some basis in fact, but not the proof of fact, or proof that the facts actually occurred. It is in that sense that the some basis in fact threshold falls comfortably below the civil standard of proof on a balance of probabilities, and cannot be equated with a merits-based test.

[80] I am also in full agreement with the Motion Judge that the two-step approach is the only one consistent with the underlying rationale and the purpose of the certification process. If that process is to be meaningful and to achieve its objective to root out unfounded and frivolous claims, there must be a minimum assessment of the proposed common issue to ensure that it has an air of reality. Otherwise, the certification would not achieve its goal and almost any proposed certified action would have to be certified: *Dine v. Biomet*, 2015 ONSC 7050, [2015] O.J. No. 6732 (QL) at para. 15, fn 9. To quote again from the Motion Judge, "[a] cause of action with no

factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or millions": Reasons at para. 214. Allowing a common issue lacking a basis in fact to proceed to trial would certainly not promote judicial economy, nor would it promote behaviour modification, or enable access to justice.

[81] The requirement that a plaintiff establish some basis in fact for the existence of a proposed common issue has been consistently applied as a condition of certification. The Motion Judge referred to a number of cases applying the two-step approach in his Reasons (at para. 198), and many others could no doubt be added: see, for example, *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 6 at para. 104; *Canada v. Greenwood*, 2021 FCA 186, [2021] F.C.J. No. 1006 (QL) at 188; *Atlantic Lottery* at paras. 160-161; *Ewert v. Canada (Attorney General)*, 2022 BCCA 131 at para. 22; *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at paras. 140, 143 [*Nissan*]; *LaSante v. Kirk*, 2023 BCCA 28 at paras. 22, 26, 61; *Sherry Good v. Toronto Police Services Board*, 2014 ONSC 4583, [2014] O.J. No. 3643 (QL) at paras. 62-63, aff'd 2016 ONCA 250; *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470, [2015] O.J. No. 1892 (QL) at para. 88; *Shah v. LG Chem Ltd.*, 2015 ONSC 6148, [2015] O.J. No. 5168 (QL) at paras. 140-141, aff'd 2017 ONSC 2586 (Div. Ct), rev'd on other grounds 2018 ONCA 819; *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53 at para. 161, aff'd 2017 ONSC 6098 (Div. Ct.); *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81, at para. 257; *Loblaw* at para. 71; *Simpson v. Facebook*, 2021 ONSC 968, 2021 CarswellOnt 1822 at para. 43, aff'd 2022 ONSC 1284 (Div. Ct.), at paras. 26-27; *Wright v. Horizons ETFS Management (Canada) Inc.*, 2021 ONSC 3120, 2021 CarswellOnt 6446 at para. 116; *G.C. v. Jugenburg*, 2021 ONSC 3119, 155

OR (3d) 634 at para. 130; *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138, 2021 CarswellOnt 8397 at para. 80; *Curtis v. Medcan Health Management Inc.*, 2021 ONSC 4584, 2021 CarswellOnt 9727 at para. 82; *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423, 2021 CarswellOnt 16594 at para. 21; *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794, at para. 99; *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, 2021 CarswellBC 1348 at paras. 115-116; *MacInnis v. Bayer Inc.*, 2020 SKQB 307, 2020 CarswellSask 609 at para. 143; *Engen v. Hyundai Auto Canada Corp.*, 2021 ABQB 740, 2021 CarswellAlta 2262 at para. 56 and fn 39; aff'd (on this point) 2023 ABCA 85 at para. 12; *Simpson v. Goodyear Canada Inc.*, 2021 ABCA 182, 459 D.L.R. (4th) 315 at para. 40.

[82] In support of their argument for the one-step approach, the appellants rely on a single passage taken from the decision of the Supreme Court in *Pro-Sys* where Justice Rothstein stated:

> 110. The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. (…) In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[83] I fully agree with the Motion Judge that, when put in context, Justice Rothstein's comments were not meant to do away with the first step of the requirement that the proposed common issue exists in fact. Indeed, he never addressed the one-step versus two-step approach, and his comments were made in response to Microsoft's argument that the some basis in fact standard required the plaintiff to prove that it had met the elements of the test on a balance of probabilities. His statement in paragraph 110 is merely a reaffirmation that the same basis in fact standard does not equate with a balance of probabilities test.

[84] That Justice Rothstein did not mean to depart from *Hollick* is further supported by his application of the test in that case. At issue in *Pro-Sys* was the assessment of the commonality of the harm or loss-related issues in indirect purchaser actions. The same basis in fact standard was applied in the context of establishing the legal requirement an expert methodology must meet to certify harm in such cases as a common issue. In his discussion of that question, it is abundantly clear that Justice Rothstein was looking for more than a bare assertion that the issue is common to all class members:

> 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 date to which the methodology is to be applied.

[85] The decision of the Supreme Court in *Infineon*, released on the same day as *Pro-Sys*, provides further confirmation that Justice Rothstein did not intend to upset the two-part test requirement for the common issue criteria or to signal that the some basis in fact standard was a mere formality. Contrasting the "arguable case" standard applied in Québec class actions with the *Hollick* "some basis in fact" standard, Justices LeBel and Wagner, writing for the Court, stated:

> 128. This evidentiary burden is less demanding that the one that applies in other parts of Canada. As evidenced by this Court's decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, indirect purchasers in other Canadian jurisdictions would, to obtain certification of a class proceeding, have to show that their claim has a sufficient basis in fact…

[86] Further on in its reasons, the Court stressed that bare allegations of harm in the pleading would not be sufficient to establish an arguable case in Québec, but that such allegations, if accompanied by some evidence of the existence of a price-fixing conspiracy, would be sufficient to discharge a plaintiff's burden at the authorization stage (*Infineon* at paras. 133-135).

[87] Had the Court wanted to signal a departure from *Hollick* and its requirement that there be some basis in fact for the existence of proposed common issues as a condition for certification, one would have expected a more explicit statement than the isolated sentence carved out of Justice Rothstein's reasons in *Pro-Sys* and relied upon by the appellants. Yet far from retreating from *Hollick*, the Court reaffirmed its central tenets in its subsequent decisions.

[88] Shortly after releasing its decisions in *Pro-Sys* and *Infineon*, the Court in *AIC Limited v. Fisher* (2013 SCC 69, [2013] 3 S.C.R. 949 [*Fisher*]) confirmed that the evidentiary burden on a motion for certification is low and quoted approvingly from paragraph 25 of *Hollick* where the Court articulated its "some basis in fact" standard: *Fisher* at para. 39. Justice Cromwell, writing for the Court, went on as stating that these principles were "reaffirmed" in *Pro-Sys* and referred to a number of paragraphs of that decision without ever mentioning its paragraph 110: *Fisher* at para. 40. Justice Cromwell goes on to cite the Ontario Court of Appeal's decision in *Pearson v. Inco Ltd.* (2006 CanLII 913 (ON CA), [2005] O.J. No. 4918 (QL)), which certified an environmental class action on the strength of evidence showing a negative impact on property prices, as an illustration of how the "some basis in fact" criterion could be met: see *Fisher* at paras. 39-42.

[89] Even more recently, Justice Karakatsanis (dissenting but not on this point) reiterated in *Atlantic Lottery* that the "some basis in fact" standard requires from a representative plaintiff a "certain minimum evidentiary basis", to ensure that the proposed class action does not "founder at the merits stage": *Atlantic Lottery* at paras. 138, 160. On that basis, she found that a bare allegation could not provide some basis in fact that the monetary relief sought could ultimately be determined on a class-wide basis.

[90] As previously mentioned, Canadian courts have rejected the argument that *Pro-Sys* altered the two-step test or the "some basis in fact" standard: see the case law referred to above, at para. 83. The Ontario Divisional Court did so explicitly in two decisions (*Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (CanLII), 320 A.C.W.S. (3d) 382 at para. 32-36 and *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 6098 (CanLII), [2017] O.J. No. 5673 (QL) at paras. 15 to 23), and these decisions are particularly relevant considering that the *Federal Courts Rules* have been modelled after the *Ontario Rules*. As for the recent decision of the British Columbia Court of Appeal in *Nissan*, it clearly does not stand for the proposition that the two-step approach has been abandoned, as suggested by the appellants. While the Court does not explicitly address that issue, it is clear from a careful reading of its reasons (and in particular from paragraphs 140 and 143) that it was not endorsing the one-step approach advocated by the appellants.

[91] For all of the foregoing reasons, I am therefore of the view that the Motion Judge stated the correct legal standard and did not err in applying the two-step approach to assessing commonality.

[92] Finally, the appellants have failed to identify any palpable and overriding error in the Motion Judge's assessment of their evidence. After carefully considering the evidence filed by the appellants in support of their conspiracy-related common issues, the Motion Judge concluded that it did "not even allow [him] to detect [the] pulse" of a conspiracy claim: Reasons at para. 289. This finding is entitled to a high degree of deference. Mere disagreement with the Motion Judge's conclusions does not amount to a reviewable error.

[93] As for Dr. Singer's expert evidence, the appellants cannot fault the Motion Judge for concluding that it did not supply a basis in fact for the existence of a conspiracy, when Dr. Singer himself clearly stated that he was not asked to provide an opinion on the existence of an agreement between the respondents, whether collusion in fact occurred, or on whether collusion can be inferred from record documents: Expert Report of Dr. Hal J. Singer, April 19, 2019 at para. 3, Appeal Book Vol. 1, at p. 214; Transcript of the Cross-Examination of Dr. Singer, dated July 14, 2020, p. 23, ln. 8 to 20, Appeal Book Vol. 6, at p. 1896. Moreover, I agree with the Motion Judge that tendering an expert report is not sufficient to establish some basis in fact of a proposed common issue.

[94] As for the argument that the Motion Judge erred by examining the evidence category by category, it is completely without merit. It is not at all clear to me how else the Motion Judge was to go about the evidence that the appellants themselves introduced by category. If none of the evidence supported any coordinated suppression, restriction or limitation in the supply of DRAM by the respondents, I fail to see how considering the various categories of evidence holistically could lead to a different result. Whether considered in isolation or in its totality, the

evidence falls short of an agreement to suppress the supply of DRAM, and the appellants have failed to discharge the heavy burden of establishing a palpable and overriding error in the Motion Judge's assessment of that evidence.

V. Conclusion

[95] I would therefore dismiss the appeal.

"Yves de Montigny"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Judith Woods J.A."

ANNEX

***Competition Act*, R.S.C., 1985, c. C-34, s. 45 and s. 46**	***Loi sur la concurrence*, L.R.C. (1985), ch. C-34, art. 45 et art. 46**
Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :
(a) to fix, maintain, increase or control the price for the supply of the product;	**a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	**b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.
Penalty	**Peine**
(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.	**(2)** Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende maximale de 25 000 000 $, ou l'une de ces peines.
Evidence of conspiracy, agreement or arrangement	**Preuve du complot, de l'accord ou de l'arrangement**
(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.	**(3)** Dans les poursuites intentées en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être

prouvé hors de tout doute raisonnable.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Défense

(4) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

a) il établit, selon la prépondérance des probabilités :

(i) que le complot, l'accord ou l'arrangement, selon le cas, est accessoire à un accord ou à un arrangement plus large ou distinct qui inclut les mêmes parties,

(ii) qu'il est directement lié à l'objectif de l'accord ou de l'arrangement plus large ou distinct et est raisonnablement nécessaire à la réalisation de cet objectif;

b) l'accord ou l'arrangement plus large ou distinct, considéré individuellement, ne contrevient pas au même paragraphe.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into

Défense

(5) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) si le complot, l'accord ou l'arrangement se rattache exclusivement à l'exportation de produits du Canada, sauf dans les cas suivants :

a) le complot, l'accord ou l'arrangement a eu pour résultat ou aura vraisemblablement pour résultat de réduire ou de limiter la valeur réelle des exportations d'un produit;

b) il a restreint ou restreindra vraisemblablement les possibilités

or expanding the business of exporting products from Canada; or

pour une personne d'entrer dans le commerce d'exportation de produits du Canada ou de développer un tel commerce;

(c) is in respect only of the supply of services that facilitate the export of products from Canada.

c) il ne vise que la fourniture de services favorisant l'exportation de produits du Canada.

Exception

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

Exception

(6) Le paragraphe (1) ne s'applique pas au complot, à l'accord ou à l'arrangement :

(a) is entered into only by parties each of which is, in respect of every one of the others, an affiliate;

a) intervenu exclusivement entre des parties qui sont chacune des affiliées de toutes les autres;

(b) is between federal financial institutions and is described in subsection 49(1); or

b) conclu entre des institutions financières fédérales et visé au paragraphe 49(1);

(c) is an arrangement, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked, if the conspiracy, agreement or arrangement is directly related to, and reasonably necessary for giving effect to, the objective of the arrangement.

c) constituant une entente au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée et le complot, l'accord ou l'arrangement est directement lié à l'objectif de l'entente et raisonnablement nécessaire à la réalisation de cet objectif.

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Principes de la common law — comportement réglementé

(7) Les règles et principes de la common law qui font d'une exigence ou d'une autorisation prévue par une autre loi fédérale ou une loi provinciale, ou par l'un de ses règlements, un moyen de défense contre des poursuites intentées en vertu du paragraphe 45(1) de la présente loi, dans sa version antérieure à l'entrée en vigueur du présent article, demeurent en vigueur et s'appliquent à l'égard des

poursuites intentées en vertu du paragraphe (1).

Definitions

(8) The following definitions apply in this section.

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

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (prix)

Définitions

(8) Les définitions qui suivent s'appliquent au présent article.

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (competitor)

prix S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (price)

Where application made under section 76, 79, 90.1 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

Procédures en vertu des articles 76, 79, 90.1 ou 92

45.1 Aucune poursuite ne peut être intentée à l'endroit d'une personne en application du paragraphe 45(1) si les faits au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien d'une ordonnance à l'endroit de cette personne demandée par le commissaire en vertu des articles 76, 79, 90.1 ou 92.

Foreign directives

46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a

Directives étrangères

46 (1) Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne

conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

Limitation

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

Restriction

(2) Aucune poursuite ne peut être intentée en vertu du présent article contre une personne morale déterminée lorsque le commissaire a demandé en vertu de l'article 83 de rendre une ordonnance contre cette personne morale ou toute autre personne et que cette demande est fondée sur les mêmes faits ou sensiblement les mêmes faits que ceux qui seraient exposés dans les poursuites intentées en vertu du présent article.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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