IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sutherland v. Electronic Arts Inc.,* 2024 BCSC 2202

Date: 20241205
Docket: S209803
Registry: Vancouver

Between:

Mark Sutherland

Plaintiff

And

Electronic Arts Inc. and Electronic Arts Canada Inc.

Defendants

Before: The Honourable Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:	S. Jaworski S. Turner R. Matheuszik J. Giovannetti (February 20-22, 2024)
Counsel for the Defendants:	B.W. Dixon, K.C. M. Maniago
Place and Date of Hearing:	Vancouver, B.C. August 29–31; September 1, 2022; and February 20–22, 2024
Place and Date of Judgment:	Vancouver, B.C. December 5, 2024

Introduction

[1] Mark Sutherland, the proposed representative plaintiff, applies to certify this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], at a continuation of the certification hearing. These reasons should be read with my decision following the original certification hearing indexed at 2023 BCSC 372 (the "2023 Decision").

[2] Mr. Sutherland's claim relates to "loot boxes" purchased in digital or electronic video games developed and published by the defendants Electronic Arts Inc. and its wholly owned subsidiary Electronic Arts (Canada) Inc. (together, "EA").
Mr. Sutherland brings the claim on behalf of a proposed class that would include all B.C. residents who paid directly or indirectly for loot boxes in over 70 of EA's video games since 2008.

[3] A loot box contains randomized virtual items generated by an underlying algorithm for use in video games. Purchasing a loot box provide players with the chance to obtain high-value items that will give them an advantage in the game or some other reward that is unknown or uncertain at the time of purchase. In addition to purchasing loot boxes with virtual currency purchased with real money, or in some games with real money directly, virtual currency can be earned through gameplay and used to acquire loot boxes, although Mr. Sutherland alleges this is very difficult.

[4] Essentially, he claims that EA takes unfair advantage of players by structuring gameplay and loot boxes and concealing the reality they have almost no chance of obtaining a high-value item, which drives them to repeatedly purchase loot boxes.

[5] At the original certification hearing, the asserted causes of action in the Further Amended Notice of Civil Claim (the "FANOCC") included deceptive and unconscionable acts or practices under ss. 4–5 and ss. 8–9 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*].

[6] Mr. Sutherland also pleaded that by offering and operating loot boxes, which players pay to access, the defendants had engaged in unlawful gaming or gambling

contrary to multiple offence provisions in Part VII of the *Criminal Code*, R.S.C. 1985, c. C-46.

[7] Although rooted in *Criminal Code* offences, the unlawful gaming allegations provided a factual grounding for the unconscionability claim.

[8] In the 2023 Decision, I concluded the FANOCC disclosed a cause of action based on deceptive acts or practices under ss. 4–5 of the *BPCPA* but not unconscionable acts or practices under ss. 8–9. I found the unconscionability claim based on the allegations of unlawful gaming was bound to fail. I also found the FANOCC failed to plead material facts in support of the constituent element of improvidence. Rather than order the unconscionability claim struck however, I granted Mr. Sutherland leave to amend the pleading of unconscionability unrelated to illegality. In light of the potential impact of the 2023 Decision on the other requirements for certification, I also granted the parties leave to make additional submissions, following any further amendments to Mr. Sutherland's pleading.

[9] At the continuation of the certification hearing, Mr. Sutherland relied on a further amended pleading, the Second Further Amended Notice of Civil Claim (the "SFANCC") and further amended common issues.

[10] The evidentiary record remained the same. In addition to his own affidavits, Mr. Sutherland relies on affidavits from an employee of his counsel, Sean Tweed, attaching documents related to loot boxes and EA, and the affidavit of Eamon Garret, a doctoral candidate at the University of Tasmania whose research focuses on gambling and video games. Mr. Garrett reviews the EA games listed in the pleading for the presence of loot boxes and whether the content of the loot boxes was disclosed prior to purchase. Mr. Sutherland also relies on affidavits and reports from Dr. David Zendle, a computer scientist, and Dr. Aaron Drummond, a cognitive cyberpsychologist, as expert opinion evidence.

[11] EA argues much of this evidence is inadmissible.

[12] EA's own evidence includes affidavits from Kerry Hopkins, the Senior Vice President of Legal and Government Affairs for Electronic Arts Inc., and the affidavit evidence of Jijnes Patel, commissioned when he was a Vice President of Product Management.

[13] Under s. 4(1) of the *CPA*, an action must be certified as a class proceeding if the following requirements are met:

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

[14] Class action legislation is interpreted generously in light of the three principal objectives, or recognized benefits, of class proceedings: judicial economy by avoiding unnecessary duplication in a multiplicity of actions; access to justice by making economical the prosecution of claims that any one class member would find too costly to pursue on their own; and behaviour modification for actual and potential wrongdoers: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 27; *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235 at para. 20.

[15] The certification stage is not concerned with, or a test of, the merits of the action, but focuses instead on its form: *Hollick* at paras. 16 and 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99–104 [*Microsoft*].The question at certification is not whether the claim is likely to succeed,

but whether the action is appropriately brought as a class proceeding: *Hollick* at para. 16.

[16] Having further amended his pleading to pursue the additional *BPCPA* claim of unconscionable acts and practices, Mr. Sutherland bears the burden of showing (1) the SFANCC discloses a cause of action in unconscionability under ss. 8–9, and (2) based on the evidence, there is "some basis in fact" for each of the other certification requirements.

[17] EA maintains its earlier position that the claim is wholly misconceived and purchasing loot boxes is simply a matter of choice for players. EA argues that Mr. Sutherland's amended claim of unconscionability still fails to plead material facts in support of an allegation of improvidence or compensable harm and that he has failed to establish some basis in fact for every other requirement.

Factual Overview

[18] EA develops and publishes digital or electronic video games played on various gaming platforms including personal computers, gaming consoles and mobile devices such as cell phones. There is no dispute that EA is a global leader in the industry.

[19] As a developer, EA designs and produces games. As a publisher, EA manufactures, markets and distributes them. EA developed most of the games identified in the pleadings (the "Affected Titles") and published all of them. The Affected Titles fall into a range of different genres such as professional sports simulation games, multiplayer battle royale games, "first person shooter" games and life simulation games.

[20] EA distributes its games through a platform that it owns and operates (the "Origin Platform") as well as platforms that are owned and operated by third parties.

[21] Ms. Hopkins refers to loot boxes as one type of in-game virtual content that can be acquired and used in EA games. As indicated, they contain randomized in-

game content or virtual items which the user can access after the loot box is acquired and opened.

[22] Until 2018, EA did not disclose any probabilities respecting the content of loot boxes when purchased. Since then, EA has provided some disclosure related to the category or type of virtual item and the number of items contained in loot boxes.

[23] Ms. Hopkins deposes that loot boxes can be acquired using game specific virtual currencies, which are earned through gameplay or purchased with real money. Loot boxes can also be purchased directly with real money or through a user engagement reward mechanism. She states that, in all the Affected Titles, players can use real money to purchase virtual currency to acquire loot boxes, and that in a limited number of titles, loot boxes can be purchased directly with real money.

[24] All real money transactions involving virtual currency and loot boxes in EA games occur at the platform level between the platform owner/operator and the user through the user account associated with the platform. Those who play EA games on a personal computer through the Origin Platform must have an EA account. They can buy virtual currency with real money through this account. Purchases through the Origin Platform are subject to EA's terms of sale agreement.

[25] EA receives a portion of the proceeds from the sales of virtual currency through third party platforms.

[26] Ms. Hopkins deposes EA does not have transaction records for "any class members" who engaged in real money transactions through third party platforms. For certain of the Affected Titles, she says, EA has records for the type of payment method used to obtain loot boxes, but it may not have those same records for older games. Depending on the date, EA may or may not have records of what specific virtual items were obtained from a loot box.

[27] Ms. Hopkins also indicates she is not able to provide a reliable estimate of the proposed class size based on her knowledge of EA's records. She adds however that in creating an EA user account, users provide a valid email address and other

information about where they reside that includes a country chosen from a drop-down list (that does not allow for the selection of Canadian provinces). EA also has some records that may include billing addresses in B.C. for Origin Platform users.

[28] Ms. Hopkins asserts that loot boxes and virtual currencies have no value or use outside the game environment. Once purchased, virtual currency cannot be refunded and may only be redeemed for "entitlements" within the relevant game. Although EA does not provide a way for players to "cash out" virtual items for real money, in some games virtual items can be traded within the game. Ms. Hopkins also asserts EA's user agreement prohibits any attempt to transfer virtual items outside of the game, although there is an external "black market".

[29] Mr. Sutherland deposes to purchasing and playing EA's Madden NFL series of games over a number of years on Microsoft's Xbox console platform. In his first affidavit he simply refers to buying loot boxes inside those games to gain an advantage in gameplay. In his second affidavit he describes his experience of playing multiple versions of the games in much more detail. His evidence includes:

- he bought virtual currency or "MUT Points" using his credit card via the Xbox Live service;
- he used the MUT Points to open loot boxes or "Packs" in the game;
- the loot boxes contain virtual football players based on real life-players that can be used to build a team to compete against other human players;
- loot boxes are the primary way to get players for the team;
- there is skill involved on the part of human gamers, but the electronic skill of the virtual football players is the key element for success;
- players available in loot boxes are ranked by an "OVR" score set by EA which shows how effective they will be in the game;
- a higher OVR score represents a better and more effective player and seems to be related the player's real-life statistics, current popularity and achievements;
- although virtual currency is obtainable from regular gameplay, it is awarded so slowly that spending real money on loot boxes is required to field a competitive team;
- when presented with a loot box, Mr. Sutherland was required to commit to spending MUT Points before knowing its contents;

- he did so in the hopes that a given loot box would contain a player that would provide his team with a competitive advantage;
- most of the time the loot boxes did not provide any high-value players and certainly not the really rare ones; instead, he would get something of no use to his team or competitive advantage;
- as a result, he would open loot box after loot box in the hopes of getting lucky, which meant spending considerable real money to buy virtual currency in order to keep opening loot boxes;
- in his experience, this created a compulsion to keep buying loot boxes or a vicious expensive cycle;
- he is aware that EA began disclosing odds at some point and has purchased loot boxes where odds were displayed; and
- those odds did not include the odds of obtaining specific players; at most they showed that loot box contained a certain number of players with generic ranges for minimum OVR values.

[30] Mr. Sutherland also discusses Madden NFL's in-game auction house where virtual players obtained in loot boxes can be auctioned for MUT Coins. In addition, he deposes to observing players being traded and sold based on a monetary value in several independent internet forums related to Madden NFL. Not surprisingly, players with higher OVR scores commanded a higher price.

[31] In finding Mr. Sutherland had pleaded material facts to support a cause of action under ss. 4–5 of the *BPCPA*, I referred at para. 79 of the 2023 Decision to pleaded allegations that included:

- misleading class members regarding the availability and scarcity of rare or valuable items within loot boxes;
- controlling the probabilities of a loot box containing a particular item without disclosing those probabilities (or any odds) to class members before they purchase the opportunity to open a loot box, for some or all of the class period;
- once the defendants did begin disclosing odds, the disclosure was not sufficient to allow class members to know the probability of receiving particular virtual items or even particular classes of virtual items;
- deliberately using vague language to describe the content of loot boxes and the odds to obscure the likelihood that a class member would or could realistically obtain a valuable item; and
- setting "vanishingly small" odds for the most desired items with the effect that class members could pay hundreds or even thousands of dollars in real currency or their equivalent in virtual currency, trying to obtain them.

[32] On the last point, the FANOCC alleged those vanishingly small odds were less than 1% or even 0.1%.

Section 4(1)(a) – Cause of Action

[33] The s. 4(1)(a) requirement is assessed on the same standard that applies to motions to strike under R. 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The question is whether, assuming the pleaded facts to be true, it is plain and obvious the claim cannot succeed or is bound to fail: *Microsoft* at para. 63; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 31. A claim will be bound to fail if the pleading does not set out the elements of the cause of action and the material facts in support of them: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22. The standard is a low one with a view to allowing claims to go forward if they have any chance of success or if an amendment would resolve the problem: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 44. In the same way, the test is applied by reading the pleadings generously.

[34] However, this approach does not include sidestepping difficult legal issues that call into question whether there is a reasonable prospect that the case should proceed. If the case is bound to fail because of the frailty of the legal foundation, that should be addressed at the certification stage: *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 at para. 14, citing *Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19 at paras. 18–19; *Finkel* at para. 18, citing *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64.

[35] A significant issue here is whether there are material facts pleaded in support of the amended claim of unconscionability, and the element of improvidence, in particular as required to disclose a cause of action under ss. 8–9 of the *BPCPA*. Although assumed to be true, pleaded facts must be facts capable of proof, as opposed to assumptions, speculation or generalized assertions. The court will not

ignore the absence of material facts or infer facts from bald legal conclusions: *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794 at para. 25.

Legal Framework - Unconscionability

[36] Sections 8 and 9 of the *BPCPA* provide:

> **Unconscionable acts or practices**
>
> **8**(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.
>
> (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
>
> (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
>
> (a) enter into the transaction;
>
> (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
>
> (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
>
> (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> (f) a that the supplier subjected the consumer or guarantor to undue pressure to prescribed circumstance.
>
> **Prohibition and burden of proof**
>
> **9** (1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

[37] The *BPCPA* does not define an unconscionable act or practice.

[38] At common law, unconscionability is an equitable doctrine used to set aside unfair agreements that were formed due to an inequality of bargaining power: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 54 [*Uber*], citing John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012) at 424.

[39] In *Uber*, the Supreme Court of Canada affirmed that unconscionability has two elements: an inequality of bargaining power and a resulting improvident bargain: paras. 64–65.

[40] Inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process. *Uber* clarified there are no rigid limitations on the types of inequality that fit this description: para. 67. Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses a diversity of possible disadvantages that may be personal or circumstantial.

[41] *Uber* identified “cognitive asymmetry” as a common example of inequality of bargaining power. It occurs when only one party can understand and appreciate the “full import” of the contractual terms, due to “disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms” or personal vulnerability: para. 71. What matters is a bargaining context "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied" [citations omitted]: para. 72.

[42] Regarding the element of improvidence, *Uber* affirmed a bargain is improvident if it unduly advantages the stronger party, or unduly disadvantages the more vulnerable party as a result of the inequality in bargaining power: para. 74. The question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. Assessed contextually, improvidence is determined at the time the contract is formed, based on all the surrounding circumstances, such as market price, the commercial setting, or the

positions of the parties. The nature of the flaw in the contracting process is also part of the context.

[43] In the 2023 Decision, based on *Uber* I described the standard for improvidence as a high bar.

[44] Also significant here is the discussion in *Uber* of improvidence related to cognitive asymmetry:

> [77] Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the "reasonable expectation" of the weaker party or cause an "unfair surprise". This is an objective standard, albeit one that has regard to the context. [Citations omitted.]

[45] Further, as with inequality of bargaining power, the majority decision left the boundaries of an improvident bargain unclear. Because improvidence can take so many forms, the majority commented, the “exercise” cannot be reduced to an “exact science”: para. 78. The majority also underscored that unconscionability has always targeted unfair bargains resulting from unfair bargaining and refused to adopt a higher threshold for unconscionability that would have required a “grossly unfair” transaction: paras. 79–82.

[46] *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, established that the essential elements of unconscionability under s. 8 of the *BPCPA* are the same as at common law: para. 54.

[47] *A Speedy Solutions Oil Tank Removal Inc. v. Garraway*, 2021 BCCA 220, confirmed the test for unconscionability under the *BPCPA* will be met where there is inequality in the position of the parties and substantial unfairness in the bargain (or transaction), although the inquiry is not limited to whether the transaction was unconscionable at the time it was entered: para. 83. Instead, s. 8(1) provides an unconscionable act or practice may occur before, during or after the transaction.

[48] As Justice Tammen observed at para. 71 in *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699, this indicates that unconscionability under the *BPCPA* may have a wider application than under the common law.

[49] In *Bowman*, Justice Matthews similarly discussed s. 8 as both incorporating and extending beyond the common law elements of unconscionability. She noted that depending on the circumstances, omissions may lead to a finding of an unconscionable act or practice: para 160.

[50] Both Matthews and Tammen JJ. also observed that unconscionable acts and practices can include more "systemic" conduct. Justice Tammen's consideration of systemic conduct was endorsed on appeal: *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274 [*Gomel CA*] at para. 71.

[51] In sum then, the *BPCPA* incorporates the common law test for unconscionability. Under s. 8, an unconscionable act or practice may occur before, during or after the consumer transaction. Further, in determining unconscionability, the court must consider all the surrounding circumstances that the supplier knew or ought to have known, including those listed in s. 8(3) and it may include systemic conduct.

Discussion

[52] For ease of reference, my reasons regarding Mr. Sutherland's claim of unconscionability unrelated to the unlawful gaming allegations in the 2023 Decision included the following:

> [130] Leaving aside his argument about the unlawful gaming allegations, Mr. Sutherland made few submissions in support of his assertion that the FANOCC has pleaded the constituent elements of unconscionability under s. 8 of the *BPCPA*.
>
> [131] For the most part, the FANOCC relies on the same alleged conduct to [ground] its claims of unconscionable acts or practices and deceptive acts and practices.
>
> [132] During the hearing Mr. Sutherland did identify allegations at para. 68 that are specific or "relevant" to the s. 8 claim and the requirement under s. 8(3) to consider all of the surrounding circumstances, "which the defendants knew or ought to have known". They include:

- the defendants employed variable rate reinforcement schedules when they knew or ought to have known that this would "induce and encourage" class members to spend money on loot boxes;
- the defendants structured game play in the specified video games to "encourage" players to resort to spending money on loot boxes;
- the defendants made high-value items that affect game play available exclusively from loot boxes, thereby forcing players to obtain loot boxes; and
- the defendants exerted or subjected consumers, including class members, to undue pressure to enter into consumer transactions through their control of game mechanics, in the "further and alternative" claim in "breach" of s. 8(3)(a) (at para. 99).

[133] I would note again that the FANOCC alleges (in the alternative) the defendants "took advantage" of the inability of consumers to reasonably protect their own interests based on their ignorance or inability to understand the nature of the consumer transaction, the defendants' misconduct "within it", and the defendants' total control of the "service".

[134] Paragraph 100 further states the defendants also took advantage "by the way in which" they "exploited" that control to compel class members to obtain loot boxes, relying on essentially the same allegations found at earlier points in the pleading.

[135] The pleading also alleges that the terms and conditions of the loot box purchases were so harsh or adverse "as to be inequitable because of the inequality of bargaining power and the lack of candid disclosure" about the lawfulness of the defendants' activity, also referring to "the way in which the Defendants exploited that control to compel Class Members to obtain Loot Boxes and the failure to disclose the odds of the Loot Boxes." However, there are no pleaded facts with respect to the terms and conditions of the loot box purchases.

[136] The facts pleaded in support of exerting or subjecting class members to "undue pressure" or "compelling" them to obtain loot boxes are those set out at para. 68, where the defendants' alleged conduct is described as "encouraging" and "inducing". I agree with the defendants that neither "falls afoul" of or engages the factors listed in s. 8(3). Nor in my view are "encouraging" and "inducing" sufficient to ground the element of improvidence. Again, an improvident bargain, here a transaction, requires undue advantage or undue disadvantage resulting from unequal bargaining power.

[137] At the other extreme, I also agree with the defendants that there are no facts pleaded in support of the allegation that the defendants' conduct "forced" players to obtain loot boxes.

[138] The only explicit reference to the requisite elements of unequal bargaining power and improvidence is found at para. 69. In addition to stating Mr. Sutherland's and class members' loot box purchases were improvident bargains caused by the defendants' "above misconduct", it also states the improvident bargains resulted from the inequality of bargaining power

> between the defendants and the class members, and the defendants' "actions before and directly in connection with the acquisition of Loot Boxes … by Class Members and thereafter".
>
> [139] On their own, these are bare and conclusory statements. The question becomes: have material facts been pleaded in support of the elements, when the FANOCC is read generously and as [a] whole?

[53] I went on to find that, although vague and implicit, some of the facts pleaded in the FANOCC, particularly when considered together with the deceptive acts and practices allegations, could support the element of inequality of bargaining power, based on a lack of knowledge or informational asymmetry arising from EA's alleged conduct.

[54] As I have said, I also found however the FANOCC did not include material facts that could support the element of improvidence.

[55] Based on the amendments along with aspects of what was already pleaded, Mr. Sutherland asserts the SFANCC alleges material facts in support of both constituent elements of unconscionability under ss. 8–9.

[56] His submissions outlining his theory regarding each element include:

> Inequality of Bargaining Power
>
> > i) EA's conduct, the nature of the transactional process and/or the vulnerability of the class prevented the class members from being able to understand and appreciate the terms and conditions of the loot box purchases;
> >
> > ii) the foregoing resulted in a cognitive asymmetry between EA and the class members as to the terms and conditions of the loot box purchases
>
> Improvidence
>
> > iii) the terms and conditions flouted the reasonable expectations of the class members and were therefore inequitable and/or excessive, and
> >
> > iv) the inequitable and/or excessive terms conferred upon EA an undue advantage and/or conferred upon the class members an undue disadvantage.

[57] Some of the amendments in the SFANCC related to unconscionability are found at paras. 61.1 through 61.4:

> 61.1 The total control the Defendants exercised over all circumstances surrounding Loot Box transactions and the Plaintiffs' and Class Members' comparative ignorance of the design, function and operation of Loot Boxes in the Affected Titles produced a cognitive asymmetry between the Defendants and Class Members as to the terms and conditions of the transaction for Loot Boxes amounting to an inequality of bargaining power.
>
> 61.2 As a result of this inequality of bargaining power, the Plaintiff and Class Members did not understand or appreciate the inequitable and/or excessive terms and conditions of the transaction for Loot Boxes, including but not limited to:
>
> a) that the content of the Loot Boxes is almost always worth less than the cost to acquire the Loot Box or its resale value in an auction house or third-party marketplace;
>
> b) the low probability of obtaining rare and/or high-value items through the purchase of Loot Boxes; and/or
>
> c) the difficulty of obtaining virtual currency through gameplay.
>
> 61.3 The terms and conditions of the transactions for the Loot Boxes were inequitable and/or excessive because they flouted the reasonable expectations of the Plaintiff and Class Members that:
>
> a) the content of the Loot Boxes would be worth the price paid for them;
>
> b) the probability of winning a rare and/or high-value item would be greater than it actually is; and
>
> c) the gameplay of the Affected Titles would not be structured in such a way as to make:
>
> i) earning virtual currency through gameplay so difficult and time-consuming as to encourage the expenditure of real money on virtual currency to purchase Loot Boxes; and
>
> ii) rare and/or high-value items so difficult and time-consuming to obtain through gameplay as to make them impractical to obtain other than through multiple Loot Box purchases.
>
> 61.4 The Defendants' total control, particularly over the probability of obtaining rare and/or high-value items in Loot Boxes, and Class Members' corresponding inability to understand the true probabilities conferred an undue advantage on the Defendants and an undue disadvantage on the Class Members, resulting in an improvident bargain for Class Members.

[58] The SFANCC asserts EA breached ss. 8–9 of the *BPCPA* as follows:

> 102.1 Further, through their total control over Loot Box mechanics, the Defendants set the probabilities so low for rare and/or high-value items as to

> make them virtually unattainable without excessive, repeated attempts to obtain those items from Loot Boxes. The Defendant' total control over Loot Box mechanics also created a cognitive asymmetry whereby the Plaintiff and Class Members could not appreciate or understand the terms and conditions of the transaction for the Loot Boxes, the terms and conditions of which were inequitable and/or excessive. This renders the overall price of all Loot Box contents significantly higher than it would be absent these inequitable and/or excessive terms and conditions.

[59] The amendments also include para. 102.2, which pleads how EA's alleged conduct constitutes unconscionable acts or practices:

> 102.2 These circumstances confer an undue advantage on the Defendants at the expense of Class Members, who are unduly disadvantaged by the inequitable and/or excessive terms and conditions of the transaction for the Loot Boxes. This improvident bargain is the result of the inequality of bargaining power arising from the cognitive asymmetry between the Defendants and Class Members regarding how Loot Boxes in the Affected Titles operate and the probabilities of those Loot Boxes containing specific items.

[60] Echoing my reasons in the 2023 Decision, EA argues there are still no material facts pleaded in support of improvident or bad bargains resulting from any inequality in bargaining power. Instead, says EA, the pleading deals with alleged process unfairness and goes no further than alleging that the impugned transactions were concluded between parties of unequal bargaining power.

[61] Mr. Sutherland suggests this argument misconstrues the approach to improvidence in *Uber*. At para. 77, the decision provides that where the more vulnerable party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by those terms, which will be unfair when, given the context, they flout the "reasonable expectation" of the more vulnerable party or involve unfair surprise.

[62] In other words, the undue disadvantage is realized when the stronger party imposes terms and conditions that the more vulnerable party cannot understand or appreciate which flout their reasonable expectations. This is the "bad bargain".

[63] Ultimately, the SFANCC pleads that the loot box transactions were improvident because EA could not have imposed the terms and conditions, which flouted the reasonable expectations of Mr. Sutherland and class members, but for the cognitive asymmetry involved in those loot box transactions arising from EA's total control, which therefore conferred not only an undue disadvantage but also an undue advantage.

[64] I accept that read generously and as a whole, the SFANCC now includes material facts in support of improvidence, as well as some of the considerations under s. 8(3), along with the legal basis for a claim under ss. 8–9 of the *BPCPA*.

Remedy Pleading

[65] As I stated in the 2023 Decision, in establishing a claim is not bound to fail, a plaintiff must also show that the remedy or remedies they seek are available for the causes of action they plead.

[66] Based on the alleged breaches of ss. 4–5 and ss. 8–9 of the *BPCPA*, the FANOCC pleaded remedies under s. 172, including declaratory and injunctive relief, and a restoration order.

[67] The relevant provisions of the *BPCPA* include:

> **Remedy for an unconscionable act or practice**
>
> **10** (1) Subject to subsection (2), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.
>
> …
>
> **Damages recoverable**
>
> **171** (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a
>
> (a) supplier,
>
> …
>
> who engaged in or acquiesced in the contravention that caused the damage or loss.
>
> …

> **Court actions respecting consumer transactions**
>
> **172** (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
>
> > (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
> >
> > (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
>
> …
>
> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> > (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

[68] At para. 149 of the 2023 Decision, I discussed *Ileman v. Rogers Communications Inc.,* 2015 BCCA 260, starting with the four prerequisites for granting a restoration order at para. 53:

> a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) – this requirement is set out in the opening words of s. 172(3);
>
> b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation – this requirement is explicit in s. 172(3)(a);
>
> c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier – this requirement is a necessary implication of the use of the word "restore"; and
>
> d) The beneficiary must have "an interest" in the thing to be restored – this requirement is explicit in s. 172(3)(a).

[69] In considering what constitutes an interest, the Court of Appeal concluded the interest claimed must be one that is recognized by law outside of s. 172(3)(a), offering a right to recover damages under s. 171 as an example of what would be sufficient to allow for recovery.

[70] At paras. 67 and 104, the FANOCC pleaded that Mr. Sutherland and class members have an interest in the funds they paid to EA to acquire loot boxes

because class members “would have a right to make a claim for damages” under s. 171 of the *BPCPA*. Consequently, those funds could be the subject of a restoration order.

[71] In the 2023 Decision, I rejected EA’s arguments that Mr. Sutherland had failed to plead a loss causally connected to the breach of ss. 4–5 and that the pleadings were insufficient because they impugned only the purchase of loot boxes, which most often occurs with virtual currency, rather than the purchase of virtual currency when the loss of real money occurs. I was also satisfied a causal link was pleaded at para. 66 of the FANOCC, which alleged Mr. Sutherland and class members suffered a loss in the amount of money used to obtain EA’s loot boxes. I interpret the balance of the paragraph as connecting the asserted loss (and the defendants’ benefit) with the breaches of the *BPCPA*.

[72] Ultimately, I found the pleadings in support of an order to restore money acquired by EA in contravention of ss. 4–5 were sufficient for the purpose of certification.

[73] In relation to payments for loot boxes and the alleged s. 9 breaches, paras. 103 and 104 of the FANOCC relied on s. 10(1) of the *BPCPA,* which provides that an unconscionable act or practice in respect of a consumer transaction renders the transaction not binding on the consumer.

[74] I declined to deal with the dispute about the plea for a restoration order related to funds obtained in breach of s. 9, given my decision about the unconscionability claim and having granted Mr. Sutherland leave to propose amendments to that claim. EA had also asserted a different analysis was required for the s. 9 breach.

[75] Disagreeing with this past assertion, Mr. Sutherland also relies on *Ileman* as setting out the requisite elements for a restoration order pleading under s. 172(3), for the alleged breach of s. 9, as well as s. 4. Although the cause of action in *Ileman* was an alleged s. 4 breach, the discussion of the requirements for a restoration

order, including what is meant by an interest, are unrelated to the particular breach. The second element simply requires the supplier to have acquired something because of a contravention of the legislation.

[76] It is unclear to me how some of EA's submissions addressing Mr. Sutherland's claim for a restoration order for a breach of s. 9 involve a complaint about the adequacy of the remedy pleading.

[77] EA's main argument appears to be that Mr. Sutherland has failed to plead material facts that would support an allegation of compensable harm. In making this submission, however, EA relies in part on an unfair and incomplete characterization of the pleading that portrays Mr. Sutherland and proposed class members as merely experiencing buyer's remorse. It does not address the claim that the unconscionable transactions resulted in their loss. Instead, EA's submissions assume the loot box transactions were not unconscionable and are impermissibly merits-based.

[78] EA also relies on s. 10(1) of the *BPCPA* in discussing general principles related to s. 8 and restoration orders under s. 172(3).

[79] EA's written submissions suggest s. 10 has the same effect as the common law, referring to rescission and restitution for an injured party to an unconscionable contract, if that party is able to make counter-restitution. EA argues that if a consumer *elects* to be relieved of the "bargain", "the law is clear that under either common law or statutory rescission, the consumer cannot retain the property or thing acquired under the impugned transaction." However, the authorities cited for this proposition, *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 and *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050, are unhelpful. As Mr. Sutherland notes, *Windmill* considered the scope of remedial relief as part of compliance under s. 155(4) of the *BPCPA,* not s. 172. The court in *Windmill* also drew a clear distinction between statutory rescission and common law, stating that common law limitations, such as the requirement to account for benefits, do not apply equally to the statutory remedy: para. 78. In *Marshall* the court simply stated at para. 107 that there are "valid

questions" about what remedies may be available under s. 172 because the plaintiffs had used the furniture in question for approximately a decade after the impugned transaction.

[80] At the hearing, EA framed their position on counter-restitution somewhat differently, indicating s. 10 says nothing about the consequences of the unconscionable transaction not being binding and therefore, the common law must govern what happens to the benefits received by the consumer.

[81] EA also asserted that if there were anything to be restored on the unwinding of in-game transactions, it could only be for the return of virtual currency for in-game use and not real money because the only transactions impugned by the pleadings are the acquisition of loot boxes, which predominantly involve the exchange of virtual currency. Like its previous argument regarding the restoration order claim in relation to the s. 4 breach, this assertion rests on an impermissibly narrow reading of the pleading related to the scope of the conduct/transactions that gives rise to the alleged breach and the nature of the loss. What is impugned includes the real money transactions that result in the loot boxes purchases with virtual currency.

[82] Apparently addressing the requirement under s. 172(3) for an interest recognized at law, EA also submits rather vaguely, "[i]f restitutionary relief is sought, it will always be open to the court to consider whether the benefits of use and the ability to restore the parties to the status *quo ante* should be taken into account" again citing *Windmill* at paras. 76–78.

[83] Taking the position the common law doctrine of contractual rescission is not imported into the *BPCPA*, Mr. Sutherland interprets s. 172(3) as not permitting consideration of counter-restitution or a set-off of benefits received, based on the absence of express language in s. 172 or elsewhere in the *BPCPA*, and the recognition that it is an exhaustive code: *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 at para. 63. Mr. Sutherland also contrasts the silence in the *BPCPA* with s. 18 of Ontario's *Consumer Protection Act*, *2002*, S.O. 2002, c. 30 which sets out the consumer's entitlement to recover the amount by which their payment under an

agreement exceeds the value of the goods or services, or damages or both if rescission of the agreement is not possible.

[84] Mr. Sutherland's interpretation further relies on s. 10:

> (2) If a court determines that an unconscionable act or practice occurred in respect of a consumer transaction that is a mortgage loan, as defined in section 57 [*definitions*], the court may do one or more of the following:
>
> > (a) reopen the transaction and take an account between the supplier and the consumer or guarantor;
> >
> > (b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;
> >
> > (c) order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;
> >
> > (d) set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;
> >
> > (e) suspend the rights and obligations of the parties to the transaction.

[85] Because the provision specifies that only mortgage loan transactions can be re-opened to provide various forms of remedial relief, Mr. Sutherland argues the intention was to limit set-off or counter-restitution to only this form of unconscionable transaction.

[86] Mr. Sutherland also suggests that as the law stands, he is not required to plead counter-restitution or set-off to establish a cause of action under s. 172(3) based on a contravention of s. 9.

[87] I agree, absent any authority to the contrary, assuming EA is actually arguing Mr. Sutherland has failed to meet the requirements for a restoration order claim under s. 172(3) related to the alleged s. 9 breach based on its interpretation of s. 10.

[88] Relying also on my analysis in the 2023 Decision, I conclude therefore it is not plain and obvious that the pleading in support of an order to restore money acquired by EA in contravention of ss. 8–9 is bound to fail.

[89] I find therefore the SFANCC discloses a cause of action under ss. 8–9 and s. 172 of the *BPCPA*.

Some Basis in Fact Standard

[90] Mr. Sutherland must show some basis in fact to support the remaining certification requirements under ss. 4(1)(b),(c),(d) and (e).

[91] The "some basis in fact" standard is low. This is well established, although the cases provide the particular level of evidence required is highly fact-specific: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27. In *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 leave to appeal ref'd [2019] SCCA No. 311, Justice Hunter explained the standard by contrasting it with no basis in fact (at paras. 100–104). He also held the evidentiary threshold must be considered in the context of the *CPA* scheme, which contemplates certification applications being brought at a very early stage in the proceeding before there has been any discovery, and a legislative intention not to impose a high evidentiary burden on the applicant.

[92] Justice Griffin similarly stated in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at paras. 134–136, that the purpose of the requirement is to ensure there is a minimum evidentiary foundation to support the certification order.

[93] In this context I turn to the dispute about the admissibility of evidence.

Admissibility Dispute

[94] As indicated, EA argues that much of the evidence Mr. Sutherland relies on is inadmissible as irrelevant and impermissible hearsay. With respect to the expert evidence, EA further argues that the evidence is unnecessary.

Legal Framework

[95] *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 provides that "it is well established" that the "normal" rules of evidence apply to a certification application, including the usual criteria for admissibility: para. 71. Similarly, in *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*,

2021 BCSC 837, Justice Murray commented that while the “some basis in fact” or “evidentiary basis” test is a low evidentiary burden, it “must be discharged by evidence which meets the usual criteria for admissibility” (at para. 15).

[96] The general framework for the admissibility of expert opinion evidence involves a two step analysis. The threshold for admission requires the opinion to be: 1) relevant; 2) necessary in assisting the trier of fact; 3) not subject to an exclusionary rule; and 4) from a properly qualified expert: *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80. If these criteria are met, the court has a residual discretion to exclude the evidence if its prejudicial effect outweighs its probative value: *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 at para. 19.

[97] The potential risks of expert evidence include: that the expert’s opinion will usurp the role of the trier of fact; that expert evidence is “resistant to effective cross-examination by counsel who are not experts”; that the evidence may consist of “junk science”; and that expert evidence “may lead to an inordinate expenditure of time and money”: *White Burgess* at paras. 17–18.

[98] In *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, Justice Branch considered whether the approach to expert evidence at the certification stage was more relaxed, referring to *Cantlie v. Canadian Heating Products Inc.,* 2017 BCSC 286, which stated:

> [96] I note, however, that where expert opinion evidence is adduced at the certification hearing, as is the case here, "it should not be subjected to the exacting scrutiny required at a trial": *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd [2010] S.C.C.A. No. 32 at para. 66. Certification is a procedural step and it is not appropriate for a court to review the evidence to the same extent as would be done in the trial of the merits on a full evidentiary record.

[99] *Pro-Sys Consultants* held that a lesser level of scrutiny is applied if the expert evidence is otherwise admissible based on the *Mohan* criteria. In *Krishnan*, after reviewing a mix of cases some of which recognized a more generous approach to

admissibility depending on the nature of the issue and others that did not, Branch J. concluded at para. 127:

> While I accept that the expert evidence at certification is scrutinized at a lower standard than it will be subject to at trial, there remains a standard that must be met. The court must still be satisfied that "the expert's evidence on the issue is sufficiently reliable that it provides some basis in fact for the existence of the common issue": *Bhangu* at para. 99.

Discussion

[100] Turning first then to the disputed fact evidence and Mr. Tweed's three affidavits, EA objects to the admissibility of many of the exhibits attached to his first affidavit, arguing they are not relevant or constitute inadmissible hearsay.

[101] The exhibits in all three of the affidavits that Mr. Sutherland continues to rely on and some of his comments about their purpose are as follows:

Affidavit No. 1 of Sean Tweed	
Exhibit A	CBC news article (*tendered only for the purpose of establishing the source of the documents in Exhibit B*)
Exhibit B	Document created by EA regarding a new FIFA game
Exhibit C	EA's documents, retrieved from its website (EA's *public statement regarding the documents in Exhibit B, confirming their authenticity by reference*)
Exhibit D	Internet source of public statements by EA's Chief Experience Officer Chris Bruzzo
Exhibit E	EA's 2021 Form 10-K Annual Report filed in the U.S. Securities and Exchange Commission
Exhibit F	Correspondence in this proceeding (*section 5 disclosure obligation*)
Affidavit No. 2 of Sean Tweed	
Exhibit B	Correspondence in this proceeding (*section 5 disclosure obligation*)
Exhibits C to E	EA's documents, retrieved from the defendant's website
Affidavit No. 3 of Sean Tweed	
Exhibit C	Correspondence in this proceeding (*section 5 disclosure obligation*)

[102] Regarding Mr. Tweed's first affidavit, as indicated, Mr. Sutherland does not rely on Exhibit A, a CBC news article, for the truth of its contents, but instead to

establish the source or nature of Exhibit B, an internal EA document dealing with a new version of a FIFA game. The news article contains a link that reads “View the EA Documents”. Exhibit A is admissible for this purpose.

[103] Exhibit B an internal EA document that states the following about “FUT” or loot boxes: “FUT is the cornerstone and we are doing everything we can to drive players there” and; “all roads lead to FUT” followed by “Content teasers + targeted Aruba messaging will drive excitement and funnel players towards FUT from other modes”. Exhibit C appears to be EA’s response to the CBC news article. It includes comments such as “We do not ‘push’ people to spend in our games. Where we provide that choice, we are very careful not to promote spending over earning in the game and the majority of FIFA players never spend money on in-game items”. Exhibit D involves an interview with EA’s “Chief Experience Officer” Chris Bruzzo regarding the FIFA game and loot boxes, where he too emphasizes that buying loot boxes is a choice for players and most players do not spend in the FIFA game at all. Exhibit E, EA’s securities filings, the annual report for 2021, includes consolidated financial statements. Referring to net revenue derived from extra content or loot boxes, the report states:

> Through our live services offerings, we offer our players high-quality experiences designed to provide value to players and extend and enhance gameplay. These live services include extra content, subscription offerings and other revenue generated outside of the sale of our base games. Our digital live services and other net revenue represented 71 percent of our total net revenue during fiscal year 2021. We expect that live services net revenue, particularly extra content net revenue, will continue to be material to our business. Our most popular live service is the extra content within the *Ultimate Team* mode associated with our sports franchises. ... Net revenue from *Ultimate Team* represented 29 percent of our total net revenue during fiscal year 2021, a substantial portion of which was derived from *FIFA Ultimate Team.*

[104] In civil cases generally, relevance is determined by the pleadings. Here it is also determined by the certification requirements under s. 4(1)(b) through (e), including perhaps most significantly the proposed common issues.

[105] I am satisfied that each of the exhibits is relevant to the pleaded ss. 4–5 and ss. 8–9 claims and some of the common issues. Further, as Mr. Sutherland submits, Exhibits B through D are admissible hearsay under the party admission exception: *R. v. Schneider*, 2022 SCC 34 at paras. 52–55. Exhibit E is also relevant and admissible hearsay as a business record under s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124.

[106] As I understand it, EA does not object to the admission of Exhibit F, which is correspondence from Mr. Sutherland's counsel to counsel for EA, requesting information and document disclosure pursuant to s. 5 of the *BPCPA*. The same is true of Exhibit B to Mr. Tweed's second affidavit and Exhibit C to his third. EA also does not object to Exhibits C through E of Mr. Tweed's second affidavit, which are EA's documents obtained from its website.

[107] Before turning to the evidence of Dr. Zendle and Dr. Drummond, as it relates to the *Mohan* criteria, I would note that EA challenges the relevance and the necessity of much of the evidence.

[108] Relevance at the threshold stage refers to logical relevance to a material issue, which in a regular civil case is determined by the pleadings. Logically relevant evidence is evidence that tends to make the existence or non-existence of a fact in issue more or less likely.

[109] Expert opinion evidence is necessary if it provides the trier of fact with information that is likely outside of their knowledge or experience. Although mere helpfulness is not sufficient, at the threshold stage necessity is not judged on too strict a standard.

[110] Some parts of Drs. Zendle and Drummond's evidence deal with loot boxes in the context of gambling or gambling addiction. Given my rejection of unconscionability as a cause of action based on allegations of illegal gaming or gambling in the 2023 Decision, those parts of their evidence are irrelevant and

therefore inadmissible. Easily distinguished from the remainder, I do not intend to discuss them.

[111] Turning briefly to Dr. Zendle's qualifications. He holds a PhD in computer science. The focus of his doctorate was in human/computer interaction. His current research is focused on gambling, computers and loot boxes. His CV lists approximately 15 journal articles that he has authored or co-authored since 2015, most of which appear to involve loot boxes.

[112] Dr. Zendle's report, exhibited to his first affidavit, responds to four questions. Mr. Sutherland now relies on only his responses to questions 1 and 3 which ask:

> 1. What is a video game loot box and how do they work?
>
> …
>
> 3. If a game publisher made available the source code or game mechanics of a particular game, could that data be used to explain to the Court the mechanics of a particular game's loot box(es)?

[113] In his response to question 1, Dr. Zendle defines loot boxes as a special kind of microtransaction that emerged in the early 2000s, involving the direct or indirect exchange of real money for a small amount of randomized in-game content that is unknown at the time of purchase. He explains that the increasing ubiquity of internet access along with the widespread emergence of accessible technology for rapid online payments, enabled video game publishers to embed additional opportunities for players to spend money within games themselves. Addressing what is special about loot boxes as a form of microtransaction, Dr. Zendle opines that incorporating uncertainty into the purchasing process as what makes loot boxes algorithmically and procedurally distinct from other microtransactions such as video games that allow players to purchase identified specific in-game content.

[114] He goes on to further discuss the nature of loot boxes and how they operate based on specific examples, some of which do not involve EA games. Along with describing how the implementation of individual loot boxes can or may vary, Dr. Zendle identifies the key feature of all loot boxes as the direct or indirect payment of real money for randomised reward of uncertain value, or uncertainty and

randomness. He also identifies some of the typical features of algorithms which govern loot box openings, such as the most advantageous or desirable loot box items usually being significantly rarer than other potential rewards, with reference to various videos games including EA's FIFA Ultimate Team. Noting that the odds for loot boxes were not generally disclosed in the past, he writes that even where odds are declared the chance of receiving a specific item remains unclear to players, again referring to FIFA Ultimate Team.

[115] Citing secondary sources, Dr. Zendle writes that little is publicly known about the algorithms that underpin loot box openings and the presentation of outcomes, beyond broad declarations of loot box odds; and specific algorithms are not publicly available. He also writes that limited information is available about how much money gamers spend on loot boxes. Citing two surveys of gamers he co-authored and acknowledging the samples were not representative, Dr. Zendle indicates they found a significant number of respondents spend hundreds if not thousands of dollars each year on loot boxes. Although little data is available on the concentration of spending in most loot boxes, he clarifies that specific analytic tools exist to gather data on players.

[116] Identifying "the specifics" of how individual gaming companies store data regarding player spending as not in the public domain, Dr. Zendle opines that the standard practice for video game publishers involves storing granular data regarding player spending on remote servers they control. He also expresses the view that this data will be stored in such a way that each player has a unique identifier associated with each of their financial transactions, which are likely time stamped and associated with other data regarding player involvement and interaction in-game. In his opinion, EA is "overwhelmingly likely" to use such a setup and to record how much is spent by players on a transaction-by-transaction basis for the lifetime of their account Dr. Zendle identifies the purposes for collecting and storing data in this manner as including enabling the implementation of sophisticated monetisation algorithms which respond to changes in player data; understanding which in-game

events tend to precipitate player disengagement to prevent “churn”; and the simple need to keep electronic receipts for in-game transactions.

[117] EA suggests that this part of Dr. Zendle’s evidence is not relevant because much of it relates to games that are not among the Affected Titles or involves generalized comments about loot boxes and video gaming without any connection to EA. I reject this argument given Dr. Zendle’s emphasis on the common characteristics of loot boxes and the practical limits on access to EA’s data and records at this early pre-discovery stage. When Dr. Zendle refers to one particular game that is not an Affected Title, he does so alongside his view that the functioning of all loot boxes is substantially similar and to clarify the nature of loot boxes. When he refers to another such game, it is in the context of explaining how loot boxes are purchased and to contrast that particular game with the different approach to purchasing used in EA’s FIFA Ultimate Team.

[118] Regarding the requirement for necessity and my own query about how some of Dr. Zendle’s evidence is properly characterized as opinion evidence and/or within the scope of his expertise, I am satisfied that the information he provides about loot boxes generally along with the rest of his evidence in response to question 1 engages his knowledge and experience as a computer scientist focused on the gaming industry. Viewing it as likely outside the experience and knowledge of the trier of fact, I am satisfied that his opinions are necessary.

[119] Responding to question 3, Dr. Zendle opines that video game publishers are capable of sharing materials or source documents that can be examined to determine the mechanics or underlying computer code for loot boxes in particular games. Indicating these materials are almost certainly more complex than simple text files defining the game’s source code, he identifies them as including other forms of code and associated documents, any data and/or files associated with loot box opening source code and other items (proprietary and/or bespoke toolchains etc.) that may be required to understand how a game’s loot boxes operate, explaining and discussing each in some detail.

[120] EA argues Dr. Zendle's evidence regarding the use of source code to explain game mechanics is not relevant because the underlying source code mechanics are not in issue. But Mr. Sutherland relies on Dr. Zendle's evidence about the similarity of game mechanics, the identical or near identical functioning of loot boxes, and his opinion that the specific operation of the loot boxes in EA's games can be determined as permitting a common analysis of EA's conduct in adjudicating the *BPCPA* claims.

[121] Recognizing it is an issue that goes to weight not admissibility, EA also makes a general assertion that, to the extent Dr. Zendle relies on hearsay, such as research articles he cites, the facts contained in those articles must be proven before any weight can be given to his opinion.

[122] I would not accede to this argument. In *R. v. Lavallee*, [1990] 1 S.C.R. 852 at 899, 1990 CanLII 95, Justice Sopinka stated in his concurring decision that hearsay evidence relied upon by an expert may be accepted without independent proof of the facts it contains if that evidence is grounded in "forms of inquiry and practice that are accepted means of decision within that expertise." This reasoning was later adopted in *R. v. S.A.B.*, 2003 SCC 60 at para. 62. Similarly, *Mazur v. Lucas*, 2010 BCCA 473 provides that an expert witness is not confined to their firsthand experience but may rely on sources such as "intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises". The fact that such evidence constitutes hearsay is a question that goes to weight, and hearsay evidence that is "an accepted means of decision making within that expert's expertise … may have greater reliability": para. 40.

[123] Dr. Zendle references academic literature and surveys, including some that he has contributed to or wholly authored which would therefore reflect his firsthand knowledge and experience. To the extent his sources do not involve his own work, absent any specific submissions about those materials or their connection to various opinions he expresses, I would not give less or meaningfully less weight to his opinions. I reach this conclusion bearing in mind the context. These reasons address

the continuation of a certification application; Mr. Sutherland's evidentiary burden, to provide some basis in fact for the certification requirements, including the proposed common issues, is as I will come to, a low one. There is also no contrary expert opinion evidence or other evidence with which to assess EA's broad and general submission about weight.

[124] Dr. Zendle's supplementary affidavit responds to aspects of Ms. Hopkins' affidavit evidence. In addition to reiterating his view that there is nothing to prevent a game-by-game analysis to determine whether each of EA's games includes a loot box mechanism where real money is directly or indirectly exchanged in return for a randomised reward, he maintains that, if produced, EA's underlying computer code for the Affected Titles could be analyzed to determine how the core loot box randomisation-reward mechanism functions in the games. He also states that he expects transaction records for real money transactions regarding loot box purchases on the Origin Platform and third-party platforms exist.

[125] EA makes the same argument about Dr. Zendle's additional evidence being unnecessary, along with stating it adds "nothing of value".

[126] Mr. Sutherland suggests Dr. Zendle continues to address contested issues including whether there is some basis in fact that the loot boxes in the Affected Titles are substantially similar and therefore permit common analysis and whether a methodology exists to uniformly analyse them. Regarding Dr. Zendle's evidence about the availability of records, this provides some basis in fact that a methodology to assess class members' damages claims exists. I agree.

[127] Apparently addressing the court's residual discretion to exclude expert evidence, EA also argued Dr. Zendle's evidence was prejudicial because it was "a confusing waste of time". EA also described it as a general rant against loot boxes and filled with unfounded speculation unconnected to the case, all of which I found unhelpful in its exaggeration. EA's more restrained submissions about prejudice suggest it is difficult to weed out what is relevant, and Dr. Zendle's evidence has the ability to prejudice the court's consideration of EA's conduct, neither of which I

accept. The fact that an expert's evidence may impact the court's assessment of a party's conduct is not a recognized risk or reason to exclude that evidence; indeed, the need for expert evidence may arise precisely because of this circumstance.

[128] Turning to the evidence of Dr. Drummond, in terms of qualifications, he is a cognitive cyberpsychologist with a PhD in psychology and more than 15 years experience in the psychological antecedents and consequences of digital media and technology use. His current research is focused on gambling-related mechanisms in video games. His CV identifies a multitude of psychology publications in a range of journals of psychology and psychiatry, education publications and research reports.

[129] In the first part of his report, Dr. Drummond opines that loot boxes in video games have a number of important psychological characteristics that make them effective at driving player engagement including: behavioural learning or operant conditioning, which he identifies as the fundamental psychological mechanism underpinning loot boxes; item scarcity and value mechanisms; and cognitive appraisal characteristics.

[130] His discussions of them in summary included the following.

[131] Regarding behavioural learning, positively reinforced behaviours are more likely to be repeated and become more frequent. Conversely, behaviours that are punished are less likely to be repeated and typically reduce in frequency. Less intuitively obvious is that strong learning can result when behaviours are inconsistently reinforced (meaning they are learned more quickly, more frequently repeated and more resistant to extinction).

[132] Related to this he explains, the strongest behavioural learning occurs from a variable ratio reinforcement schedule, which involves reinforcing a behaviour as the name suggests at a variable rate, resulting in a feeling of unpredictability about when the reward will be delivered. Dr. Drummond comments that variable ratio reinforcement has been shown to be highly effective in computerised environments and identifies it as the schedule used in loot boxes. Noting a loot box when opened

delivers a randomised reward that is sometimes valuable and sometimes not, but unknown at the time of purchase, Dr. Drummond writes:

> This results in players, on average, being rewarded every X times they open a loot box, with X being specified by the odds of obtaining a specific item as set by the seller. This is the model definition of a variable ratio reinforcement schedule. This has the potential to cause the rapid acquisition of behaviour responses (e.g., the purchasing and opening of loot boxes), which will likely be difficult to unlearn.

[133] Turning to item scarcity and value mechanisms, they are a technique used in the sale of loot boxes that involves creating the notion of scarcity of the most valuable rewards, although the rewards in loot boxes are actually the result of digital code.

[134] He goes on to discuss cognitive appraisals, or the subjective interpretations of individuals, engaged by loot boxes, including four clear commonalities that players likely engage in to explain winning and losing streaks when purchasing loot boxes: near-miss mechanics; predictive control; sunk cost bias, and informational asymmetry. I highlight only predictive control and informational asymmetry. Predictive control is a series of cognitive illusions that primarily occur because people have poor intuition about probability and odds, which include for example the belief that a series of losses is likely to be followed by a win and a series of wins is likely to be followed by a loss. Regarding informational asymmetry and loot boxes, Dr. Drummond observes that game companies know more about players than players know about the game. This allows companies to increase the chances players will purchase items through tailored purchase prompts to “high likelihood” players at particular times, such as just following a loss, or with time limited offers when the game’s algorithms deem these are most likely to be effective. Another manifestation of informational asymmetry, he offers, involves players not having detailed information about the chances of obtaining particular items that they are seeking.

[135] Although Dr. Drummond makes comparisons to gambling activities, his discussion is not confined to these comparisons and as I have indicated they are readily identified.

[136] The second part of Dr. Drummond's report, which responds to the question "[i]n what ways are video game loot boxes similar to traditionally-regulated gambling activities such as slot machines, in terms of their psychological impact on the user?", is not relevant and Mr. Sutherland no longer relies on it.

[137] The same is true of Dr. Drummond's second affidavit where he reviews Ms. Hopkin's evidence related to loot boxes and the psychological characteristics of gambling activities, which is not relevant.

[138] EA argues that all of Dr. Drummond's evidence is "completely" irrelevant to the claims in this proceeding, cannot be tied in any way to the proposed common issues regarding the *BPCPA* claims and is unnecessary.

[139] I agree with Mr. Sutherland that the first part of Dr. Drummond's report is relevant to the pleaded claim of unconscionability and some of the proposed common issues.

[140] I cannot discern a separate argument about necessity in EA's submissions.

[141] I am satisfied the aspects of Dr. Drummonds' evidence unrelated to gambling are relevant and meet the threshold for necessity.

[142] As with Dr. Zendle's evidence, addressing the cost/benefit analysis, EA characterizes the report of Dr. Drummond as a diatribe against loot boxes and asserts his entire discussion has nothing to do with this case, which is to deny the relevance I have found. EA also says again that prejudice arises from having to weed out what is relevant and the general nature of Dr. Drummond's evidence about video games and loot boxes. Considered in the context of all of the general and specific evidence about loot boxes, which alleges the same or much the same operation or loot box mechanics and structuring of transactions (none or limited

disclosure of odds), I am satisfied the probative value of Dr. Drummond's evidence about the psychological characteristics of loot boxes generally outweighs any prejudicial effect.

[143] For both Drs. Zendle and Drummond I am reinforced in my view of their evidence by the nature of Mr. Sutherland's claim and EA's alleged conduct related to ss. 4–5 and 8–9 claims, and again, the absence of any discovery at this very early stage. There is little if no alternative to relying on the evidence of experts with knowledge and experience related to loot boxes and the gaming industry, as opposed to EA specifically except to the extent relevant documents, code etc. are available in the public domain.

[144] In summary then, those parts of the evidence I have identified as not relevant are not admissible. Otherwise, the evidence Mr. Sutherland relies on is admissible. I frame my conclusion this way because of the written form of the evidence. I leave it to the parties to determine whether redacted copies of particular affidavits/reports should be filed.

Identifiable Class

Legal Principles

[145] Under s. 4(1)(b), Mr. Sutherland must establish there is an identifiable class of two or more persons.

[146] *Jiang v. Peoples Trust Company*, 2017 BCCA 119 [*Jiang 2017*], outlined the general principles that govern this requirement:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and

- the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[Emphasis in original].

[147] A proposed class definition is not overbroad because it may include persons who will ultimately not have a claim against the defendants: *Price v. H. Lundbeck A/S*, 2018 ONSC 4333 at para. 96, rev'd on other grounds 2020 ONSC 913.

Discussion

[148] Mr. Sutherland proposes a class that includes all BC residents who purchased or otherwise paid directly or indirectly for loot boxes in any one of the Affected Titles between 2008 and the date of certification.

[149] EA argues Mr. Sutherland has failed to show the proposed class definition is rationally connected to the common issues because there is no evidence of compensable harm to the proposed class or that two or more persons in the proposed class have "relevantly similar claims" or seek to rescind their loot box transactions (under s. 10 of the *BPCPA*).

[150] Again, the assertion that Mr. Sutherland is required to provide evidence of compensable harm is merits based and not what is meant by a relevantly similar claim.

[151] Nor does not it mean he must provide specific evidence that a second person has such a claim: *Douez v. Facebook*, 2018 BCCA 186 at para. 53. It is well recognized that ordinarily the existence of more than one claim will be apparent from the very nature of the claim being advanced (see *Douez* at para. 53, citing *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248 at para. 70); *Hoy v. Medtronic, Inc.*, 2003 BCCA 316 at paras. 56–58.

[152] It is also not necessary to show that any individual is sufficiently motivated by their claim to bring the matter to court: *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165 at para. 32.

[153] The proposed definition provides objective criteria that would allow two or more persons to self identify (and later prove membership in the class) as required by *Jiang 2017*.

[154] Although the nature of his claim makes the existence of more than one claim apparent, Mr. Sutherland's evidence shows he is a class member. Ms. Hopkin's evidence confirming EA sells loot boxes in the Affected Titles, also provides some basis in fact that a class of two or more exists.

[155] I conclude the proposed class definition and the evidence establish the requirement for an identifiable class.

Section 4(1)(c) - Common Issues

Legal Principles

[156] Section 4(1)(c) requires Mr. Sutherland to show some basis in fact that "the claims of class members raise common issues". Section 1 of the *CPA* defines common issues as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts". *Atlantic Lottery Corp.* further provides that issues are not common when they are dependent upon findings of fact that must be made with respect to each individual claimant: at para. 143, citing *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, 2000 CanLII 22704 (O.N.S.C.), at para. 39, aff'd (2003), 226 D.L.R. (4th) 112 (O.N.C.A.).

[157] The fundamental question underlying the common issues requirement is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39 [*Dutton*].

[158] Citing *Dutton*, *Microsoft* at para. 108, identified the key principles animating the commonality analysis as including:

(1) The commonality question should be approached purposively.

> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

[159] *Dutton* also provided that success for one class member must bring with it benefit for all the others: at para. 40.

[160] *In Vivendi Canada Inc. v. Dell'Aniello,* 2014 SCC 1, the court held that the common success requirement articulated in *Dutton* must be applied flexibly: para. 45. The decision clarified that a common question can exist even if the answer might vary from one member of the class to another and the common question may require nuanced and varied answers based on the situation of individual members. For a question to be common, success for one member of the class does not necessarily have to lead to success for all members or even to the same extent. A common issue may be certified if it serves to advance the resolution of every class member's claim. It is enough that the answer to the question does not give rise to conflicting interests among the members: para. 46.

[161] Subsequently the Court of Appeal has identified the commonality threshold as low, setting out that a triable factual or legal issue which advances the litigation (for or against the class) when it is determined is sufficient: *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at para. 85; *Service v. University of Victoria*, 2019 BCCA 474 at para. 59; *Finkel* at para. 22.

[162] Put another way, a proposed common issue will not move the litigation forward if it is dependent on individual findings of fact that must be made for each class member, framed in overly broad terms, or not capable of benefitting all class members if successfully prosecuted: *MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093 at para. 88 (appeal allowed on other grounds).

Some Basis in Fact Test

[163] The parties dispute the scope of the "some basis in fact" test as applied to the common issues requirement. EA contends that the evidentiary test has two steps: a plaintiff must show some basis in fact that the proposed common issues actually exist; and they are common across class members.

[164] In *Nissan Canada*, which involved a product liability claim, Justice Griffin rejected the proposition that, to meet the commonality requirement, the plaintiff had to provide some evidence of negligence where the proposed common issue involved a defect in the product: para. 132. Reiterating the low threshold, she concluded the question is whether, given the language of the common issue proposed, there is some evidence that supports the argument that it is a common issue across members of the class: para. 133.

[165] In *O'Connor*, Chief Justice Hinkson interpreted her reasons as not rejecting the two-step evidentiary test but rather the imposition of an evidentiary burden to show the defect was dangerous, noting Griffin J.A. had considered evidence that went to the existence of the defect. Although Hinkson C.J. also emphasized the plaintiff's evidentiary burden is at the second step, that is, they must provide some evidence of class-wide commonality, he commented it was difficult to conceive of how there could be evidence that an issue is common absent evidence that the issue also exists: para 263.

[166] Agreeing this will *often* be the case, Matthews J. in *Bowman* clarified that an issue exists if it is a live issue of fact or law in the proceeding, which can and often does arise from the pleadings, jurisprudence or legislation. She determined therefore, that a pleading, legislation or legal principles can support the existence of an issue, which together with some evidence of commonality, will meet the certification test: para. 136. At para. 139 Matthews J. explained:

> In summary, I conclude that the two-step evidentiary test as it has been articulated is not appropriate for every common issue that might be sought to be certified in a given case. It may overstate the burden and run the risk of a merits-focussed inquiry. … While there must be common issues to certify a

> class proceeding, their existence is determined by whether they are live issues of fact or law which is not always an evidentiary matter. There must be some evidence of commonality of a proposed common issue. That evidence will often also go to its existence, but if it does not, the existence can be supported by the pleadings or the law.

[167] I pause to note there remains the Supreme Court of Canada's clear conclusion in *Microsoft* 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 class members" [emphasis added].

Discussion

[168] Mr. Sutherland proposes 11 common issues that fall into several categories. Common issues 1–4 involve factual questions; 5–6 relate to breaches of the *BPCPA*; 7–9 deal with relief; and 10–11 deal with court ordered interest and the appropriate distribution of any aggregate damages award. He asserts their existence and commonality are established by the evidence, the pleadings or the law as discussed in *Bowman*.

[169] In taking the position there is no basis in fact for any of the common issues, EA makes a myriad of arguments. Many of them relate to cause of action issues, involve a merits-based approach, or otherwise seem untethered from the principles that govern the commonality requirement. EA's general view that Mr. Sutherland's claim is wholly misconceived permeates. EA also makes broader complaints that the proceeding is bound to devolve into individual issues and inquiries—including game, platform and time-specific inquiries; some of these concerns are more appropriately addressed when considering the preferable procedure requirement.

Common Issues 1–4: Factual Questions

[170] Proposed common issues 1 through 4 read:

> 1. During the period of January 1, 2008 to the date of certification (the "Class Period") did the Defendants, or some of them, offer Loot Boxes in their Digital Games? If so, in which games and during what time period(s)?

a) If the answers to Question 1 is yes for one or more Digital Games, the relevant games are the "Affected Titles".

2. Did the Defendants disclose the odds of winning in their Loot Boxes in the Affected Titles?
    a) If so, how and in which Affected Titles during what time period(s)?
    b) If not, in which Affected Titles and during what time period(s)?
3. Did the Defendants make available high-value virtual items that affect gameplay exclusively or primarily from Loot Boxes in the Affected Titles, thereby encouraging players to obtain Loot Boxes?
    a) If so, in which Affected Titles during what time period(s)?
4. Did the defendants set the probabilities of obtaining rare and/or high-value items through Loot Boxes in the Affected Titles so low as to make them virtually unattainable without multiple, repeated attempts to obtain those items from Loot Boxes?
    a) If so, in which Affected Titles during what time period(s)?

[171] Each of these factual issues focuses on EA's conduct and does not require an inquiry into the individual circumstances of class members.

[172] There is undisputed evidence supporting questions 1 and 2. There is also evidence supporting Mr. Sutherland's broader allegations that (1) EA did not or inadequately disclosed the odds of obtaining items in loot boxes, while (2) making high-value items so difficult to obtain through gameplay that they were primarily available only through loot boxes and (3) setting the odds of obtaining high-value items so low that players would make repeated loot box purchases attempting to obtain them.

[173] It is also clear then that the evidence provides some basis in fact for the existence of all four issues.

[174] Mr. Sutherland disputes EA's position that common issues 1 and 2 will not materially advance any claim because they are basic and uncontroversial. He asserts that establishing basic facts can provide a foundation that assists in adjudicating other common issues, citing *Dalhuisen v. Maxim's Bakery*, 2002 BCSC 528 at para. 8. Given that EA has yet to file a pleading and no factual admissions have been made at this stage, I would agree.

[175] EA also seized on some of the specific language in the questions such as "the odds of winning" in question 2. Clearly the reference to winning refers to obtaining high-value items as set out in question 3.

[176] EA similarly impugns common issue 4 with the obvious point that rare (valuable) items are by definition difficult to obtain.

[177] Regarding common issue 3, EA also focuses on the proposed change from "forcing" to "encouraging" players to obtain loot boxes, asserting that *encouraging* a customer to buy something cannot be a breach of the *BPCPA*.

[178] Mr. Sutherland submits the proposed change to encouraging was intended:

> to better capture the nuance of the alleged practice of structuring the placement of in-game items to encourage Loot box expenditure by making rare and valuable items that have a significant impact on class members' ability to stay competitive with other players difficult to obtain through gameplay.

[179] EA asserts there is no evidence they encouraged users to acquire loot boxes, which is simply inaccurate. Whether its conduct is described as "encouraging" or something more forceful such as "driving" players to make repeated loot box purchases, some of EA's own documents support this allegation and the related factual allegations underlying common issues 3 and 4. An evidentiary basis for those issues is provided by some aspects of Dr. Drummond and Dr. Zendle's evidence, and Mr. Sutherland's affidavit regarding the Madden NFL series of games.

[180] EA also asserts there is no basis in fact for class-wide determinations of "high-value" items referred to in both common issues 3 and 4, because the notion of what is high-value is inherently individual and game specific.

[181] Mr. Sutherland points to various aspects of the evidence that indicate EA assigns objective ratings of value for items in loot boxes. There are a multitude of images of loot boxes or packs in a range of EA's games included in Mr. Garrett's report showing forms of disclosure related to loot box contents. Various sports games show categories of packs ranging from bronze to gold, which correspond with

increasing value and rarity. Other EA documents discussing pack or loot box item probabilities, attached to Mr. Tweed's second affidavit, state that packs are categorized by item, type and rating. FIFA 19 Ultimate Team includes bronze, silver, gold and premium gold packs. The description of the premium gold pack includes: "Triple the Rares of a standard Gold Pack! A mix of 12 Gold items, including players and consumables, 3 Rares". A document dealing with Madden NFL 21 pack probabilities discusses ratings on categories of items and "OVR bands". It explains, a pack might show a 100 percent likelihood of getting a category of items rated 80 or above, which means getting at least one player that has that rating. Regarding OVR bands, the document provides in general the higher an OVR band, the lower the probability of getting it. Again, Mr. Sutherland's evidence regarding his experience with the Madden NFL series of games includes that the players available in loot boxes are ranked by an OVR score set by EA which shows how effective they will be in the game. Dr. Drummond also provides, as Mr. Sutherland put it, contextual evidence of objective value metrics for loot box items. In opining about item scarcity and value mechanisms, as a psychological characteristic of loot boxes that makes them effective at driving player engagement, he writes:

> … the rewards are the result of digital code ... virtual items … are simply coded to appear in loot boxes more or less frequently. Typically games will signal the relative rarity of items to players by using terms such as "common", "uncommon", "rare", "epic", or "legendary" to describe an item's chances of being rewarded to the player. This creates a tiered desirability of items based upon their scarcity, increasing the desirability of items at the highest reward tiers. Usually, where items are functional … the rarest items also confer the best bonuses to gameplay, while the most common items confer limited gameplay benefits.

[182] EA further contends that even if there was some basis in fact for issues 3 and 4, neither would materially advance "any claim" available in law, submitting that the availability of items is simply a game design issue, and not something that is justiciable.

[183] "Justiciability" is not a consideration here.

[184] I agree with Mr. Sutherland that EA misconstrues the point of both questions. Common issues 3 and 4 ask about EA's game and loot box design choices precisely because those choices are alleged to breach the *BPCPA*.

[185] Considered together, they pose whether making high-value items available only or primarily through loot boxes, while setting the odds of obtaining them "so low" or extremely low, and not disclosing or inadequately disclosing this conduct, results in "encouraging players" to make multiple repeated attempts to obtain them from loot boxes.

[186] Mr. Sutherland emphasizes that the conduct alleged in question 4 was recognized in the 2023 Decision as relevant to the alleged ss. 4–5 breach and is also relevant to the ss. 8–9 inquiry because it relates to the reasonable expectations of class members. As set out below, common issues 5 and 6 regarding breaches of the *BPCPA* are predicated on the answers to factual common issues 2, 3, and 4.

[187] Applying a purposive approach, I find that common issues 1–4 satisfy the commonality requirement and are suitable for certification. Each issue focuses on impugned aspects of EA's conduct involving game design and loot box mechanics. As structured, they provide the basis for the liability questions regarding EA's alleged deceptive and unconscionable acts or practices in common issues 5 and 6. Accordingly, resolving the factual issues becomes necessary to resolving each class member's claim and will serve to advance the litigation.

[188] I have indicated, however, the SFANCC and the evidence would readily support framing EA's alleged conduct in stronger terms and clearer language. It is not my role to decide if the common issues will succeed. This is not what is meant by advancing the litigation. I leave it to Mr. Sutherland to determine whether he wishes to apply for leave to further amend.

Common Issues 5–6: Breaches of the *BPCPA*

[189] Proposed common issues 5–6 Include:

> 5. Based on the answers to common issues 2, 3 and/or 4, did the Defendants engage in deceptive acts or practices contrary to the *BPCPA*, ss 4 - 5?
>
> 6. Based on the answers to common issues 2, 3 and/or 4, did the Defendants engage in unconscionable acts or practices contrary to the *BPCPA*, ss 8 - 9?

[190] Mr. Sutherland argues the breach issues can be answered commonly because liability under ss. 4–5 and 8–9 focuses exclusively on the conduct of EA and does not require a consideration of the individual circumstances of class members, emphasizing that proof of reliance on a representation or conduct by the consumer allegedly deceived is not required to establish a breach of s. 4: *Krishnan* at para. 196.

[191] Mr. Sutherland points to the same evidence that I have found supports common issues 1 through 4 for the factual component of whether EA's impugned conduct constitutes breaches of the *BPCPA*'s prohibitions on deceptive and/or unconscionable acts or practices by a supplier to a consumer transaction.

[192] Addressing the some basis in fact standard and the alleged breach of s. 9 specifically, his written submissions discussed how the evidence allows for a common analysis:

> … there is evidence that the Loot Boxes … operated in a substantially similar manner, despite their superficial aesthetic differences, according to computer code that the defendants unilaterally created and controlled. The basic functioning of the loot boxes was identical or nearly identical from the perspective of class members, while Dr. Zendle states that he or a properly trained software investigator could assess the specific functioning of the underlying computer code for each game, and there is nothing preventing a game-by-game analysis of each of the Affected Titles. Dr. Drummond proposes a methodology by which to assess the psychological characteristics of each of the Affected Titles, which is relevant to the surrounding circumstances for the sections 8-9 analysis. All class members therefore are similarly situated in relation to the defendants in their ability to appreciate the terms and conditions of the transactions. There is evidence that the odds of obtaining specific items (as opposed to general classes of items) was within the sole knowledge and control of the defendants, permitting an analysis of the potential for undue advantage/disadvantage and improvidence flowing from the transactions without reference to individual class members

> circumstances, as all class members are uniformly situated vis-a-vis the defendants.

[193] EA makes numerous assertions to the effect that issues 5 and 6 cannot be certified because there is no evidence that EA has breached the *BPCPA*. In doing so, EA states that there is no basis in fact for any of the following:

- That EA guaranteed to players that they would receive certain virtual items in loot boxes;
- That EA presented types or categories of virtual items as available in loot boxes that were not in fact available;
- That class members did not know that some virtual items were only or primarily available through loot boxes; and
- That class members did not know that certain items would take multiple attempts to obtain.

[194] EA again resorts to a merits-based argument, this time by positing examples of conduct and circumstances that could ground beaches of the *BPCPA* and then asserting that they do not exist in the case at bar. The objections do not relate to commonality and they fail to address the ways in which EA is alleged to have breached the statute. The Supreme Court of Canada has recognized "the importance of not allowing the requirement to establish 'some basis in fact' to lead to a more fulsome assessment of contested facts going to the merits of the case": *IG Investment Management Ltd*. *v*. *Fischer*, 2013 SCC 69 [*Fischer*] at para. 42. The ultimate question of whether EA breached the *BPCPA* must be determined at a trial of the common issues.

[195] Turning to aspects of EA's submissions that involve some focus on commonality, EA asserts on issue 5 that there is no basis in fact for any "common understanding" *among players* regarding loot box probabilities, or that any representation or omission by EA created such a "common understanding".

[196] Mr. Sutherland observes the adjudication of alleged breaches of ss. 4–5 focuses on the "representation" itself and whether it is capable of deceiving or misleading, rather than the subjective experience of individual class members: citing *Stanway v. Wyeth Canada Inc.,* 2011 BCSC 1057 (aff'd 2012 BCCA 260 [*Stanway*

CA]). There, Justice Gropper confirmed at para. 61 that “the question of whether a representation is deceptive or misleading does not require an individual enquiry” as well as concluding more broadly at para. 64 that “the objective nature of the statutory cause of action under the *BPCPA* is suited for class treatment. The participation of individual class members is not necessary to determine whether the defendants have breached the statute”.

[197] The *BPCPA* broadly defines a deceptive act or practice to include a representation or conduct, which has the “capability, tendency or effect of deceiving or misleading a consumer”. An omission or non-disclosure of a material fact is sufficient to constitute a representation: *Stanway CA* at para. 80. The case law provides that alleged breaches of ss. 4–5 turn on whether a representation is “capable of deception” and do not require assessments of whether deception has in fact occurred: *Knight* at para. 26.

[198] The evidence regarding EA’s non-disclosure and subsequent limited disclosure of loot box odds, in the context of game play mechanics, provides some basis in fact that the issue of whether EA’s representations are capable of deceiving or misleading is common.

[199] On issue 6, EA similarly argues that a finding of unconscionability would require determining whether each class member was incapable of understanding the terms and conditions of the “bargain” and ascertaining whether each bargain was improvident.

[200] EA ignores the thrust of Mr. Sutherland’s amended claim of unconscionability and the relevant evidence. He alleges an inequality of bargaining power involving informational asymmetry arising from EA’s total control over and failure to disclose the material circumstances surrounding loot box transactions, resulted in bargains that are improvident because they flout class members’ reasonable expectations to the contrary. Neither the informational asymmetry nor the flouting of reasonable expectations depends on the subjectivity of individual class members. I have already highlighted the evidence Mr. Sutherland points to as allowing for a class-wide or EA-

focused analysis of the elements of unconscionability and the surrounding circumstances as required by s. 8(2).

[201] At the same time, the very small odds of obtaining a high-value item in a loot box suggest there could be some class members who did "win" (i.e. obtained high-value items) when they purchased loot boxes, indicating those transactions were not improvident. The authorities are clear that a common issue need not yield identical answers from all class members; *Dell'Aniello* at para. 46. Further, I am satisfied that the interests of any of those who received high-value items are not in conflict with the interests of the class as a whole.

[202] I find that issues 5 and 6 are suitable for determination as common issues. Both involve live issues at the crux of this action and their resolution would advance the litigation for all class members.

Common Issues 7–9: Relief

[203] Proposed common issues 7 through 9 are as follows:

> 7. If the answers to common issues 5 and/or 6 are yes, are Class Members entitled to a declaration under the *BPCPA*, s 172(1)(a) that the Defendants have contravened the *BPCPA*, and if so on what terms?
>
> 8. If the answers to common issues 5 and/or 6 are yes, are Class members entitled to restoration of the funds spent on Loot Boxes in the Affected Titles under the *BPCPA*, s 172(3)(a)? If so, can an aggregate monetary award be made for the benefit of all Class Members pursuant to s. 29 of the *Class Proceedings Act*? If so, what is the amount of the aggregate monetary award?
>
> 8.1. Does *BPCPA* s 172(3)(a) require a consumer to make counter-restitution or set-off of any benefit received before obtaining restoration?
>
> 8.2. If the answer to the preceding question is yes, can counter-restitution be determined on a class-wide basis?
>
> 9. If the answers to common issues 5 and/or 6 are yes, should the Court order a permanent injunction under the *BPCPA*, s 172(1)(b):
>
> > a) restricting the Defendants from offering Loot Boxes purchasable directly for real money or indirectly for virtual currency in its video games, and if so on what terms?
> >
> > b) requiring the Defendants to disclose the odds of their Loot Boxes in the Affected Titles, and if so on what terms?

> c) prohibiting the Defendants from making high-value virtual items necessary for gameplay exclusively available from Loot Boxes?

[204] Clearly, the answer to common issue 7, whether class members are entitled to a declaration that EA has contravened the *BPCPA*, depends entirely on the answers to common issues 5 and 6 regarding the alleged contraventions of ss. 4 and/or 9. Consequently, the declaratory relief provided for in s. 172 satisfies the commonality requirement and is suitable for certification as a common issue.

[205] EA opposes the certification of issue 9 arguing the only basis for sub-issues (a) and (c) are the illegal gambling allegations dismissed in the 2023 Decision. I disagree. The conduct targeted in the sub-issues is alleged to have breached provisions of the *BPCPA* unrelated to the illegal gambling. If any statutory breaches are found, considering an injunction to remedy them naturally follows.

[206] I have a separate, minor concern about common issue 9, which asks whether the court should order a permanent injunction restraining and compelling specific aspects of EA's conduct related to loot boxes. Although the issue satisfies the commonality requirement, s.172(1)(b) provides for an injunction restraining a supplier from contravening the *BPCPA*. Based on that language and the uncertainty about what conduct of EA may be found to contravene the Act, in my view the issue must be amended.

[207] Exercising my discretion to modify proposed common issues (and class definitions), as recognized in *Douez v. Facebook, Inc*., 2018 BCCA 186 at para. 47, common issue 9 now reads:

> 9. If the answers to common issues 5 and/or 6 are yes, should the Court order an injunction under s. 172(1)(b) of the *BPCPA* restraining EA from engaging or attempting to engage in those deceptive and/or unconscionable acts or practices?

[208] As amended, I am satisfied it is suitable for certification.

[209] Without specifically opposing the certification of common issue 7 and saying almost nothing about 9, EA asserts that all the proposed common issues relating to

relief must fail because they are predicated on issues 5 and 6, which cannot be certified. Having certified issues 5 and 6, I reject this submission.

[210] Mr. Sutherland and EA focus on common issue 8, which asks three questions: are class members entitled to a restoration of the funds spent on loot boxes; if so, can an aggregate monetary award be made for the benefit of all class members under s. 29 of the *BPCPA*; and if so, what is the amount of the award?

[211] For reasons of efficiency I begin with EA's position. I have distilled its many arguments into four primary objections: (1) class members could not be entitled to a restoration of the funds spent on loot boxes and an order under s. 172(3)(a) because Mr. Sutherland has failed to establish the causal link required under s. 171 to show an entitlement to damages; (2) he has not shown any methodology by which harm to the class members could be assessed commonly; (3) the remedy under s. 172(3)(a) amounts to statutory rescission, which requires counter-restitution by consumers of the property gained under the impugned transaction; and (4) an aggregate money award under s. 29 of the *BPCPA* is not available due to outstanding questions of fact or law. I deal with each in turn.

[212] EA's submission on causality is primarily based on a legal argument and the merits rather than commonality. Mr. Sutherland is only required to provide some basis in fact that *entitlement* to a restoration order is a common issue among class members, not that the restoration order would be granted. I have already found that Mr. Sutherland's pleading discloses a cause of action under s. 172(3)(a)—class members suffered a loss commensurate with the cost of purchasing loot boxes—that flows from EA's alleged breaches of the *BPCPA*. This brings them within the ambit of s. 171 which in turn may ground an entitlement to a restoration order under s. 172(3)(a).

[213] Mr. Sutherland has advanced a theory of causation that class members would not have suffered loss but for EA's alleged statutory breaches. I note at this stage, much the same theory of causation was accepted as not bound to fail in *Bowman*; *Krishnan;* and *MacKinnon* (except on punitive damages).

[214] Along with the factual allegations in support of the alleged breaches, Mr. Sutherland also alleges he and class members would not have suffered damage or loss had EA clearly disclosed the probabilities of loot box items to class members, set reasonable odds for the most valuable items such that users would not be required to spend significant funds to obtain them, disclosed the availability and scarcity of high-value items, and/or made such items more accessible in gameplay.

[215] In both *Bowma*n and *Krishnan*, the court found there was some basis in fact for the assertion that causation was found in the alleged breach of the regulatory requirements, sufficient to warrant certification of common issues on entitlement to damages under provincial consumer protection legislation.

[216] I am satisfied the evidence as discussed also provides some basis in fact for the theory here.

[217] This leads to the dispute about the issue of methodology.

[218] EA says there is no plausible methodology by which harm could be assessed on a class-wide basis in this case, emphasizing again that some players would have received valuable items in their loot boxes.

[219] EA also reiterates that loot boxes were purchased with virtual rather than real currency which imposes a myriad of complications on the question of damages and refunds.

[220] Where loss is an element of class members' causes of action, the plaintiff must demonstrate there is a credible or plausible methodology capable of establishing loss on a class-wide basis: *Microsoft* at paras. 114–118; *Charlton* at para. 86. *Fischer* clarified that while certification may be denied due to a lack of *any* methodology, the bar is low; it is not necessary to establish a compelling method to prove the loss, but it is necessary to provide some basis in fact "to think" that there is *some* method to do so: at para. 42.

[221] The standard required for a plausible methodology will differ from case to case depending on complexity. In *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353, Justice Savage explained:

> [33] In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, it refers to whether there is *any* plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim. As noted in *Andriuk*, not every case will require expert evidence (para. 11).
>
> …
>
> [38] … the methodology requirement as contemplated in *Microsoft* encompasses a broader category of methods: "the critical element that the methodology must establish is the ability to prove 'common impact'" (para. 115). In other words, to overcome the certification hurdle, plaintiffs are required to show how their common issue could be established at a common issues trial, remembering that the threshold, as this stage, is not an onerous one. Similarly, in *Ewert*, Hunter J.A. concluded that jurisprudence establishes that:
>
> > [9] …[T]he plaintiff must provide some evidence that the loss component of liability can be proven on a class-wide basis, but it is not necessary to identify the specific data that will be required in order for the proposed methodology to do so. In other words, at the certification stage, the methodology must be realistic but not compelling. To impose a higher standard of proof on the plaintiff at the certification stage would, in my view, be inconsistent with the objectives of the *CPA*.

[222] Mr. Sutherland argues the focus of the inquiry here is on the revenue received by EA from class members for loot box purchases in the Affected Titles; and assessing the loss does not require complex economic evidence or methodology unlike in other certified class proceedings where the alleged loss involved complicated allegations of price fixing and indirect purchasing; see e.g. *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503.. Instead, the assessment here involves determining the amount of money (real money or virtual currency bought with real money) paid directly by class members for loot boxes in the Affected Titles.

[223] Contemplating the court accepting that counter-restitution is required, Mr. Sutherland suggests the discovery process should elicit evidence about what

percentage of loot boxes contained high-value items, which could then be discounted from a total award. Acknowledging this may result in some inaccurate compensation, he relies on *Drynan v. Bausch Health Companies Inc*., 2021 ONSC 7423 at para. 311 where the court held that "not all class members need to be accurately compensated".

[224] The issue in any event appears to be addressed by the refinement in *Pioneer Corp. v. Godfrey,* 2019 SCC 42 [*Godfrey SCC*] regarding common issues that address the loss to class members on a class-wide basis (and as discussed in *Bowman* at para. 167). At para. 102, Justice Brown, for the majority, stated a methodology by which loss can be proved to each class member is not necessary. What is necessary is a methodology by which loss can be proved to the class as a whole. The proposed methodology in that case, which involved price fixing, would show that the price fixing reached the requisite purchaser level: at paras. 102 and 107. Despite the possibility that not every class member suffered a loss, the methodology satisfied the some basis in fact standard for commonality.

[225] Ultimately what Mr. Sutherland proposes involves an assessment of EA's own records. The evidence and the inferences to be drawn from the evidence satisfy me that EA has the records necessary to assess the loss or at least to provide a foundation for the necessary assessment, excepting perhaps some specific older records that Ms. Hopkins indicated may not exist. Without intending to recite all of the relevant evidence, the breadth and detail of EA's records is supported by some aspects of Ms. Hopkins' evidence, the evidence pointing to the sophistication and magnitude of EA's business and its role as a world leader in the virtual gaming industry, Dr. Zendle's evidence about the transactions records he would expect EA to maintain, and the information about revenues from loot boxes and annual revenue generally in EA's 2021 Form 10-K Annual Report. In my view it is simply not plausible that EA would not maintain records/data regarding most, if not all, aspects of loot box transactions: including records of payment with real money or virtual currency purchased with real money, the real money value of virtual currency, and

the coded odds of obtaining high-value (and less valuable items) in loot boxes in the Affected Titles.

[226] In *Gomel CA*, the Court of Appeal overturned the certification of common issues related to loss and damage under the *BPCPA*, based on the conclusion the plaintiff had advanced only a theory of damages, not a methodology: para. 162. At the same time, the Court affirmed at para. 149 that the requisite standard will be met if there is any plausible way for the plaintiff to prove a common impact, as discussed in *Miller*. In reaching the conclusion the chambers judge had erred, Justice Marchand as he then was, underscored there was nothing obvious or intuitive about how the issue of determining damages should be approached in that case, also observing there was no evidence about what data would be needed, whether it was available and how it would be used to measure damages.

[227] Unlike *Gomel*, in my view, Mr. Sutherland has advanced a plausible way to prove loss on a class-wide basis, in part because, as framed, determining the loss is comparatively straightforward. Involving as it does a multitude of games across a long period of time, the scope of the alleged loss is vast but assessing it is far from complex.

[228] Mr. Sutherland has added sub-issues 8.1 and 8.2 to address the legal question of counter-restitution, which EA has not challenged, other than by stating that their addition involves an improper attempt to circumvent a weakness in Mr. Sutherland's claim.

[229] I reject any argument based on counter-restitution as a ground for refusing certification of issue 8. I fail to see what relevance it could have to the common issues analysis, excepting a claim that entitlement to a restoration order would devolve into individual determinations. As I have discussed, Mr. Sutherland has provided a plausible methodology to incorporate counter-restitution into a class-wide damages determination.

[230] Finally, EA claims that an aggregate damages award under s. 29 of the *CPA* will not be available to class members. That provision provides:

> **Aggregate awards of monetary relief**
>
> 29(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgement accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determine in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[231] In *Seidel v. Telecommunications Inc*., 2016 BCSC 114, Justice Masuhara helpfully discussed the availability of aggregate damages under s. 29:

> [180] …At the certification stage, aggregate assessment may be certified only if resolving the other certifiable common issues could be determinative of monetary liability….
>
> [181] The fact that not all class members may have actually suffered a financial loss does not mean that s. 29(1) is not capable of being satisfied….Subsection 29(1) requires only proof of the aggregate or a part of the defendant's liability, not the entitlement of individual class members. Indeed, s. 31(1) allows the court to order that an aggregate award be shared on an average of proportional basis in certain circumstances regardless of actual individual entitlement. Section 32 allows for individual claims to give effect to distribution of an aggregate monetary award on an individual basis. These sections contemplate that an aggregate award will be appropriate "notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis" …
>
> [Citations omitted.]

[232] *Godfrey SCC* clarified that s. 29 of the *CPA* does not confer substantive rights and accordingly cannot be used to award class members who have suffered no loss. However, it does permit "individual members of the class to obtain a remedy where it may be difficult to demonstrate *the extent* of individual loss": para. 118.

[233] EA appears to invoke both 29(1) (b) and (c) in opposing certification of issue 8, stating that "there clearly will be individual issues of fact and law that will have to

be determined." Part of EA's argument is that it intends to raise limitation defences should the proceeding be certified and those defences will require individual inquiries.

[234] I note first that both subsections are bars to the *ordering* of aggregate damages, not the *certification* of a common issue of aggregate damages. Justice Brown for the majority in *Godfrey SCC* emphasized this distinction, stating that issues remaining to be determined by the trial judge, such as their findings on whether class members suffered loss, are irrelevant to the decision to certify aggregate damages as a common issue: para. 121. In any event, the explanation of Masuhara J. makes clear that some level of individual inquiry does not prohibit the ordering of an award under s. 29. The question of entitlement to and quantum of aggregate damages can be certified as a common issue, notwithstanding the potential for limitations defences to require individual inquiries at a later stage in the proceeding: *Godfrey SCC* at para. 121.

[235] What is required at the certification stage is a "credible or plausible" methodology to assess the extent of the award: *Seidel* at para. 183. I have already discussed the sufficiency of the methodology advanced by Mr. Sutherland to assess damages and the same reasoning applies here.

[236] I am satisfied that Mr. Sutherland has proposed a plausible methodology, that entitlement to a restoration order and an aggregate damages award are common issues arising from the *BPCPA*, and that there is ultimately some basis in fact for the certification of issue 8 and its sub-issues.

Common Issues 10–11: Interest and Aggregate Damages

[237] Proposed common issues 10–11 are as follows:

> 10. What is the liability, if any, of the Defendants, for court-ordered interest?
>
> 11. What is the appropriate distribution of any aggregate damages award to the Class and should the Defendants pay for the cost of that distribution?

[238] Mr. Sutherland submits that common issues focusing on the costs owed by the defendants in relation to the distribution and interest on any award are pure questions of law that relate exclusively to the defendants' conduct and are suitable for determination as common issues, referencing *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2019 BCSC 2007, at para. 150.

[239] EA opposes certification of common issues 10 and 11 simply on the grounds that none of the common issues on liability, causation, or damages should be certified. Having certified issues 1–9, I reject this argument and find issues 10 and 11 suitable for certification as common issues.

[240] EA has emphasized throughout its submission that the court plays an important gatekeeping role at certification and that I should accordingly approach the common issues with an appropriate degree of scrutiny. While I am cognizant of the court's gatekeeping function, nothing in that role modifies the statutory certification requirements and the case law interpreting the low evidentiary standard which is required at certification. I am satisfied that the common issues submitted by Mr. Sutherland and my amended version of common issue 9 are supported by some basis in fact and can be certified. The certified issues are attached as Schedule A.

Section 4(1)(d) – Preferable Procedure

Legal Framework

[241] Section 4(1)(d) requires that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. Section 4(2) sets out a non-exhaustive list of factors that must be considered in making this determination:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

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

[242] The preferability analysis was helpfully discussed in *Bowman*:

> [240] There are two questions that are central to the preferability analysis. The first is whether a class proceeding would be a fair, efficient, and manageable method of advancing the claims. The second is whether the class proceeding is preferable for the resolution of the claims compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives: *Rumley v. British Columbia*, 2001 SCC 69 at para. 35, citing *Hollick* at para. 28. See also *Finkel* BCCA at paras. 24–26.
>
> [241] In *Finkel* BCCA at para. 25*,* the Court of Appeal confirmed that when comparing a class proceeding to other realistically available means for resolving the claims, a practical cost-benefit approach applies, citing *AIC Limited* at paras. 21, 23 and *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230, aff'd 2015 BCCA 252, leave to appeal to SCC ref'd, 36584 (17 March 2016).
>
> [242] Generally speaking, the preferability analysis must be applied through the triple lenses of the objectives of class proceedings: access to justice, judicial efficiency, and behaviour modification: *Hollick* at para. 27. Related to this, when considering whether a class proceeding will be fair, efficient, and manageable, the common issues must be considered in the context of the action as a whole, and their relative importance taken into account: *Hollick* at para. 30.

[243] With this framework in mind, I turn to the mandatory s. 4(2) factors, noting that EA's submissions were confined to the first one.

Whether the common issues predominate

[244] Asserting its fundamental objection to certifying this action is that it would ultimately devolve into individual trials, EA submits that the following individual issues arise:

- A determination of the virtual items each user received in each loot box;
- Whether the user was satisfied with the virtual items they received;
- What was done with the received virtual items;
- Whether each class member wants their virtual transactions unwound; and
- Limitations issues.

[245] First, I do not accept that each of these individual inquiries is required for the resolution of the proposed action. Only a version of the first of them could be relevant to liability for unconscionability related to class members who may have received high value items, or if counter-restitution must be made under s. 172(3)(a). Again, breaches of ss. 4–5 and 9 of the *BPCPA* can be established without resort to individual inquiries: *Stanway* at para. 61; *Seidel* at paras. 168–172; *Haghdust v. British Columbia Lottery Corp*., 2013 BCSC 16 at para. 129.

[246] Even if I were to accept that some individual inquiries must be carried out, it is clear they would not overwhelm the common issues and the preferability of the class proceeding.

[247] Justice Matthews in *Escobar v. Ocean Pacific Ltd.*, 2021 BCSC 2414 provided helpful guidance on how to assess whether the common issues predominate:

> [219] The preferability analysis is not a matter of numerosity either in the numbers of common issues versus individual issues, or in the number of individual inquiries that will be required for a very large class. There are many cases where the individual issues will be many and time consuming for a very large class. In personal injury cases, for example, the individual inquires pertaining to causation and multiple heads of damages will involve individual

> phases that may require trials for each class member. Many cases of this nature have been certified in British Columbia including: *Rumley; Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.); and *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (S.C.), rev'd on other grounds (1998), 48 B.C.L.R. (3d) 90 (C.A.).
>
> [220] The problem arises where the individual issues are such that the case is bound to break down into a series of individual trials where the outcome will be driven by the individual issues and for which the answers to the common issues are not substantially important. These are cases where, after considering the common issues in the context of the whole of the action and the goals of class proceedings, the common issue or issues are "negligible" in relation to the individual issues (*Hollick* at para. 32).

[248] She similarly stated in *Bowman* that "[t]he existence of potentially complex individual issues does not usually stand in the way of certifying a claim where the substantial ingredients of the liability issues are central and can be resolved in a common way thereby eliminating the need to litigate them for each class member": para. 247.

[249] Regarding limitation issues, the Court of Appeal has emphasized that, while it is possible for a certification judge to consider a limitation defence "in exceptional circumstances", it is generally inappropriate to assess this issue at the certification stage: *Godfrey v. Sony Corporation* 2017 BCCA at para. 67, aff'd *Godfrey SCC*. The conclusion in *Godfrey CA* responded to an argument that the claim failed the "cause of action" requirement because it was limitation barred. However, limitations questions are also typically not certified as common issues because they are recognized as involving individual inquiries which must be determined after the trial of the common issues: *Krishnan v. Jamieson Laboratories Inc*., 2021 BCSC 1396 at para. 95, citing *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098. I am also guided by other cases where the court recognized that limitations issues exist but have gone on to certify the class action: see e.g. *Godfrey SCC*; *Krishnan*, aff'd *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72; *McCorquodale v. RBC Global Asset Management Inc*., 2021 BCSC 144.

[250] Here, EA has not yet filed a pleading. Instead, it invokes limitations to bolster its general assertion that the individual inquiries in this proceeding overwhelm the

common issues. I disagree. The common issue regarding the facts, liability and remedies are “negligible” in the context of the broader action and the individual issues raised by EA. Clearly they predominate. The answers to the common issues are substantially important and would significantly advance the litigation for class members.

Whether a significant number of class members have a valid interest in controlling separate actions.

[251] There is no evidence to indicate any potential class members have expressed an interest in pursuing separate actions.

Whether the claims are subject to other proceedings.

[252] Mr. Sutherland’s counsel advises there is a Quebec proceeding that does not include BC residents as class members.

[253] Otherwise, there is no evidence of other court proceedings that overlap with the claims he seeks to certify under the *BPCPA*.

Whether other means of resolving the claims are less practical or less efficient.

[254] It is clear that individual litigation as a possible alternative to a class proceeding would be impractical and inefficient. As Mr. Sutherland notes, the high costs for individual litigants whose separate claims may very well be small and would be duplicative suggests the objectives of judicial economy and access to justice could not be fulfilled by this means. Further, there is the potential impact of losing access to s. 27(3) of the *CPA* which requires the court to choose the least expensive and most expeditious method of determining any individual issues that remain after resolution of the common issues.

Whether the administration of a class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[255] My view of this factor is the same, absent, as *Finkel* put it, another realistically available means of resolving the claims.

Section 4(1)(e) – Representative Plaintiff

[256] Section 4(1)(e) of the *CPA* requires the court to consider whether there is a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[257] A proposed representative need not be "typical" of the class nor the "best" possible representative: *Dutton* at para. 41.

[258] In addressing this requirement Mr. Sutherland deposes to understanding the major steps in a class action and his responsibility as a representative plaintiff to fairly and adequately represent the interests of the class, and not being aware of any conflict.

[259] Regarding this requirement, EA's arguments focused on the litigation plan contemplated in s. 4(1)(e)(ii).

Litigation Plan

[260] The purpose of a litigation plan is to provide a framework within which the case may proceed, and to demonstrate the representative plaintiff and class counsel understand the complexities of the case: *Jiang v. Vancouver City Savings Credit Union,* 2019 BCCA 149 at para. 57 [*Jiang* 2019]. The case law reflects a flexible approach to litigation plans at the certification stage. It is understood they are "something of a work in progress" and a need for amendments as the case proceeds is anticipated: *Jiang* 2019 at paras 53–61.

[261] Mr. Sutherland's amended litigation plan includes:

- ongoing judicial case management every six to eight weeks or as directed by the case management judge;
- 21-day (post certification) deadline for the delivery of EA's pleading;

- 21 and 35-day deadlines for the delivery of initial lists of documents and copies of those documents in electronic form with categories of EA's documents specified;
- responses to demands for additional documents under R. 7-1(10) and (11) be made within 14 days of receipt of a demand;
- the parties conferring on a means of providing access to and inspection of EA's computer code as it relates to loot boxes in the Affected Titles to permit expert analysis, and failing agreement a court application;
- execution of the standard protocol under the Electronic Evidence Practice Direction;
- 60-day deadline for a schedule for examination for discoveries to be set at a case management conference, with each defendant proposing at least three representatives, without prejudice to Mr. Sutherland's right to select an alternative representative or additional discovery from witnesses;
- completion of discoveries by 100 days before trial and outstanding requests made at discoveries answered no less than 75 days before;
- liberty to apply to the case management judge to amend the common issues after discovery;
- applications for non-party document production in this court or through letters rogatory if EA does not or cannot produce documents regarding class member transactions on third party platforms;
- provision for depositions of witnesses in the United States;
- requiring the case management judge to hear all interlocutory applications;
- expert reports will be subject to the Rules;
- liberty to apply to amend the litigation plan;
- the common issues trial proceeding on a date to be fixed in 2024 for 30 days or such other time as the court may determine;
- witness lists; trial briefs and trial management conference will be subject to the Rules;
- alternatively a summary trial or hybrid trial may be proposed.

[262] Regarding individual issues determination, the plan observes that if Mr. Sutherland is wholly unsuccessful on the common issues, the case will simply end. If any or all of the common issues are resolved in favour of the class, however, the plan proposes the parties convene to make arguments about the how to resolve

the remaining issues, specifying Mr. Sutherland intends to present a particular process. That process includes:

> (a) After determination of the common issues, the parties and the court will consider whether there are any issues remaining that may be determined as secondary common issues.
>
> (b) The Court shall appoint an assessor to determine any individual issues of liability that may remain after the common issues trial and assess the damages to which each claiming class member is entitled.
>
> (c) The claims process and the inquiry by the assessor shall be carried out in accordance with rules of procedure and proof as agreed by the parties or determined by the Court.
>
> (d) The assessor shall issue a report to the Court for each claim made and 30 days after the report filed, the Court shall order that the claim be determined as set out in the assessor's report unless another party files a challenge in accordance with the procedure as agreed by the parties or determined by the Court.
>
> (e) If challenges are made by any party to the assessor's reports, the Court shall hold one or more hearings to determine the challenges made and for each challenge made, shall either dismiss the challenge, revise the assessment made by the assessor, or direct that further inquiry and assessment be made.

[263] The plan does not address the *CPA*'s notice requirements. Mr. Sutherland suggests and EA does not disagree that the content and manner of notice be deferred until after certification, when the parameters of a certified claim are known to permit more detailed submissions.

[264] EA attacks the plan on other various grounds. Some if not most are rooted in assertions I have already rejected and do not intend to discuss again. Specific to the plan, EA asserts that the proposed timelines are wholly unworkable and unreasonable based on their departure from the *Rules* and the substantial unfairness they would impose on EA.

[265] I would characterize some of the timelines as unrealistic, including the initial deadline for EA's document production and the 60-day deadline for scheduling discoveries, if the plan requires that time to start running before the case management conference. Obviously, 2024 as the timeframe for a 30-day common issues trial is impossible.

[266] Assuming a 30-day trial could be scheduled in 2026 and working backwards, the other time lines are reasonable.

[267] Although not raised by EA, I would not endorse any schedule for case management conferences. They should only be arranged as directed by the case management judge. It must be appreciated that the assignment of a case management judge does not give class proceedings priority over other cases.

[268] EA's other suggestion that the plan does not address how individual issues will be dealt with is simply incorrect.

[269] EA proposed that if the other requirements for certification are met, the parties appear before the Court and address a revised, realistic plan. Mr. Sutherland indicated he was not opposed to the proposed plan not being incorporated into the certification order. While for the most part it offers a workable plan, and revisions to litigation plans are inevitable, in my view, the plan should be amended at this stage to include more realistic timelines and the appropriate use of case management conferences.

Conclusion

[270] I grant Mr. Sutherland's application to certify this proceeding as a class proceeding. The class definition is as described at para. 148. Mr. Sutherland is an appropriate representative plaintiff. Common issues 1 through 11 as set out in Schedule A are certified. The certification order will not include Mr. Sutherland's current proposed litigation plan. He will have 60 days or by a date agreed to by the parties, to amend the litigation plan to comply with my reasons. The parties have leave to schedule an appearance in the event of a dispute regarding those amendments.

[271] I am no longer seized.

"Fleming J."

SCHEDULE A: CERTIFIED COMMON ISSUES

Facts

1. During the period of January 1, 2008 to the date of certification (the "Class Period") did the Defendants, or some of them, offer Loot Boxes in their Digital Games? If so, in which games and during what time period(s)?

    a) If the answers to Question 1 are yes for one or more Digital Games, the relevant games are the "Affected Titles".

2. Did the Defendants disclose the odds of winning in their Loot Boxes in the Affected Titles?

    a) If so, how and in which Affected Titles during what time period(s)?

    b) If not, in which Affected Titles and during what time period(s)?

3. Did the Defendants make available high-value virtual items that affect gameplay exclusively or primarily from Loot Boxes in the Affected Titles, thereby encouraging players to obtain Loot Boxes?

    a) If so, in which Affected Titles during what time period(s)?

4. Did the defendants set the probabilities of obtaining rare and/or high-value items through Loot Boxes in the Affected Titles so low as to make them virtually unattainable without multiple, repeated attempts to obtain those items from Loot Boxes?

    a) If so, in which Affected Titles during what time period(s)?

Breaches of the *BPCPA*

5. Based on the answers to common issues 2, 3 and/or 4, did the Defendants engage in deceptive acts or practices contrary to the *BPCPA*, ss. 4–5?

6. Based on the answers to common issues 2, 3 and/or 4, did the Defendants engage in unconscionable acts or practices contrary to the *BPCPA*, ss. 8–9?

Relief

7. If the answers to common issues 5 and/or 6 are yes, are Class Members entitled to a declaration under the *BPCPA*, s. 172(1)(a) that the Defendants have contravened the *BPCPA*, and if so on what terms?

8. If the answers to common issues 5 and/or 6 are yes, are Class members entitled to restoration of the funds spent on Loot Boxes in the Affected Titles under the *BPCPA*, s. 172(3)(a)? If so, can an aggregate monetary award be made for the benefit of all Class Members

pursuant to s. 29 of the *Class Proceedings Act*? If so, what is the amount of the aggregate monetary award?

8.1. Does *BPCPA* s. 172(3)(a) require a consumer to make counter-restitution or set-off of any benefit received before obtaining restoration?

8.2. If the answer to the preceding question is yes, can counter-restitution be determined on a class-wide basis?

9. If the answers to common issues 5 and/or 6 are yes, should the Court order an injunction under s. 172(1)(b) of the *BPCPA* restraining EA from engaging or attempting to engage in those deceptive and/or unconscionable acts or practices?

Interest and Aggregate Damages

10. What is the liability, if any, of the Defendants, for court-ordered interest?

11. What is the appropriate distribution of any aggregate damages award to the Class and should the Defendants pay for the cost of that distribution?