

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Barroqueiro v. Qualcomm Incorporated*,
2023 BCSC 1662

Date: 20230925
Docket: S1710984
Registry: Vancouver

Between:

David Barroqueiro, Ryan Kett and Allison Oliver

Plaintiffs

And

**Qualcomm Incorporated, Qualcomm Technologies, Inc., Qualcomm CDMA
Technologies Asia Pacific PTE Limited, and Qualcomm Canada, Incorporated**

Defendants

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

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OVERVIEW

[1] These reasons address the plaintiffs’ application to certify this matter as a class proceeding and the defendants’ application for summary judgment.

[2] For over thirty years, the defendants have been in the business of developing, implementing and licensing cellular technology and modem chips, which allow cellular devices such as smartphones and tablets to connect to the internet. The plaintiffs seek a certification order on the basis that the defendants’ alleged unlawful and anticompetitive business practices have harmed Canadian consumers by inflating the price of cellular devices. The defendants argue that their impugned business practices are pro-competitive and the plaintiffs’ claims should be dismissed, as these claims are without merit and have no chance of success.

Overview of the Certification Application

[3] The plaintiffs named in the action claim to have purchased cellular devices containing modem chips. Modem chips are the semi-conductors that enable cellular devices such as smartphones to connect to cellular communication networks and transmit voice calls and data. Every cellular-enabled device contains a modem chip, which is only interoperable with the cellular network to which the modem chip connects if it meets certain cellular communication standards. These standards are set via agreements reached by industry participants, including the defendants.

[4] The defendants comprise Qualcomm Incorporated and its wholly owned subsidiaries Qualcomm Technologies, Inc., Qualcomm CDMA Technologies Asia Pacific PTE Limited and Qualcomm Canada, Incorporated. The defendants are separate corporate entities, and each denies acting as a joint enterprise or as agents of the other. For ease of reference, however, and without making a finding as to whether the entities act independently of each other, the defendants are referred to collectively as “the defendants” or “Qualcomm,” except where the context requires identification of a particular Qualcomm entity.

[5] Qualcomm has two main areas of business: licensing its patents; and developing and supplying integrated circuits, such as modem chips, to manufacturers. Through cooperation with standard-setting organizations, many of Qualcomm's patents have become part of the cellular communication standards used throughout the global telecommunications industry (the "standard essential patents" or "SEPs"). In exchange for requiring industry participants to use patented technologies, standard-setting processes impose obligations on SEP holders like Qualcomm to prevent them from abusing their market power.

[6] The plaintiffs allege that since at least January 1, 2007, and continuing to present (the "class period"), Qualcomm has entered into anticompetitive agreements with competitors and cellular device manufacturers and engaged in anticompetitive, unreasonable, unfair, discriminatory, bad faith, and unlawful conduct in the licensing of its SEPs and the sale and distribution of its modem chips.

[7] The plaintiffs submit that Qualcomm's conduct has caused cellular device manufacturers to pay wrongfully inflated modem chip prices and SEP royalties. This, in turn, causes indirect losses to end purchasers of cellular devices, who must pay a higher price for the finished product. The plaintiffs' claims are based upon breaches of ss. 45 (as it existed prior to March 11, 2010 and as it exists currently), 46, and 61 (as it existed prior to March 11, 2009) of the *Competition Act*, R.S.C. 1985, c. C-34; civil conspiracy (both predominant purpose and unlawful means conspiracies); unlawful interference with economic relations (the "unlawful means" tort); and unjust enrichment.

[8] Through the proposed class action, the plaintiffs seek to obtain redress for the harms imposed on class members as a result of Qualcomm's conduct. The plaintiffs claim that this proceeding satisfies the low threshold for certification under s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA].

[9] The defendants submit that the plaintiffs have failed to meet the requirements to certify this proceeding under s. 4(1) of the CPA. They argue that the alleged anticompetitive conduct is not civilly actionable in Canada, the licensing and other

agreements they entered into are not conspiracies, and, in any event, none of them have acted in an anticompetitive manner. The defendants note that the plaintiffs bear the onus of satisfying all requirements for certification, including establishing some basis in fact, on admissible evidence, for each of the criteria set out in ss. 4(1)(b) to (e). They submit that the plaintiffs have failed to meet this burden.

Overview of the Summary Judgment Application

[10] In their application for summary judgment, the defendants seek an order dismissing the plaintiffs' action pursuant to Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The defendants submit that there is no legal basis for the plaintiffs' claims that the defendants breached the *Competition Act*, and there is no genuine issue for trial respecting: (a) Qualcomm's alleged unilateral anticompetitive conduct, (b) the tort of civil conspiracy, (c) the unlawful means tort, and (d) unjust enrichment. The defendants point out that Qualcomm does not sell products directly to consumers, and as such they are not in a position to dictate or even influence the prices set by third party manufacturers and distributors.

[11] The defendants submit that, if anything, the pleaded material facts amount to allegations that are only civilly reviewable by the Competition Bureau and cannot ground a claim for common law damages. As the plaintiffs' case is doomed to fail, it should be dismissed under Rule 9-6.

Summary of Decision

[12] For the reasons that follow, I allow the plaintiffs' certification application on the terms specified below. I dismiss the defendants' application for summary judgment.

BACKGROUND

The Parties

a) *The Plaintiffs*

[13] Each of the plaintiffs allegedly purchased cellular devices that contained modem chips. There are three named plaintiffs, but only Allison Oliver is put forward

as a representative plaintiff. She seeks to certify a national class (excluding Quebec) defined as follows (the “class” or “class members”):

[A]ll persons in Canada, excluding Quebec, that purchased and/or paid for some or all of the purchase price of a Cellular Device during the Class Period, including persons that had a contract for wireless services for at least a portion of the Class Period that included the purchase or provision of a Cellular Device.

For clarity, in acknowledgment of the multiple named plaintiffs and notwithstanding that there is only one proposed representative plaintiff, I will refer throughout these reasons to the “plaintiffs.”

[14] As the defendants point out, the alleged supra-competitive prices and terms were imposed on rival chipmakers and original equipment manufacturers of cellular devices (“OEMs”) such as Apple or Samsung, while the class the plaintiffs seek to certify comprises only consumers (i.e., the end users who purchased cellular devices during the class period), with whom Qualcomm has no direct commercial relationship.

b) *The Defendants*

[15] Qualcomm Incorporated is a publicly traded company headquartered in San Diego that was founded in 1985. Qualcomm Incorporated claims to be a leader in the invention, development and commercialization of foundational technologies for the wireless industry (including cellular devices and other wireless products).

[16] During the class period, Qualcomm Incorporated conducted business primarily through two entities: (1) Qualcomm Technology Licensing (“QTL”), which granted licenses to third parties to use portions of Qualcomm’s intellectual property portfolio; and (2) Qualcomm CDMA Technologies (“QCT”), which developed and supplied integrated circuits, including cellular modem chips, and system software solutions that support products that implement 3G/4G/5G cellular standards and other technologies. Since 2012, QCT has been a business unit of Qualcomm Technologies, Inc. (“QTI”), which in turn is a subsidiary of Qualcomm Incorporated.

[17] Qualcomm Incorporated is an innovation company that holds over 140,000 patents and patent applications. Its innovations are used by other members of the cellular industry when: (i) global cellular standard-setting bodies incorporate them as part of technical specifications developed and approved by industry participants; and (ii) OEMs or competing modem chipmakers license them for use in products that implement cellular communication standards.

[18] The licensing of Qualcomm's patents (including the setting of license fees and royalty rates) is conducted in the United States through QTL. There are no QTL employees in Canada. The defendants submit that QTI and QCT have no role or involvement in licensing or setting royalty rates for Qualcomm's patents.

[19] Qualcomm CDMA Technologies Asia-Pacific Pte. Ltd. ("QCTAP") is an indirect subsidiary of Qualcomm Incorporated. QCTAP sells and ships Qualcomm's chips, and the plaintiffs allege it is responsible for entering into agreements with OEMs. The defendants submit that QCTAP has no role or involvement in licensing or setting royalty rates for Qualcomm's patents, or in any standard-setting process.

[20] Qualcomm Canada, Inc., now called Qualcomm Canada ULC ("Qualcomm Canada"), is incorporated pursuant to the laws of British Columbia. It is Qualcomm's domestic Canadian subsidiary for tax and legal purposes and performs some engineering development. Like QCTAP, the defendants say that Qualcomm Canada has no role or involvement in selling chips, setting royalty rates for Qualcomm's patents, nor in the standard-setting process. The plaintiffs allege that Qualcomm Canada assisted QTL and QTI in gaining access to Canadian companies and setting up meetings with those companies to negotiate licensing and chip sales. The plaintiffs claim that, in doing so, Qualcomm Canada was implementing "directives" or "instructions" from its parent company.

[21] The defendants claim that their contributions to the wireless industry have been procompetitive, not anticompetitive. They say their success has resulted from massive, high-risk investments in research and development, the quality and functionality of their products, and their strategic decisions. They claim that, rather

than suffering harm, end users of cellular devices have benefitted from the widespread adoption of Qualcomm's innovations, which have contributed to improved functionality, increased data speeds, and reductions in cost.

Qualcomm's Customers and Competitors

[22] Qualcomm's principal customers are OEMs, to whom it both licenses its patents and sells cellular modem chips to use in manufacturing cellular devices. Unlike OEMs, Qualcomm does not manufacture or sell cellular devices.

[23] During the proposed class period, Qualcomm's modem chips have competed against modem chips designed and sold by various competitors, including Intel, Broadcom, Ericsson, MediaTek, Nvidia (Icera), Samsung, Texas Instruments, VIA, and UNISOC (formally known as Spreadtrum Communications). Qualcomm also faces competition from products internally developed by its customers, including Huawei (HiSilicon) and Samsung.

[24] While the plaintiffs allege that Qualcomm's conduct and business practices resulted in end consumers paying higher prices for cellular devices, the defendants submit that they have no role in setting or influencing the end price of cell phones.

[25] Qualcomm submits that it does not enter into agreements with its customers or competitors regarding the prices at which they sell their products. It claims that the prices consumers pay are set by the manufactures and distributors who sell such devices. They are not involved in setting the prices at which competing chipmakers sell their products to their customers and have never required or encouraged OEMs to raise their prices or prohibited or discouraged them from reducing their prices (through their pricing policies or otherwise). The defendants submit that competing chipmakers have the sole discretion to sell their products at whatever prices, in whatever quantities, and to whichever customers they choose.

[26] The plaintiffs submit that supra-competitive prices charged to cellular device manufacturers (OEMs) or competing chipmakers will necessarily be passed on to end consumers to some extent. According to the plaintiffs, economic principles

dictate that as the price of necessary inputs increase, chipmakers and OEMs will increase the price of their products.

Cellular Communication Standards and Qualcomm’s Contributions There to

[27] The parties largely agree on the history and general functioning of cellular communication standards. I accept their evidence on this point, as summarized below.

[28] Cellular devices communicate wirelessly on cellular networks by connecting to cell towers or base stations. Users may take for granted that their cellular device can connect wirelessly to their cellular network and the Internet, but this interoperability does not happen by chance. Each component of a cellular network and each component of a cellular device using that network must “speak the same language,” regardless of which company made each component. In order to ensure the interoperability of cellular networks and mobile devices, telecommunications industry participants agree to uniform protocols.

[29] These uniform protocols are called “air interfaces,” and are specified in cellular communication standards developed by Standards Development Organizations (“SDOs”), also referred to as standard-setting organizations or SSOs. A cellular communication standard contains, among other aspects, protocols governing how user devices (like cell phones) and network devices in a cellular system encode, transmit, receive, and decode data and voice over a cellular network.

[30] SDOs are global collaborations of hundreds of industry participants, including modem chip suppliers, handset OEMs, infrastructure companies, network carriers (such as Verizon, AT&T and Bell Canada), and certain government entities. Examples of SDOs include the European Telecommunications Standards Institute, the China Communications Standards Association, and the Telecommunications Industry Association.

[31] The standard-setting process undertaken by these organizations necessarily involves adopting certain patented technology to the exclusion of other technologies. When a standardized technology cannot be implemented without infringing a patent, that patent is essential to the standard and is known as a standard essential patent (“SEP”).

[32] Cellular communication standards evolve over time. Historically, a new generation of cellular standards has been adopted approximately every 10 years. To date, there are five “generations” of cellular standards:

1. 1G (first generation)—analog standards that support basic transmissions of voice calls, introduced in the 1980s;
2. 2G (second generation)—the first standards to support the digital transmissions of voice calls and internet connectivity, introduced in the 1990s;
3. 3G (third generation)—standards that support wireless internet connectivity at higher data transmission speeds than the 2G standard, introduced in the early 2000s;
4. 4G (fourth generation, including LTE)—standards that support wireless broadband at substantially higher data transmission speeds than the 3G standard, introduced in 2009/2010; and
5. 5G (fifth generation)—the latest generation of cellular standards that provides for significantly faster download speeds, higher capacity, low latency (time required for a signal to transfer over a network), and the Internet-of-Things.

[33] In basic terms, “analog” systems transmit voice similar to the way FM radio is transmitted; “digital” systems convert the voice (and later data) into digital representations and then transmit these representations over radio frequencies. Among other advantages, digital systems allow for:

- a substantially greater number of simultaneous users,

- secure encryption,
- better error correction capabilities,
- reduced interference,
- easier hand-off from cell tower to cell tower as a user moves, and
- greater handling capacity of large quantities of data.

[34] While the parties agree that Qualcomm’s SEPs have been incorporated into cellular communication standards set by SDOs for decades, they disagree as to the competitive implications of the standard-setting process and Qualcomm’s role in it.

[35] The plaintiffs submit that the standard-setting process carries with it anticompetitive risk. They agree that standardization can promote competition and efficiency in cellular communication by ensuring interoperability. However, they claim there is a trade-off. Participants must use certain technologies in order to comply with the standard. They must do so regardless of whether a superior alternative exists or compatibility with the network will be lost. As a result, the adoption of a particular standard results in particular technologies being “locked in” with the standard.

[36] Participants in the standard-setting process, like Qualcomm, often hold patents to the technology they seek to have incorporated into a proposed cellular communication standard. The plaintiffs submit there is therefore a clear economic incentive for participants to advocate for the inclusion of their patented technologies in the standard. Because the standard requires the use of these SEPs, SEP holders can interrupt the implementation of a standard by refusing to license their SEPs or imposing unreasonable licensing terms. As such, SEPs confer substantial market power on their holders and create anticompetitive risks if there are not appropriate safeguards in place. In an attempt to mitigate these concerns, SDOs require participants to declare their SEPs and commit to license their SEPs to other industry participants on fair, reasonable and non-discriminatory (“FRAND”) terms. The

plaintiffs assert that Qualcomm made FRAND undertakings it did not intend to comply with. They submit that Qualcomm breached its FRAND undertakings by refusing to license its SEPs to competing modem chip makers and imposing supra-competitive royalty rates on OEMs who used modem chips containing their SEP technology.

[37] The plaintiffs further allege that Qualcomm entered into unlawful agreements outside of the formal standard-setting process to ensure certain cellular communication standards became industry leaders. In the mid-2000s, development was commenced on three competing 4G standards: UMB, WiMAX and LTE. Several major companies promoted WiMAX. This posed a direct competitive threat to Qualcomm, as Qualcomm had a much higher percentage of SEPs in the LTE standard. The plaintiffs allege that, in a 2007 contract with Apple, Qualcomm granted Apple partial relief from its SEP royalties in exchange for Apple's agreement not to market wireless devices that were WiMAX compatible. Given Apple's uniquely important position in the cellular device market, Apple's agreement to renounce WiMAX helped ensure the widespread adoption of LTE and assisted Qualcomm's acquisition of market power in the premium-LTE market by "killing" or diminishing the threat of a competing standard.

[38] Conversely, the defendants submit that the adoption of cellular communication standards involves competition and choice, both among different contributors' technologies during the standardization process itself and among competing standards. They say that standardization can provide many benefits, including, among other things, fostering improvements in technology (instead of "locking in" technology, as the plaintiffs suggest), promoting interoperability among wireless devices and networks, and incentivizing investments in infrastructure.

[39] The parties also disagree on whether the standard-setting process is "company driven", which the plaintiffs say it is. The defendants reject the plaintiffs' assertion that the decision-making process is dominated by a few industry "big boys"; rather, it follows the detailed rules and procedures of each SDO and reflects

the consensus of all participants. Qualcomm says that it contributes its innovations to SDOs and collaborates with other members of SDOs to develop cellular communication standards in accordance with the rules, regulations, and processes established by those organizations.

[40] The defendants claim that the prevailing cellular standards (2G, 3G, 4G, and 5G) would not exist in their current advanced form were it not for Qualcomm's technological innovations, which have been incorporated into cellular standards over the last 30-plus years.

[41] Qualcomm submits that it employed inventiveness, determination and substantial financial investment to achieve the standardization of important technologies, often in the face of significant industry resistance and technological challenges. Aside from its participation in SDOs, Qualcomm submits that it did not enter into any agreements with industry participants to achieve the standardization of its technologies.

Qualcomm's Licensing Business

[42] Qualcomm's evidence is that it protects and disseminates its important technological innovations through its patents. It is one of many companies that has disclosed patents as potentially essential for technologies included in cellular industry standards, and which licenses its technology to third parties. Other companies, including Samsung, Huawei, Nokia, InterDigital and Ericsson, also license their patents and contribute technologies to cellular standards.

[43] Qualcomm has an extensive licensing program to provide access to its innovations. It says it grants licenses to OEMs whose products practice one or more of Qualcomm's patented technologies, including Apple. Importantly, it grants licenses at the device level to OEMs instead of at the component level to chipmakers, the latter of which could prevent rival chipmakers from having access to or using Qualcomm's SEPs (although this is a course of disagreement between the parties).

[44] The plaintiffs argue that Qualcomm’s policy amounts to a “no license, no chips” policy, whereby Qualcomm refuses to supply modem chips to an OEM unless the OEM agrees to license Qualcomm’s modem chip technology at supra-competitive royalty rates. Under this policy, Qualcomm refuses to license its SEPs to competing chipmakers; instead, it allows competing chipmakers to use its technologies without being sued on the condition that they only sell to Qualcomm-licensed OEMs. This is known as a “non-assert” agreement rather than a licensing agreement. These agreements force OEMs to license SEPs directly from Qualcomm, regardless of which company supplies their modem chips.

[45] The defendants argue their policy amounts to a “no license, no problem” policy, as Qualcomm does not enforce its patents against rival chipmakers and does not prevent chipmakers from using its SEPs. Qualcomm calls this policy “chip supplier neutral” because the OEM pays the same per-unit licensing royalty to Qualcomm for its licensing rights regardless of whether Qualcomm’s or another supplier’s chips are used. Qualcomm says this is consistent with the prevailing practice in the industry.

[46] Qualcomm submits that because it does not compete in the cellular device manufacturing business and instead earns royalty fees from its patents on a per-device basis, its commercial interest is in having as many handset manufacturers licensing its technology as possible and selling as many units as they can. Far from being anticompetitive, Qualcomm argues that this increases competition in the cellular device market to the net benefit of consumers. Qualcomm points out that in real terms, the prices of cell phones and cellular data have fallen over time while the variety, capability, and utility of cellphone features (supported in large measure by Qualcomm’s technologies) have increased exponentially.

[47] The plaintiffs submit that Qualcomm’s device-level licensing policy puts rival modem chip makers at a competitive disadvantage and at risk of patent infringement litigation. The policy requires all OEMs to obtain a license from Qualcomm to use any modem chip that complies with industry standards, which in turn allows

Qualcomm to control the supply of modem chips in the market and impose supra-competitive, non-FRAND licensing terms. For instance, the plaintiffs allege that Qualcomm has entered into *de facto* exclusive dealing agreements with OEMs by offering discounts on royalty fees in exchange for their agreement to purchase a certain percentage of modem chips from Qualcomm. The plaintiffs submit that, if this mirrors the usual industry practice, it is only because Qualcomm's competitors have followed its lead.

Qualcomm's Modem Chip Business

[48] The plaintiffs allege that Qualcomm is and has been the largest supplier of modem chips globally. They say that Qualcomm held from 80 to 96 percent of the 2G and 3G modem chip market during the class period. They further allege that Qualcomm is the largest manufacturer of premium LTE modem chips and has secured an exclusive agreement to supply 5G-capable modem chips to Apple. As a consequence of the licensing practices explained above, the plaintiffs allege that it is impractical for OEMs to obtain their standard-compliant modem chips from suppliers other than Qualcomm; by over-charging on royalty fees, Qualcomm can undercut its competitors' prices for modem chips.

The U.S. Proceedings

[49] A 2017 complaint filed by the U.S. Federal Trade Commission (the "FTC") is based on the same licensing and modem chip sales practices alleged in the plaintiffs' action. In the U.S., allegations of abuse of dominance and unilateral anticompetitive conduct are actionable under the *Sherman Act*, 15 U.S.C.

[50] In 2018, the FTC sought partial summary judgment in the action, and the District Court granted the FTC's motion: see *FTC v. Qualcomm*, 2018 U.S. Dist. LEXIS 190051 (N.D. Cal. Nov. 6, 2018) [*Order Granting Partial Summary Judgment*].

[51] In 2019, the District Court ruled further in favour of the FTC on the three antitrust claims it presented and issued an injunction against Qualcomm: see *FTC v. Qualcomm*, 411 F. Supp. 3d 658 (N.D. Cal. 2019) [*FTC District Court Decision*].

[52] However, the United States Court of Appeals for the Ninth Circuit allowed Qualcomm's appeal, reversed the *FTC District Court Decision*, and vacated the injunction issued by the District Court as well as the *Order Granting Partial Summary Judgment*: see *FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020) [*FTC Appeal Decision*]. The Ninth Circuit Court framed the case, at p. 9, as asking it “to draw the line between *anticompetitive* behavior, which is illegal under federal antitrust law, and *hypercompetitive* behavior, which is not” [emphasis in original]. It held, *inter alia*, that the same patent licensing and modem chip sales practices as are identified in the plaintiffs' claim were not anticompetitive and did not violate the *Sherman Act*. The Ninth Circuit Court further found that Qualcomm's agreements with Apple did not substantially foreclose competition. The summary of the decision states at p. 3:

The panel framed the issues to focus on the impact, if any, of Qualcomm's practices in the area of effective competition: the markets for CDMA and premium LTE [modem] chips.

The panel began by examining the district court's conclusion that Qualcomm had an antitrust duty to license its SEPs to its direct competitors in the [modem] chip markets pursuant to the exception outlined in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The panel held that none of the required elements for the *Aspen Skiing* exception were present, and the district court erred in holding that Qualcomm was under an antitrust duty to license rival chip manufacturers. The panel held that Qualcomm's OEM-level licensing policy, however novel, was not an anticompetitive violation of the Sherman Act.

The panel rejected the FTC's contention that even though Qualcomm was not subject to an antitrust duty to deal under *Aspen Skiing*, Qualcomm nevertheless engaged in anticompetitive conduct in violation of § 2 of the Sherman Act. The panel held that the FTC did not satisfactorily explain how Qualcomm's alleged breach of its contractual commitment itself impaired the opportunities of rivals. Because the FTC did not meet its initial burden under the rule of reason framework, the panel was less critical of Qualcomm's procompetitive justifications for its OEM-level licensing policy—which, in any case, appeared to be reasonable and consistent with current industry practice. The panel concluded that to the extent Qualcomm breached any of its FRAND commitments, the remedy for such a breach was in contract or tort law.

The panel next addressed the district court's primary theory of anticompetitive harm: Qualcomm's imposition of an "anticompetitive surcharge" on rival chip suppliers via its licensing royalty rates. The panel held that Qualcomm's patent-licensing royalties and "no license, no chips" policy did not impose an anticompetitive surcharge on rivals' modem chip sales. Instead, these aspects of Qualcomm's business model were "chip-supplier neutral" and did not undermine competition in the relevant markets. The panel held further that Qualcomm's 2011 and 2013 agreements with Apple have not had the actual or practical effect of substantially foreclosing competition in the CDMA modem chip market. Also, because these agreements were terminated years ago by Apple itself, there was nothing to be enjoined.

[Emphasis added.]

[53] The plaintiffs' experts opine that the decision of the Ninth Circuit Court was controversial and an antitrust outlier under U.S. law. However, the defendants point out that the FTC's subsequent petition for *en banc* review was denied, as none of the 28 judges in the Ninth Circuit indicated that further review was warranted. The FTC did not appeal further to the Supreme Court of the United States.

[54] The parties strongly diverge as to whether the Ninth Circuit Court's decision under the *Sherman Act* has implications for the Canadian approach to competition law under the *Competition Act*. The defendants suggest the two approaches are similar; the plaintiffs disagree.

[55] The plaintiffs' experts opine that, since the Ninth Circuit Court did not disagree with the District Court's factual findings and left open possible relief for breach of contract or tort to the extent that Qualcomm breached its FRAND commitments, the *FTC District Court Decision* and *Order Granting Summary Judgment* may be cited as persuasive authority in this proceeding. The defendant's expert says reliance on these District Court decisions is erroneous, as it is well established that factual findings have no precedential value and no preclusive effect when the decision in which those findings were made has been reversed.

[56] In 2018, a separate consumer class action was launched and certified against Qualcomm in the U.S. In January 2023, a District Court judge allowed Qualcomm's motion to dismiss most of the claims in the consumer class action, including the allegation that Qualcomm unlawfully tied together the sale of its chips and patent

licensing, but declined to dismiss the claim that Qualcomm violated California antitrust law through "exclusive dealing" relationships with OEMs to maintain its position in the modem chip market: *Re Qualcomm Antitrust Litigation* (6 January 2023), Docket No. 895 (N.D. Cal.).

Other Regulatory Proceedings Against Qualcomm

[57] The plaintiffs refer to other regulatory proceedings against Qualcomm in South Korea, Taiwan, China and the European Union. Each of these proceedings was based on allegations that Qualcomm abused its dominant position and/or engaged in anticompetitive unilateral conduct, neither of which are civilly actionable in Canada. None of the proceedings involved allegations of conspiracy or findings that the defendants conspired among themselves or with others.

[58] The plaintiffs also reference the existence of ongoing consumer class action litigation against Qualcomm in the U.K. and Quebec.

[59] A class action has been authorized in Quebec, but it is based on alleged unilateral conduct that would be a violation of the *Civil Code of Quebec*, rather than claims of breach of the *Competition Act* or civil conspiracy: see *Tenzer c. Qualcomm Incorporated* (30 April 2019), Court File No. 500-06-000896-171 (Que. S.C.).

[60] In May 2022, the U.K. Competition Appeal Tribunal certified a collective proceeding against Qualcomm pursuant to the U.K. *Competition Act 1998* (c. 41). The action alleges that Qualcomm abused its dominant position in respect of its SEP licensing practices, and in particular, the royalties Qualcomm charged OEMs to license its modem chip patents: *Consumers' Association v. Qualcomm Incorporated*, [2022] CAT 20. As noted at para. 3:

[t]he essence of the claim is that Qualcomm has leveraged its dominant position in the supply of LTE chipsets to smartphone manufacturers, into the licensing of its patents, so as to charge inflated royalties for the use of Qualcomm's patents. In turn, it is said, those inflated royalties are passed on to the final consumers of smartphones. ...

[61] The plaintiffs note that the tribunal largely followed leading Canadian authorities on the certification of competition law cases in its decision to grant certification. The case is ongoing.

THE PROPOSED CLASS ACTION

The Further Amended Notice of Civil Claim

[62] The plaintiffs filed their notice of civil claim on November 27, 2017. They filed an amended notice of civil claim on January 28, 2019 and a further amended notice of civil claim on March 5, 2020 (the “FANOCC”). The FANOCC provides that the plaintiffs seek to obtain redress against Qualcomm for: its anticompetitive agreements in the modem chipset market, in combination with other parties; and its illegal and/or anticompetitive use of its SEPs. The plaintiffs allege that Qualcomm’s conduct artificially inflated royalties for SEPs and the all-in prices for modem chips, causing some or all of this inflated amount to be passed on to class members in the form of artificially increased prices for cellular devices.

[63] As noted in the Overview, the FANOCC makes four categories of claims based on:

- (a) breaches of ss. 45 (both former and current), 46 and 61 (as it existed prior to March 11, 2009) of the *Competition Act*;
- (b) civil conspiracy (both predominant purpose and unlawful means);
- (c) unlawful interference with economic relations (the “unlawful means” tort);
and
- (d) unjust enrichment.

[64] Although the FANOCC refers to a claim under *The Statute of Monopolies*, R.S.O. 1897, c. 323 and the “*U.K. Monopolies Act*”, the plaintiffs advised during argument that they are no longer pursuing a claim for monopoly. I will not consider this issue further.

[65] The plaintiffs' pleadings allege that Qualcomm breached its obligations made to SDOs during the standard-setting process to license its SEPs on FRAND terms. The FRAND allegations are components of the plaintiffs' conspiracy and "unlawful means" tort claims. Qualcomm strongly denies such allegations, and points out that, in any case, FRAND obligations are owed to the SDOs, not the putative class members.

[66] The plaintiffs' allegations concern conduct that began over a decade before the plaintiffs commenced this action in 2017.

General Positions of the Parties

[67] The thrust of the plaintiffs' claim is that Qualcomm abused its alleged dominant position in the modem chip market to charge supra-competitive prices or otherwise impose unfair terms when selling its modem chips and licensing its SEPs.

[68] The defendants argue that the admissible evidence before this Court reveals that the plaintiffs' conspiracy claims (and economic torts that require "unlawful means") are merely bald assertions that lack any air of reality and are prima facie nonsensical. The defendants also allege that significant portions of the plaintiffs' claims are statute-barred by the applicable limitation periods under the *Competition Act* and the *Limitation Act*, S.B.C. 2012, c. 13.

[69] The defendants argue that admissible evidence demonstrates that they worked diligently and collaboratively with a broad array of industry participants—in accordance with the established rules, regulations, and processes governing the various global SDOs—to have their technology accepted and incorporated into cellular communication standards. Qualcomm says its evidence demonstrates that it never entered into any improper—let alone unlawful—agreements with its competitors or other industry participants.

[70] In any event, the defendants argue that the unilateral business practices the plaintiffs allege are anticompetitive are not civilly actionable in Canada. The defendants' position is that, at most, the plaintiffs' claims could amount to an

allegation that Qualcomm abused its dominant position or otherwise engaged in conduct that is reviewable under the *Competition Act*, such as exclusive dealing. These practices are addressed in ss. 78–79 (abuse of dominance) and s. 77 (exclusive dealing) in Part VII of the act, and are accordingly non-criminal reviewable trade practices. Breaches of these sections can be reviewed by the Competition Bureau (and be the subject of an application to the Competition Tribunal) but cannot be the subject of a civil action pursuant to section 36; nor has the plaintiff pleaded that they constitute the “unlawful means” for any tort.

[71] The defendants say their evidence refutes the plaintiffs’ allegations of anticompetitive unilateral conduct. In particular, Qualcomm says it does not require licensees to take a license for all of Qualcomm’s patents. Qualcomm submits that its business practices are procompetitive, such as:

- (a) granting licenses to OEMs whose products practice one or more of Qualcomm’s patented technologies;
- (b) charging for the use of its patented innovations by OEMs through device-level licensing (a practice not unique to Qualcomm), instead of licensing at the component level (and in any event, this does not prevent any component manufacturers from having access to or using Qualcomm’s cellular SEPs, as Qualcomm enforces its patents at the OEM level); and
- (c) not requiring Apple or any other customers to exclusively use its modem chips.

[72] For their part, the plaintiffs argue that their evidence and pleadings are sufficient to support claims in civil conspiracy, unjust enrichment, the unlawful means tort, and conspiracy or price maintenance under sections 45 (former and current), 46 and 61 (as it existed prior to March 11, 2009) of the *Competition Act*, all of which are or were in Part VI and are thus civilly actionable under s. 36(1)(a). As such, they submit that the proposed action ought to be certified as a class action, that

certification would further the objectives of the *CPA*, and that to dismiss their claims would undermine the interests of justice.

The Plaintiffs' Evidence

[73] The plaintiffs have filed one affidavit from the proposed representative plaintiff, Allison Oliver, appended to which are receipts from cell phones she acquired through her phone company. They have also filed various affidavits from paralegals or law clerks at class counsel's law firms, appended to which are reams of documents, primarily from regulatory investigations and proceedings in foreign jurisdictions.

[74] The plaintiffs have also filed a total of six expert reports from four individuals: Dr. Janet Netz, Dr. Roya Ghafele, Professor Jose Contreras, and Professor Harry First.

[75] Dr. Netz is an economics consultant. She was retained to provide an opinion regarding the commonality of impact and damages arising from Qualcomm's alleged misconduct. In her report, Dr. Netz concludes that common methods and evidence are available to assess whether class members suffered damages or harm as a result of Qualcomm's alleged misconduct. Specifically, she opines that there are common methods and evidence available to calculate: any overcharge resulting from the alleged misconduct, whether and to what extent that overcharge was passed through to downstream purchasers, and the amount of aggregate damages suffered by class members.

[76] Dr. Ghafele is the Managing Director of OxFirst Ltd., a firm of economics experts affiliated with the University of Oxford who focus on intellectual property ("IP") valuation, IP management, and the economic assessment of IP and competition law. The plaintiffs asked Dr. Ghafele to determine whether a class-wide method exists for determining the appropriate FRAND market rate for Qualcomm's SEPs. In her report, Dr. Ghafele concludes that there are widely accepted methods that can be applied on a class-wide basis to determine the FRAND royalty rate for Qualcomm's SEPs, and that the data necessary for this analysis is available. Such

methods include the “comparable license approach”, which would determine a FRAND royalty rate with reference to similarly situated licensing transactions, and the “top down approach”, which would split the cumulative royalty rate among all SEPs deemed essential to a standard, effectively apportioning the FRAND royalty rate for the specific set of SEPs belonging to Qualcomm in relation to their contribution to the standard.

[77] Professor Contreras is licensed to practice law in the U.S. and is a faculty member at the S.J. Quinney College of Law at the University of Utah. Professor Contreras was retained to provide an opinion on, *inter alia*, whether Qualcomm’s licensing practices accord with FRAND and industry practice, and the impact of the *FTC Appeal Decision* on the significance of the findings contained in the *FTC District Court Decision* and *Order Granting Partial Summary Judgment*. Professor Contreras opines in his first affidavit that, under U.S. law, the facts and legal reasoning contained in the *Order Granting Partial Summary Judgment*, which was vacated as moot by the Ninth Circuit, remain available and may be cited as persuasive authority in other proceedings. Professor Contreras also concludes that Qualcomm’s licensing practices may have violated its FRAND commitments.

[78] Professor First is a professor at the New York University School of Law and an expert on U.S. antitrust law. He was asked to provide an opinion on various matters with respect to the *FTC Appeal Decision*. He opines, in his first affidavit, that the Ninth Circuit Court’s *FTC Appeal Decision* is an antitrust outlier compared to the decisions reached in other Circuits in the U.S.

[79] Both Professor First and Professor Contreras filed second affidavits wherein they disclosed that they were signatories of an amicus brief in support of the request for an *en banc* rehearing of the Ninth Circuit Court’s *FTC Appeal Decision*.

Admissibility Challenges to the Plaintiffs’ Evidence

[80] The defendants submit that there are significant admissibility issues with respect to the plaintiffs’ expert reports and the exhibits attached to the paralegal/law clerk affidavits. They claim that some of the plaintiffs’ affidavits (or exhibits appended

thereto) contain inadmissible opinion evidence and inadmissible hearsay, and that they should therefore be ignored on these applications.

a) The Expert Reports

[81] Specifically, Qualcomm objects to the admissibility of the affidavits of Professors Contreras and First and Dr. Netz on the basis that they lack the requisite impartiality and independence of an expert witness and have assumed the role of an advocate against Qualcomm.

[82] In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, the Court explained the proper approach as follows:

[47] ... While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should

occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[Emphasis added.]

[83] All three of the plaintiffs' impugned experts have certified that they are aware of their obligations to the court under Rule 11-2 and are willing to adhere to those obligations. Applying the *White-Burgess* framework, the burden now shifts to the defendants who oppose the admission of the witness' evidence to show there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with their duty.

[84] As noted, two of the experts co-signed an amicus brief in a case before the Ninth Circuit Court. I consider this to be a role in which the expert merely provides assistance to the Ninth Circuit Court, even though the role of amicus in the United States takes on a somewhat different character than the role of amicus curiae in Canada.

[85] The defendants also allege that Dr. Netz has assumed the role of an advocate, citing as one example her failure to acknowledge that Qualcomm was successful in its appeal to the Ninth Circuit when relying on evidence from the *FTC District Court Decision*.

[86] The defendants have not satisfied me that the plaintiffs' experts will be "unable or unwilling to provide the court with fair, objective and non-partisan evidence" (*White-Burgess* at para. 49). None of the experts have a direct interest in the outcome of the litigation or a close relationship with a party. I also do not find that any of the experts has assumed the role of an advocate. *White Burgess* indicates that the threshold impartiality requirement is not particularly onerous and it will be rare for a proposed expert's evidence to be found inadmissible for failing to meet it. I find that the plaintiffs have met their initial burden of establishing that the experts challenged by the defendants are impartial, independent and unbiased.

[87] The Court in *White Burgess* at paras. 54-55 states that courts hearing summary judgment motions should generally not engage in the second step of the admissibility analysis, which involves weighing the costs and benefits of the evidence, as weighing evidence is outside the scope of the judge's role on such applications. Extending this reasoning, I will not consider the second step of the analysis on this certification application, in light of the Court's limited role in examining evidence to establish the existence of sufficient facts to meet the s. 4(1) criteria and to determine the suitability of the case for class treatment.

[88] Finally, I reject the argument that the opinions of the plaintiffs' experts should be excluded at this stage because they rely on unproven facts such as unsubstantiated claims of Qualcomm's conduct and business practices. In my view, such a claim has no merit in the summary judgment or certification context. Such facts must be proven at trial, and evidence proving or disproving these facts is likely to emerge during the discovery process.

[89] The plaintiffs' expert reports are thereby admissible for the purpose of the certification and summary judgment applications.

b) The Paralegal / Clerk Affidavits

[90] In addition, the defendants object to the affidavits of J. Hung and M. Chartrand on the basis that they contain inadmissible hearsay. These affidavits attach documents from foreign legal proceedings concerning Qualcomm. Many of the documents purport to be trial exhibits that originated from the defendants or transcripts of testimony by the defendants' employees. The defendants' objections are in the nature of a blanket objection to these affidavits. They have not made specific objections to the exhibits cited in the plaintiffs' certification submissions, though they reserve the right to do so.

[91] I note that the ordinary rules of evidence apply to class actions. Hearsay evidence introduced by way of affidavits sworn on information and belief can be relied on in a class certification application pursuant to Rule 22-2(13)(b)(i), as such applications are interlocutory. In any case, it appears to me that much of the

evidence appended to the paralegal and clerk affidavits is not tendered for a hearsay purpose. Moreover, to the extent that the documents originate with Qualcomm or are transcripts of the testimony of Qualcomm employees, the documents are admissible as statements against interest, business records and/or public documents. The defendants have not pointed to any specific inaccuracy or inauthenticity in the impugned exhibits. I would therefore not give effect to the defendants' blanket objections to the admissibility of the affidavits of Ms. Hung and Ms. Chartrand. I will refer to admissible material from these affidavits throughout my decision.

The Defendants' Evidence

[92] Qualcomm filed affidavits that explain the following, among other things: the history of Qualcomm and its beginnings as a small engineering company, the development of its breakthrough cellular communications technologies, Qualcomm's participation in SDOs and how SDOs operate, Qualcomm's contributions to cellular standards over the decades, and Qualcomm's licensing business. Qualcomm says its detailed, comprehensive evidence disproves central elements of the plaintiffs' legal claims.

[93] Specifically, Qualcomm has filed affidavits from five of its representatives providing the following evidence:

- (a) Adam Schwenker, Vice President and Legal Counsel at Qualcomm, in his first affidavit filed December 16, 2021, provides evidence regarding the relationship between the various defendants and alleges that Qualcomm has no role or involvement in setting prices by OEMs for devices sold to end customers;
- (b) Jonathan Weiser, Senior Vice President and Division Counsel at QTI, in his first affidavit filed December 16, 2021, provides evidence on QTI's customers and competitors and Qualcomm's relationship with Apple and alleges that Qualcomm has no role in setting prices for competing modem chips or cell phones sold to end consumers;

- (c) Fabian Gonell, Senior Vice President, Licensing Strategy and Legal Counsel at Qualcomm, in his first affidavit filed December 16, 2021, provides evidence on Qualcomm’s licensing business and Qualcomm’s relationship with Apple;
- (d) Ed Tiedemann, Senior Vice President of Engineering at QTI, in his first affidavit filed December 16, 2021, provides extensive evidence explaining Qualcomm’s substantial contribution to cellular standards development and the consensus nature of cellular standards development, from the 1980s through the development of 3G; and
- (e) Lorenzo Casaccia, Vice President, Technical Standards and Intellectual Property at Qualcomm, in his first affidavit filed December 16, 2021, provides detailed evidence explaining Qualcomm’s contribution to the development of the 4G standard.

[94] In addition to these affidavits, Qualcomm has filed an expert report from Professor Arthur R. Miller, a leading expert in American civil procedure at New York University. In his expert report, Professor Miller opines that the plaintiffs’ reliance on the *FTC District Court Decision* is misplaced in the face of the *FTC Appeal Decision*. Professor Miller explains that the Ninth Circuit left no part of the District Court’s decision undisturbed; instead, the Ninth Circuit Court unequivocally rejected both the District Court’s core factual findings and its conclusions of law. Thus, he opines that the factual findings from the reversed *FTC District Court Decision*, including the injunction issued against Qualcomm and the *Order Granting Partial Summary Judgment*, have no precedential value.

THE CERTIFICATION APPLICATION

Requirements for Certification

[95] This Court is required to certify an action as a class proceeding where the requirements of s. 4(1) of the *CPA* are met:

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

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

[96] The question at certification is whether the action can properly proceed as a class action. Certification does not involve an assessment of the merits and is not a pronouncement on the viability or strength of the action. The outcome of certification is not predictive of the outcome of the common issues at trial. The focus at this stage is not on the merits or the weight of the evidence but rather on the appropriate form of the action: *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57 at paras. 99, 102, 105 [*Microsoft SCC*]; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 19–20.

[97] The plaintiffs bear the onus of satisfying all of the requirements for certification. For s. 4(1)(a), the court must assume that the facts as stated in the notice of civil claim are true and ask whether it is “plain and obvious” that the plaintiffs’ notice of civil claim discloses no reasonable cause of action, which is determined on the same “plain and obvious” standard as an application under Rule 9-5(1): *Microsoft SCC* at para. 63.

[98] For each of the other certification requirements, the plaintiffs must show “some basis in fact”: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 24–25. This

evidentiary standard does not require the court to resolve conflicting facts or evidence. The test reflects the fact that, at certification, the court is ill-equipped to resolve conflicts in the evidence or engage in finely calibrated assessments of evidentiary weight: *Microsoft SCC* at paras. 99–102.

[99] However, the plaintiffs cannot rely upon allegations alone—the standard for assessing evidence at certification involves more than “symbolic scrutiny” or “a superficial level of analysis into the sufficiency of the evidence”: *Microsoft SCC* at para. 103.

[100] The use of the word “some” means that the evidentiary record need not be exhaustive and certainly not a record upon which the merits will be argued. This legislative intention is reflected in section 2(3)(a) of the *CPA*, which (although not often strictly adhered to) requires the certification motion to be brought within 90 days of the filing of the response to civil claim (i.e., at the early stages of the proceeding, before discovery has taken place): *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at para. 34; *AIC Limited v Fischer*, 2013 SCC 69 at para. 41; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 102, leave to appeal ref’d, 38784 (19 December 2019) & 39403 (29 April 2021).

[101] The court plays an important gatekeeper function on a certification application to ensure that there is evidence supporting the existence of sufficient facts to meet each of the s. 4(1) criteria and that the proceeding is suitable for class treatment. The power to strike hopeless claims is a valuable housekeeping measure essential to effective and fair litigation: *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19 at para. 18. In *Microsoft SCC* at para. 103, the Court stated that it was “worth reaffirming the importance of certification as a meaningful screening device.” At para. 104, the Court held that

...[t]here must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

See also *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27.

Section 4(1)(a): Whether the Pleadings Disclose a Cause of Action Against Qualcomm

[102] In considering section 4(1)(a), the court is to assume that the facts stated in the notice of civil claim, as they stand or as they may be amended, can be proven. It must then decide whether it is “plain and obvious” that the claim discloses no reasonable cause of action:

[I]f there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect...should the relevant portions of a plaintiff’s statement of claim be struck out...

See *Hunt v Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90 (S.C.C.).

[103] The court must read the notice of civil claim “generously to accommodate drafting deficiencies”: *Fakhri et. al. v Alfalfa’s Canada Inc cba Capers*, 2003 BCSC 1717 at para. 42, aff’d 2004 BCCA 549. Usually, if a pleading could be fixed by amendment, that is sufficient to meet the test under s. 4(1)(a): *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 87, 106 [*Watson BCCA*].

[104] The defendants seek summary judgment on the basis that (i) there is no legal basis for the plaintiffs’ claims that the defendants breached the *Competition Act*, (ii) there is no genuine issue for trial in respect of Qualcomm’s alleged unilateral anticompetitive conduct, and (iii) there is no genuine issue for trial in respect of the plaintiffs’ tort and unjust enrichment claims.

[105] The defendants submit that the plaintiffs have failed to plead material facts that would establish, if proven at trial, a cause of action against them. They say the plaintiffs’ core factual allegations relate to abuse of dominant position in the market, which Qualcomm says is not civilly actionable in Canada and has been “shoehorned” by the plaintiffs into a series of vague statutory and common law claims.

[106] The parties clearly differ on whether it is plain and obvious that the plaintiffs' claims cannot succeed.

a) *Contraventions of the Competition Act*

Generally

[107] The plaintiffs allege that Qualcomm's conduct, in combination with other suppliers of modem chips and other participants in the standard-setting process, including SEP holders, breached the *Competition Act*. The plaintiffs claim loss and damage under s. 36 of the *Competition Act* resulting from this unlawful conduct.

[108] Both the current and former versions of the *Competition Act* are engaged by the proposed claims. Section 36(1)(a) of the *Competition Act* creates a right of action for "[a]ny person who has suffered loss or damage as a result of...conduct that is contrary to any provision of Part VI". The former and current section 45 (prohibiting conspiracies), section 46 (breaching section 45 by implementing foreign directives), and the former section 61 (prohibiting price maintenance) are (or were) contained within Part VI.

[109] Qualcomm was engaged in the business of supplying modem chips and licenses to related technology. The plaintiffs say that Qualcomm entered into agreements with OEMs, modem chip suppliers, SEP holders, and other participants in the standard-setting process to reduce or eliminate competition and acquire market power; it then used that market power to control the production and supply of modem chips and influence modem chip prices and royalty rates upwards. These alleged agreements can be generally summarized as follows:

- a) agreements made as part of the standard-setting process to have Qualcomm's intellectual property included in various cellular communication standards, to the exclusion of alternative technology;
- b) non-assert agreements made with its competitors (i.e., agreements that Qualcomm would not enforce its SEPs against the competitors) in

exchange for its competitors restricting their chip sales to Qualcomm-licensed OEMs;

- c) licensing agreements made with OEMs requiring OEMs to pay supra-competitive royalty rates to Qualcomm for every modem chip used, regardless of who supplied the chip; and
- d) agreements made with Apple to renounce an alternative cellular communication standard.

[110] Paragraph 123 of the FANOC provides particulars of Qualcomm's misconduct including, but not limited to, the following:

(a) Qualcomm entered into horizontal agreements, including with other Modem Chip suppliers and other SEP Holders, and vertical agreements with participants in the standard setting process to have Qualcomm's patented technology included in cellular communication standards [which gave it market power];

(b) Qualcomm entered into agreements with others, including Modem Chip suppliers and OEMs, to preclude the adoption of an alternative to the LTE standard;

(c) Qualcomm and OEMs entered into agreements that discriminate against other Modem Chip manufacturers, limiting competition;

(d) Qualcomm and others, including OEMs, Modem Chip suppliers and other SEP Holders, entered into agreements, that unreasonably inflate Modem Chip prices and SEP licensing royalties;

(e) Qualcomm entered into agreements with OEMs to exclusively purchase Modem Chips from Qualcomm, lessening competition;

(f) after reaching agreements that gave it market power, Qualcomm refused to license FRAND encumbered SEPs and/or licensed SEPs on non-FRAND terms and conditions;

(g) after reaching agreements that gave it market power, Qualcomm collected royalties at collusive, artificially inflated, and supra-competitive prices;

(h) after reaching agreements that gave it market power, Qualcomm and others, including OEMs and Modem Chip suppliers, entered into non-FRAND licensing agreements;

(i) Qualcomm leveraged its entire patent portfolio to charge non-FRAND royalty rates;

(j) after reaching agreements that gave it market power, Qualcomm required OEMs to agree to non-FRAND licensing terms in order to be supplied Qualcomm Modem Chips;

(k) Qualcomm, OEMs, and other Modem Chip suppliers entered into agreements that Qualcomm was aware, or ought to have been aware, would prevent or lessen competition;

...

(m) Qualcomm refused to supply Modem Chips or enter into licensing agreements with OEMs unless non-litigation and non-regulatory co-operation terms were accepted.

[Emphasis added.]

[111] Specifically, the plaintiffs allege that Qualcomm entered into the following horizontal and vertical agreements, among others, that unduly prevented or limited competition and were contrary to its FRAND commitments:

- a) Qualcomm entered into a 2007 licensing agreement with Apple, through which Qualcomm sought to eliminate WiMAX, a competing wireless technology in which Qualcomm did not have a strong patent position. Qualcomm would not license to Apple without an agreement that Apple would publicly denounce WiMAX and would not produce WiMAX-enabled chips on a commercial scale. According to the plaintiffs, there is no effective 4G competition to LTE because Qualcomm “killed” WiMAX through this anti-competitive agreement.
- b) Instead of providing an irrevocable license to its technology, Qualcomm only offered patent non-assert agreements or other such arrangements to rival chip suppliers. A key term of the agreements was limiting who the competing chipmakers could sell to (i.e., OEMs who had entered into a licensing agreement with Qualcomm), thereby restricting the supply of modem chips. Consequently, OEMs were forced to contract directly with Qualcomm and pay Qualcomm’s supra-competitive royalties. These non-assert agreements required competitors to comply with onerous reporting obligations, which included disclosing sensitive business information about their customers and volume of sales to Qualcomm. This was an oversight mechanism to detect cheating.
- c) Qualcomm entered into licensing and other agreements with OEMs that:

- i. required the OEMs to pay a royalty to Qualcomm, whether or not they purchased modem chips from other suppliers. This operated as an industry-wide “surcharge” and removed the competitive restraint on Qualcomm’s all-in prices;
- ii. operated as de facto exclusivity agreements, whereby Qualcomm provided discounts or rebates on the purchase price of modem chips if the OEM purchased all or nearly all modem chips from Qualcomm (typically 85–100%). The result was that Qualcomm charged higher royalty rates for modem chips purchased from a competitor; and
- iii. imposed non-litigation and non-regulatory cooperation terms to circumvent the required FRAND-compliant licensing terms.

[112] The plaintiffs allege that the defendants’ anticompetitive conduct unduly prevented or lessened competition and caused class members to pay supra-competitive prices for cellular devices. They further submit that the defendants were aware, or ought to have been aware, that their conduct would prevent or lessen competition.

[113] The defendants submit that their conduct was pro-competitive and did not result in anti-competitive effects. For instance, they argue that the SDO process itself is pro-competitive, that cellular standardization is essential and that such developments deliver real and substantial benefits to the public at large. They submit that the non-assert agreements with competitors and the licensing agreements with OEMs cannot constitute conspiracies, as the allegedly anti-competitive terms were unilaterally imposed by Qualcomm to the detriment of the other contracting party rather than embraced as a concerted action in their common interest. Alternatively, the defendants submit that, even if there was some form of conspiratorial agreement, there is no basis upon which to conclude that any conduct by Qualcomm was directed at consumers, the class members in this proceeding.

[114] In considering whether section 4(1)(a) of the *CPA* is satisfied, I must assume that the facts as stated in the FANOCC are true and ask whether it is plain and obvious that the FANOCC discloses no reasonable cause of action: *Microsoft SCC* at para. 63. While the defendants have placed significant reliance on the decision of the Ninth Circuit Court, I find that this decision, while informative, does not turn on the same considerations at play here under the *Competition Act*. The Supreme Court of Canada has specifically discussed the differences between the *Sherman Act* regime and the nature of inquiry under the former s. 45 of the *Competition Act*: *R. v. Nova Scotia Pharmaceutical Society*, 1992 CarswellNS 15 at paras. 88–91, [1992] 2 SCR 606 (S.C.C.) [*Nova Scotia*], and I take this dicta into account.

[115] I turn now to the specific *Competition Act*-related causes pleaded in the FANOCC.

Claims under the Former Section 45

[116] The old s. 45 of the *Competition Act*, as it existed prior to March 11, 2010, prohibited conspiracies, combinations, agreements and arrangements with “another person” (i.e., horizontal competitors and vertical customers or suppliers) that “unduly” limited competition. There are both subjective and objective fault elements to this offence. Under the old s. 45, the plaintiff must establish that:

- there was an agreement between the defendant and another person (there must have been an actual agreement, not merely conscious parallelism: see, for example, *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para. 105);
- the defendant intended to enter into that agreement and was aware of its terms; and
- the evidence, viewed objectively, establishes that the defendant was aware or ought to have been aware that the effect of the agreement would be to prevent or lessen competition unduly: *Nova Scotia* at paras. 119–20.

[117] There are two major steps in considering whether an agreement has “unduly” lessened competition: (i) the structure of the market (which requires the scope of the market to be defined and the degree of market power the parties hold to be determined), and (ii) the behaviour of the parties to the agreement: *Nova Scotia* at para. 96. Parties need only have a moderate amount of market power—or the capacity to behave independently of the market, in a passive way—in order to have the capacity to unduly lessen competition: *Nova Scotia* at para. 103. It is the combination of some degree of market power and behaviour that is likely to injure competition that makes the lessening of competition “undue”:

... Many combinations are possible. For one, market power may come from the agreement. The agreement could either have an "internal" effect, in consolidating the market power of the parties (as is the case with price-fixing) or have an "external" effect, in weakening competition and thus increasing the market power of the parties (as is the case with market-sharing). Market power may also exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious. A particularly injurious behaviour may also trigger liability even if market power is not so considerable. These are only examples of possible combinations of market power and behaviour likely to injure competition that will be "undue"...

[Emphasis added.]

See *Nova Scotia* at para. 110.

[118] The old s. 45(3) provides a defence for persons engaged in conspiracies, agreements, or arrangements that relate to “the defining of product standards,” except where:

...the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

- (a) prices,
- (b) quantity or quality of production,
- (c) markets or customers, or
- (d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

(former s. 45(4))

[119] In relation to the former s. 45 of the *Competition Act*, the plaintiffs plead that, from 2007 to 2010, Qualcomm entered into agreements, both horizontal and vertical, that unduly prevented or limited competition as follows:

- a) As part of the standard-setting process, Qualcomm entered into horizontal and vertical agreements with industry participants, including rival modem chip suppliers (such as Ericsson, MediaTek, Intel, Samsung, LG, Broadcom, and VIA Telecom), other SEP holders, OEMs and cellular service providers to have its patented technology included in cellular communication standards, to the exclusion of alternative technology. Qualcomm entered into these agreements with the intention of using the acquired market power to charge supra-competitive modem chip prices and SEP royalties. These agreements allowed Qualcomm to acquire and maintain market power. Qualcomm then leveraged this market power to engage in a course of anti-competitive conduct and impose supra-competitive modem chip prices and SEP royalties.
- b) Qualcomm entered into agreements with others, including modem chip suppliers and OEMs, to prevent alternatives to the LTE standard from being widely adopted. For example, Qualcomm entered into an agreement with Apple, whereby Apple was required to renounce the WiMAX standard. This helped to ensure the widespread adoption of LTE technology.
- c) Qualcomm, its competitors and OEMs entered into the following agreements that unduly lessened competition:
 - (i) Qualcomm and other modem chip makers entered into agreements, whereby the modem chip makers agreed to sell modem chips only to OEMs who had a license agreement in place with Qualcomm. This enabled Qualcomm to enforce its “no license, no chip” policy. This policy resulted in OEMs paying supra-competitive royalty rates to Qualcomm, as there was no alternative means of accessing the technology that was essential to the standard.

- (ii) As part of the agreements referenced above, modem chip makers were required to comply with onerous reporting obligations, including by providing sensitive business information about their customers and volume of sales. This was an oversight mechanism to detect cheating.
 - (iii) Qualcomm and OEMs entered into agreements that required OEMs to pay a royalty to Qualcomm when they purchased modem chips from other suppliers. This operated as an industry-wide “surcharge” and removed the competitive restraint on Qualcomm’s all-in prices.
- d) Qualcomm entered into *de facto* exclusivity agreements with OEMs, whereby Qualcomm provided discounts or rebates on the purchase price of modem chips only if the OEM purchased all or nearly all modem chips from Qualcomm (typically 85-100%). The result was that Qualcomm charged higher royalty rates for modem chips purchased from a competitor. This created a strong incentive for OEMs to purchase from Qualcomm and had the effect of lessening competition.
- e) After acquiring market power through the agreements referenced in (a), Qualcomm:
- (i) refused to license its SEPs to competitors, contrary to FRAND;
 - (ii) withheld modem chips from OEMs unless they agreed to simultaneously license SEPs from Qualcomm on non-FRAND terms;
 - (iii) entered into non-FRAND licensing agreements with OEMs; and
 - (iv) entered into licensing agreements with OEMs with non-litigation and non-regulatory co-operation terms to circumvent FRAND-compliant licensing terms.

[120] The plaintiffs say that Qualcomm was aware, or ought to have been aware, that its conduct would unduly prevent or lessen competition and cause supra-competitive prices to be paid by the Class.

Claims under the Current Section 45

[121] In 2010, s. 45 of the *Competition Act* was amended to remove the “unduly lessen” requirement to create a *per se* offence. The section was also narrowed to prohibit only horizontal conspiracies (i.e., conspiracies between competitors):

- (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
 - to fix, maintain, increase or control the price for the supply of the product;
 - to allocate sales, territories, customers or markets for the production or supply of the product; or
 - to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

...

- (3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

[122] Section 45(4) provides an “ancillary restraints” defence, which might apply in the cellular communication standard-setting context:

- (4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if
 - (a) that person establishes, on a balance of probabilities, that
 - (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
 - (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
 - (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

[123] In relation to the amended s. 45 of the *Competition Act*, the plaintiffs allege that, from 2010 to present, Qualcomm entered into agreements with competitors (horizontal agreements) in the context of the standard-setting process through which they acquired market power—which Qualcomm then leveraged to, among other things, impose supra-competitive modem chip prices and SEP royalties.

[124] Specifically, the plaintiffs allege that Qualcomm entered into other agreements with competitors as follows:

- a) Qualcomm entered into agreements with modem chip suppliers to preclude the adoption of alternative LTE standards; and
- b) Qualcomm entered into agreements with modem chip suppliers, whereby the modem chip suppliers were only permitted to sell modem chips to OEMs who had a license agreement with Qualcomm and were subject to onerous reporting obligations.

[125] As a result of the conduct, the plaintiffs allege that Qualcomm collected supra-competitive royalties, the cost of which were passed on to the Plaintiffs and other class members.

Conclusions on Section 45

[126] The defendants argue that the s. 45 claims in this case do not raise a genuine issue for trial, or do not disclose a reasonable cause of action, and should not be permitted to proceed in the absence of any evidentiary support—particularly where, as here, they say there is uncontroverted evidence to the contrary. They say the plaintiffs have failed to “plead even the barest material facts”.

[127] I do not accept the defendants’ submission that the plaintiffs’ claims are absent of any evidentiary support. Assuming the facts in the claims alleged are true, the failure to plead to the level of specificity desired by the defendants is not fatal. It is not plain and obvious to me that the claim will fail as a result: similarly, see

Bauman C.J. (as he then was) in *Watson v. Bank of America Corporation*, 2014 BCSC 532 at para. 102 [*Watson BCSC*], aff'd on this point in *Watson BCCA*.

[128] I accept that, on the basis of the facts set out in the FANOCC—which I must assume to be true—and the expert evidence on Qualcomm’s FRAND commitments, its position in the market, and the consequences of its conduct, the plaintiffs’ claims against the defendants can form a cause of action based on a breach of the current and former s. 45 of the *Competition Act*. The plaintiff has pleaded and demonstrated a basis for such claims, contrary to the defendants’ assertions, and it is not plain and obvious that the claim discloses no reasonable cause of action.

Claims Under Section 46 of the Competition Act

[129] The plaintiffs rely on s. 46 of the *Competition Act*, which makes it an offence for a corporation carrying on business in Canada to give effect to a conspiracy entered into outside Canada that, if entered into in Canada, would have contravened s. 45:

46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

[130] The FANOCC provides as follows:

The Canadian subsidiary, Qualcomm Canada Inc., participated in and furthered the objectives of the conspiracy, described above, by knowingly modifying its competitive behaviour in accordance with instructions received from its parent company, Qualcomm Incorporated. Qualcomm Canada Inc. thereby acted in concert with Qualcomm Incorporated in carrying out the conspiracy and is liable for such acts in breach of s. 46 of the *Competition Act*.

[131] In other words, the plaintiffs allege that Qualcomm Canada breached s. 46 of the *Competition Act* by carrying on business in Canada and implementing directives, instructions, policies or communications from Qualcomm Incorporated to give effect to breaches of section 45 of the *Competition Act*.

[132] Specifically, the plaintiffs' evidence is that Qualcomm told the IRS that its subsidiaries assisted Qualcomm in accessing companies in the countries in which they were incorporated and setting up meetings with those companies. In Canada, the plaintiffs submit, this would have meant Qualcomm Canada set up meetings and established contacts with Blackberry, a Canadian OEM, for the purpose of royalty and chip sale negotiations. To the extent this occurred, Qualcomm Canada would be implementing a "directive" or "instruction" from its parent companies to give effect to Qualcomm's conspiratorial conduct. Such conduct would fall within the contours of s. 46.

[133] In *Jensen* at para. 115, Gascon J. (as he then was) held that s. 46 "adds [to] and complements" s. 45 by establishing an offence for persons beyond those who are directly involved in the conspiracies covered by s. 45. The purpose of this section is to "target subsidiaries operating in Canada that implement a foreign communication", regardless of their knowledge or connection to the conspiracy, to provide recourse against Canadian entities who implement the conspiracy: *Jensen* at para. 115.

[134] The plaintiffs point out that, as discoveries have not yet taken place, they do not presently know the details of any arrangements between Qualcomm Canada and Blackberry. Indeed, certification is a pre-discovery motion, intended to be a first step in the litigation, which merely produces an interlocutory order: *Monaco v. City of Coquitlam*, 2014 BCSC 2090 at para. 18.

[135] The defendants submit that, as was the case in *Jensen* at para. 177, the plaintiffs' foreign conspiracy allegation is "brief and conclusory, and essentially amount[s] to a mere recitation of the language contained in the provision." Again taking the language from *Jensen* at para. 177, the defendants argue that the

plaintiffs merely set out “bald assertions and conclusory legal statements” and are “[s]imply parroting the language of the [*Competition Act*] and hoping that facts will eventually emerge from it.”

[136] More pointedly, the defendants argue that the plaintiffs have not provided evidence of a foreign conspiracy, let alone that any direction was given to implement any such conspiracy in Canada. Nor is there any evidence that Qualcomm Canada received, let alone implemented, any such direction. They say the evidence in the record shows that Qualcomm Canada (i) is not actively engaged in either chip sales or licensing with third parties, (ii) has no role or involvement in setting royalty rates for Qualcomm’s patents, and (iii) is not involved in the standard-setting process. Therefore, how or why it would have any role in implementing a supposed conspiracy is left wholly unexplained.

[137] I cannot give effect to the defendants’ arguments. I have already found that the pleadings, which I must accept to be true, and the evidence provided by the plaintiffs disclose a reasonable cause of action under s. 45. The s. 46 allegations are merely a subset of the larger s. 45 claim, and a vehicle through which recourse can be sought specifically against the Canadian subsidiary (here, Qualcomm Canada): see *Jensen* at para. 115. I would therefore not characterize the allegations as mere bald assertions.

[138] In any event, evidentiary proof of the allegations is not required at this stage, and the available evidence does not satisfy me that it is plain and obvious the allegations fail to disclose a reasonable cause of action under s. 46. Furthermore, to the extent that the defendants take issue with the lack of particularization in the FAN OCC, I note that the plaintiffs provided more detail about their s. 46 claim (i.e., Qualcomm Canada’s dealings with Blackberry) in their written submissions, and I would be wary to find that there is no reasonable cause of action where the plea can be fixed by amendment: see *Watson BCCA* at para. 106.

[139] It is not plain and obvious that the plaintiffs’ claim under section 46 of the *Competition Act* discloses no reasonable cause of action.

Claims Under the Former Section 61 of the Competition Act

[140] In March 2009, the former s. 61 of the *Competition Act* was revoked and replaced with s. 76. The former s. 61 constituted a criminal prohibition on price maintenance:

- (1) No person who is engaged in the business of producing or supplying a product, ... shall, directly or indirectly,
 - (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada...

[141] The elements of a section 61 offence were laid out in *2038725 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 96 O.R. (3d) 252, 2009 CanLII 23374 (Sup. Ct. Just. Div.) at para. 55, aff'd 2010 ONCA 466:

According to the language of s. 61(1), the offence has three constituent elements:

- (1) a person engaged in the business of producing or supplying a product; (2) who, directly or indirectly, attempts to influence upward or discourages the reduction of the price at which another person supplies or offers to supply a product within Canada; (3) by agreement, threat, promise or any like means.

At para. 54, the Court held that loss or damage is not a constituent element of s. 61.

[142] The plaintiffs allege that the defendants breached s. 61 by: (i) engaging in the business of supplying modem chips and licenses to related technology, (ii) attempting to upwardly influence the price of modem chips and royalty rates, and (iii) entering into agreements with others in the standard-setting process to acquire the market power to do so.

[143] The FANOC provides:

122. From at least as early as January 1, 2007, until at least March 11, 2009, Qualcomm:

- (a) by agreement, threat, promise, or any like means attempted to influence upward or discourage the reduction of the price at which Modem Chips and Cellular Devices were sold in Canada contrary to s. 61 of the *Competition Act*; and/or,

(b) refused to supply a product or otherwise discriminated against other persons engaged in the Modem Chip and Cellular Device market due to the pricing policy of those entities contrary to s. 61 of the *Competition Act*.

[144] Much like their arguments in relation to the other claims alleged under the *Competition Act*, the defendants say that the plaintiffs

have not asserted a single fact supporting any such allegation [under s. 61], they merely reference the provision. The Plaintiffs do not say whose prices were influenced upward, in respect of what products, or when or where this is said to have occurred. They do not identify anyone Qualcomm refused to deal with because of that person's low pricing policy, the products involved, or when such conduct occurred. Qualcomm's uncontroverted evidence is that it has not influenced upward or discouraged the reduction of the prices at which either OEMs sell their products or competing chipmakers sell their modem chips. Qualcomm's customers and competitors are free to sell their products at any price they choose. There is no evidence that Qualcomm ever refused to deal with anyone because of that person's low pricing policy.

[145] Again, I would not accede to the defendants' argument. The FANOC provides particulars of Qualcomm's misconduct, and the plaintiffs cite to a number of horizontal and vertical agreements that could have ultimately resulted in enhanced prices of cellular devices: see, for example, the alleged agreements described in the section of this judgment titled "Contraventions of the *Competition Act*", which include licensing agreements with OEMs, non-assert agreements with rival chipmakers, and the 2007 agreement with Apple.

[146] I find it is not plain and obvious that the plaintiffs' price maintenance claims under former s. 61 of the *Competition Act* disclose no reasonable cause of action.

Whether the Claims Under the Competition Act are Statute-Barred

[147] The defendants submit that the plaintiffs' claims under the *Competition Act* are statute-barred. They point out that the proposed class period purports to extend back more than a decade before the plaintiffs commenced this action.

[148] Section 36(4) of the *Competition Act* provides the limitation period for recovering damages under s. 36(1):

- (4) No action may be brought under subsection (1),

- (a) in the case of an action based on conduct that is contrary to any provision of Part VI [(which includes current ss. 45 and 46, and included former ss. 45 and 61)], after two years from
 - (i) a day on which the conduct was engaged in, or
 - (ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

- (b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from
 - (i) a day on which the order of the Tribunal or court was contravened, or
 - (ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

[Emphasis added.]

[149] Section 45 was amended in March 2010—more than seven years before this action was commenced. Section 61 was repealed in 2009—more than eight years before this action was commenced.

[150] The defendants submit that any conduct that occurred prior to March 2010, and to which the former s. 45 could possibly apply, was subject to a two-year limitation period that would have expired no later than March 2012. The same reasoning applies to s. 61. Neither the original Notice of Civil Claim nor the FANOCOC plead discoverability or assert any other basis to extend or postpone the limitation period for any claims under the former ss. 45 and 61. The defendants submit that it is clear on the pleadings that any possible claims under the former ss. 45 and 61 are statute-barred; there are no genuine issues for trial under these sections and the claims do not disclose a reasonable cause of action.

[151] In response, the plaintiffs point out that they filed a reply pleading discoverability and continuing harm on August 22, 2022. The reply alleges, *inter alia*, that the conduct of the defendants continued throughout the class period up to the present, that there is continuing harm from the alleged conspiracy, and that any

applicable limitation period does not commence running until after the plaintiffs' claims could have been reasonably discovered, which is alleged to be just prior to the commencement of this action.

[152] The plaintiffs argue that the defendants' submission runs counter to the Supreme Court of Canada's finding that "the discoverability rule applies to the limitation period in s. 36(4)(a)(i), such that it begins to run only when the material facts on which [the plaintiff's] claim is based were discovered by [the plaintiff] or ought to have been discovered by [the plaintiff] by the exercise of reasonable diligence": *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 50 [*Godfrey SCC*].

[153] The defendants rely on *Watson BCSC* at paras. 126–27 in regard to the former s. 61, where the Court held that claims under s. 61 of the *Competition Act* commenced more than two years after its repeal are statute-barred. I agree with the plaintiffs that *Watson BCSC* predates *Godfrey SCC*. That latter decision has since clarified the law with respect to s. 36(4). Moreover, in discussing the defendants' limitation defence in *Watson BCSC*, Bauman C.J. (as he then was) did not expressly discuss the impact of discoverability on the defence and seemed to accept, based on his quoting of the defendants' submissions and caselaw, that discoverability did not apply to s. 36(4). This surely informed the reasoning with respect to his finding on s. 61.

[154] In my view, *Godfrey SCC* supports the proposition that the discoverability rule applies to s. 36(4), which necessarily means a claim will not fail merely because the relevant section under Part VI of the *Competition Act* had been amended or repealed for over two years by the time the claim was commenced. In any event, it should not make a difference that s. 45 (the subject of *Godfrey SCC*) was amended and s. 61 (not explicitly discussed in *Godfrey SCC*) was repealed. Section 43(c) of the *Interpretation Act*, R.S.C. 1985, c. I-21 provides that "[w]here an enactment is repealed in whole or in part, the repeal does not ...affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed".

[155] Accordingly, I find that discoverability arguably applies to all the plaintiffs' claims under the *Competition Act*. Such application would arguably postpone the commencement of the limitation period until the time at which the plaintiff discovers, or is reasonably capable of discovering, the existence of the impugned conduct that forms the basis of a claim under s. 36(1).

[156] Discoverability requires evidence and its application in this context is best left for trial. In *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 at para. 16, the Court commented that limitation problems are so bound up in the facts that they must be left to a later stage of the process. While a limitation defence can be heard at certification, it generally should not, especially when the limitation period issue is intimately connected with the facts of the alleged conspiracy/conduct: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 67, aff'd *Godfrey SCC*. In this case, evidence is required on discoverability, and I do not find that it would be appropriate to answer the limitation period issue summarily or on certification.

[157] Moreover, as noted, the plaintiffs have alleged continuing harm from the alleged conspiracy. The plaintiffs submit that Qualcomm's SEPs are necessary to operate on the 3G UTS/WCDMA, 3G CDMA and 4G LTE networks; and that Qualcomm has structured its business such that all OEMs need to acquire a license directly from Qualcomm. It alleges that, continuing to today, every cellular device operating on these networks is affected by the alleged misconduct, even for 5G devices as cellular devices are backwards compatible; meaning even a 5G phone would contain 3G and 4G technology.

[158] As harm is a necessary element of a cause of action under s. 36(1) (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74 at para. 20), the plaintiffs may argue that the cause of action does not arise and the limitation period does not commence until the harm has accrued: see e.g. *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 96 (with regard to a cause of action arising in negligence).

[159] Therefore, I agree with the plaintiffs that it is not plain and obvious that any of their claims under the *Competition Act* are bound to fail by virtue of the limitation period issue. The defendants certainly have arguments on this point, but the issue is best left to trial.

[160] The defendants also submit that the other claims (discussed below)—in tort, civil conspiracy, and unjust enrichment—are subject to a two-year limitation period pursuant to the *Limitation Act*. They say the plaintiffs have not pleaded any material facts, asserted discoverability, or pleaded any other basis to extend or postpone the expiry of the applicable limitation periods for the alleged claims. I accept that the plaintiffs properly pleaded discoverability and continuing harm in relation to these claims in their reply filed in August 2022, and I find that discoverability necessarily applies to all of their other claims by virtue of the *Limitation Act*. I find that it is not plain and obvious that any of the plaintiffs' remaining claims are limitation-barred, and that this issue is also best left for trial.

Whether There Exist Other Mechanisms for Dealing with the Plaintiffs' Claims under the Competition Act

[161] As noted above, the defendants' position is that, taken at their highest, the plaintiffs' allegations amount to conduct reviewable under the *Competition Act* under ss. 78–79 (abuse of dominance) and s. 77 (exclusive dealing). A breach of these sections is reviewable by the Competition Bureau but cannot be the subject of a civil action pursuant to section 36.

[162] I agree with the defendants that certain alleged actions may give rise to reviewable trade practices. But to the extent the defendants seem to suggest that the plaintiffs' claims are bound to fail because there exist other mechanisms for dealing with the defendants' alleged conduct, I would not go so far. The mere existence of other regulatory mechanisms (especially ones that provide no recourse to the general public for damages) does not make the plaintiffs' claims bound to fail. And to the extent the defendants seem to suggest that the conduct alleged by the plaintiffs could only fall under ss. 77–79 of the *Competition Act*, I find insufficient statutory support for that proposition at this stage. In my view, this issue is a matter

best left for trial. For the reasons above, it is not plain and obvious that the plaintiffs' claims disclose no reasonable causes of action under the current and former s. 45, s. 46, and the former s. 61.

b) *Civil Conspiracy*

[163] The plaintiffs assert claims based on predominant purpose conspiracy and unlawful means conspiracy. Both forms of conspiracy require an agreement between two or more persons, concerted action taken pursuant to that agreement, and actual damage suffered by the plaintiff: *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, 1993 CanLII 6870 at paras. 4–5, 96 BCLR (2d) 156 (C.A.).

Predominant Purpose Conspiracy

[164] A predominant purpose conspiracy is made out where: (a) two or more persons combine or conspire to carry out a common design or a means of achieving a common objective; (b) the predominant purpose is to cause injury to the plaintiff (using either lawful or unlawful means); and (c) the plaintiff does in fact suffer loss caused by the conduct: *Microsoft SCC* at para. 74; *Golden Capital Securities Limited v. Rempel et. al.*, 2004 BCCA 565 at para. 47 [*Golden Capital*]; *Watson BCCA* at paras. 125–27.

[165] The Supreme Court of Canada has called predominant purpose conspiracy a “commercial anachronism” and encouraged courts to restrict its application: *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 at 473, 1983 CanLII 23 (S.C.C.); *Microsoft SCC* at para. 75.

[166] The defendants argue that conspiracy is an intentional tort and a serious allegation. As such, pleadings alleging conspiracy must be as specific as possible, and material facts must be pleaded with heightened particularity. It is not sufficient to simply “lump some or all of the defendants together into a general allegation that they conspired”: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2019 BCSC 1138 at para. 43, aff'd 2021 BCCA 142.

[167] In order to succeed in a claim for tortious conspiracy, a plaintiff must establish the existence of an actual “agreement”. It is well established that “mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to co-operate, is not enough to constitute one a party to a conspiracy”: *Saskatchewan Farm and Land Company v. Smith et. al.*, 1923 CanLII 311 at para. 1, [1923] 1 W.W.R. 1179 (S.K. K.B.) [*Smith*]. Instead, “[t]here must be intentional participation in the transaction with a view to the furtherance of the common design and purpose” *Smith* at para. 1. I note, however, that the predominant purpose conspiracy tort does not require an agreement in a formal contractual sense: *Golden Capital* at para. 47.

[168] The Supreme Court of Canada left open the possibility that a combination or conspiracy may occur between a parent and a subsidiary: *Microsoft SCC* at para. 79. It therefore appears that, in theory, a civil conspiracy could take place between affiliated entities. The defendants claim that more specificity is required to support the allegations of individual Qualcomm entities conspiring with each other, but I do not agree. In my view, the plaintiffs’ claim is sufficiently detailed in that regard.

[169] Here, the plaintiffs plead that the Qualcomm entities conspired with each other and others for the predominant purpose of harming the plaintiffs and the class, and that the plaintiffs and the class were injured as a result. Specifically, the plaintiffs allege that Qualcomm combined or conspired to have its patented technology included in cellular communication standards, which resulted in Qualcomm acquiring market power in the modem chip and SEP markets and entering into further agreements with OEMs and rival chipmakers for the predominant purpose of requiring the class to pay artificially inflated prices for cellular devices in order to increase Qualcomm’s profits. As a result of this conduct, the plaintiffs plead the class did in fact pay artificially inflated prices for their cellular devices.

[170] In my view, at this stage in the proceedings, it is not plain and obvious that the plaintiffs’ claim respecting a predominant purpose conspiracy discloses no reasonable cause of action.

Unlawful Means Conspiracy

[171] An unlawful means conspiracy requires no predominant purpose but requires that: (a) the unlawful conduct be directed toward the plaintiff, (b) the defendant should know that injury to the plaintiff is likely to result, and (c) injury to the plaintiff does in fact occur: *Microsoft SCC* at para. 80.

[172] The “unlawful means” component can be satisfied by conduct that breaches a statute, including the *Competition Act*: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 at paras. 63–64 [*Bram*]; *Watson BCCA* at para. 58; *Godfrey SCC* at para. 83. “Unlawful means” in the context of unlawful means conspiracy has historically been construed more broadly and more flexibly than “unlawful means” in the context of the unlawful means tort (as will be discussed below): *Bram* at para. 68; see e.g. Vincent Iacono, “By All Unlawful Means? An Inquiry into the Scope of the Unlawful Means Tort” (2018) 26 Dal. J. Legal Stud. 137 at 158.

[173] In terms of the knowledge component, as held in *Cement LaFarge* at 472, the requisite intent for this tort is constructive intent. The Court of Appeal has interpreted “constructive intent” to mean more than simply knowing that injury to the plaintiff is more likely than not to occur; “it must amount to a clear expectation”: *Golden Capital* at para. 56.

[174] The plaintiffs plead that the Qualcomm entities, other participants in the standard-setting process, and others engaged in unlawful conduct together—including unlawful restraint of trade, offences under the *Competition Act* (pursuant to the former s. 61 and the current and former s. 45), breaches of Qualcomm’s FRAND contractual undertakings, and offences contrary to foreign law—directed towards purchasers of cellular devices, including the plaintiffs and class, which Qualcomm knew in the circumstances would, and did in fact, cause injury to the plaintiffs and class in the form of inflated prices of cellular devices.

[175] The plaintiffs have also provided evidence in support of their claim that overcharges were passed on to end consumers of cellular devices and that

Qualcomm knew (i.e., had a clear expectation) that such overcharges were typically passed on to end consumers, being the plaintiffs and class.

[176] In my view, it is not plain and obvious that the unlawful means conspiracy claim discloses no reasonable cause of action.

c) Unlawful Means Tort

[177] The elements of the unlawful means tort are as follows: (a) an unlawful act committed against a third party; (b) that is intended to cause economic harm to the plaintiff; and (c) results in economic harm to the plaintiff: *Low v. Pfizer Canada Inc.*, 2015 BCCA 506 at para 77, leave to appeal to SCC ref'd, 36848 (9 June 2016).

[178] This tort allows the plaintiffs to sue for harm intentionally caused to them by the defendants through an actionable wrong they committed against another party. The tort is narrow in scope: *Bram* at paras. 35, 48. The rationale behind the tort was set out in *Bram* at para. 37:

... The second, and in my view the preferred rationale, focuses on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct. I will call this the “liability stretching” rationale. The focus of the tort on this understanding is not on enlarging the basis of civil liability, but on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm. On either rationale, the tort is, at its core, a tort of intention. The main difference is that on the “intentional harm” rationale, the intention requirement is seen as the main limitation on the potential scope of liability, whereas in the “liability stretching” rationale, the potential scope of liability is limited by both the intention requirement and the more restrictive definition of the conduct which will support liability.

[Emphasis added.]

[179] In order for conduct to constitute an “unlawful act” or “unlawful means” under this tort, the conduct must give rise to a civil cause of action by the third party, or would do so if the third party had suffered loss as a result of that conduct: *Bram* at para. 76.

[180] The FANOC provides as follows:

138. Further, or in the alternative, Qualcomm's unfair, unreasonable, discriminatory, bad faith, and anti-competitive acts, as particularized herein, were unlawful and prohibited conduct against third parties that were intended to cause economic harm to the Plaintiffs and the Class.

139. Qualcomm's unlawful and prohibited conduct supports third party civil actions for damages or compensation under Canadian law, under the law of the jurisdiction in which the acts took place, and under the law of the applicable contract...

[181] The plaintiffs argue that the alleged unlawful conduct supports third-party civil actions for damages or compensation under Canadian law and foreign law. In particular, SDOs, Qualcomm's competitors and OEMs have causes of action against Qualcomm for, among other things, breaches of contractual FRAND obligations, breaches of the duty of good faith in contractual relations, civil conspiracy, and breaches of competition laws. The plaintiffs submit that they and the class suffered harm in the form of artificially inflated prices as a result of this unlawful conduct.

[182] The defendants submit that intention is a key element of the unlawful means tort and that the plaintiffs have tendered no evidence whatsoever that Qualcomm possessed the requisite intention to cause economic harm to them or the class.

[183] It is not sufficient that harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result; such incidental economic harm is an accepted part of market competition: *Bram* at para. 95.

[184] The "intention" requirement is satisfied if there is (i) an intention to cause economic harm to the claimant as an end in itself, or (ii) an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive, such as the defendant's own enrichment: *Bram* at para. 95.

[185] The plaintiffs submit that, although Qualcomm had many immediate targets, its unlawful conduct was specifically designed to maximize revenue from end consumers and was therefore aimed at the class members. Qualcomm had the requisite intention to cause economic harm to the class members precisely because

causing them harm through inflated prices was a necessary means of achieving the ulterior motive of enriching itself. At a minimum, the plaintiffs say there is a genuine issue for trial on the issue of whether Qualcomm’s misconduct falls within the scope of *Bram*.

[186] I agree with the plaintiffs on this point. While an unlawful means tort is narrow in scope, I assess that it is available on the allegations made in the FANOCC. I agree with the plaintiffs that it is not plain and obvious that this claim discloses no reasonable cause of action.

d) Unjust Enrichment

[187] In *Kerr v. Baranow*, 2011 SCC 10 at para. 32, the Supreme Court of Canada confirmed that recovery for unjust enrichment is available if the plaintiff can establish that (a) the defendant has been enriched, (b) the plaintiff suffered a corresponding deprivation, and (c) there is no juristic reason for the enrichment.

[188] The “no juristic reason” element requires a two-step analysis. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery—such as the enrichment resulting from a contract, a gift, or a disposition of law: *Moore v. Sweet*, 2018 SCC 52 at para. 57. If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case, which the defendant may rebut by showing that there is another residual reason to deny recovery: *Moore* at para. 58. In considering the defendant’s rebuttal, courts should have regard to the reasonable expectations of the parties and public policy considerations: *Kerr* at para. 44.

[189] Here, the plaintiffs plead as follows:

142. Further, or in the alternative, the Plaintiffs plead that they and other members of the Class are entitled to recover the unjust enrichment accruing to Qualcomm.

143. Qualcomm has benefited from the supra-competitive licensing royalties. The Plaintiffs and other members of the Class have suffered a corresponding deprivation in the amount of the artificially inflated prices they have paid for Cellular Devices.

144. There is no juristic reason for Qualcomm's enrichment, since the artificially inflated royalties and Modem Chip prices received by Qualcomm stems from its prohibited and unlawful acts including, but not limited to:

- (a) breaches of Part VI of the Competition Act;
- (b) breaches of the 0/1/71 and UK Monopolies Act;
- (c) an unlawful restraint of trade at common law and equity;
- (d) breaches of the Sherman Act and the applicable U.S. state anti-trust laws;
- (e) breaches of the Treaty on the Functioning of the European Union;
and
- (f) breaches of the applicable competition laws in other jurisdictions, including but not limited to South Korea, Japan, China, and Taiwan.

[Emphasis added.]

[190] The defendants deny receiving any funds directly from the plaintiffs or from the proposed class members. As such, they argue that none of the plaintiffs were deprived to their enrichment. However, in my view, whether Qualcomm benefitted and whether the class suffered a deprivation is an issue for trial.

[191] The defendants are critical of the plaintiffs' claim for its lack of particulars. In particular, the defendants claim there is an insufficient nexus between the alleged enrichment and the deprivation. However, I find that the existence, nature and extent of any nexus between the defendants' benefit (i.e., the inflated royalties and modem chip prices received) and the detriment to the class (i.e., the inflated prices on cellular devices) is adequately particularized in the pleadings on the basis that unjust enrichment may be available absent a direct relationship between the defendant and the plaintiff: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at paras. 35–38 [*Sun-Rype*]. In other words, overcharges passed through to consumers may provide a sufficient benefit/detriment nexus for an unjust enrichment claim: *Microsoft SCC* at paras. 86–87.

[192] The plaintiffs allege that there is no juristic reason for the defendants' enrichment as it resulted from prohibited and unlawful acts, breaches of domestic and foreign statutes, and unlawful restraint of trade at common law and in equity. I similarly assess that this is an issue for trial. As noted in *Microsoft SCC* at para. 88,

the question of whether the underlying contracts are illegal and void should not be resolved at this stage of the proceedings. These are questions that must be left to the trial judge.

[193] I agree with the plaintiffs that there is a genuine issue for trial as to whether the elements of unjust enrichment are satisfied. I cannot conclude that it is plain and obvious their claim in this respect discloses no reasonable cause of action.

Section 4(1)(b): Whether an Identifiable Class of Two or More People Exists

[194] Section 4(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons. The purpose of the class definition is to: (a) identify those persons who have a potential claim for relief against the defendants; (b) define the parameters of the lawsuit to identify those persons who are bound by its result; and (c) describe who is entitled to notice of the action: *Sun-Rype* at para. 57. To achieve these purposes, the court has generally required that the class definition use objective criteria, not turn on the merits of the claim, and not be capable of being narrowed without excluding members who have a valid claim: *Sun-Rype* at para. 58.

[195] As noted, the proposed national class is defined as follows in the FANOCC:

[A]ll persons in Canada, excluding Quebec, that purchased and/or paid for some or all of the purchase price of a Cellular Device during the Class Period, including persons that had a contract for wireless services for at least a portion of the Class Period that included the purchase or provision of a Cellular Device.

[196] The proposed class definition is set out in objective terms, such that membership is readily ascertainable, without reference to the merits. I find that Canadians will be able to self-identify based on whether they purchased a cellular device during the class period. Since modem chips are a necessary component of any cellular device, there is little room for the class to be narrowed further without excluding members who have a valid claim.

[197] The defendants say the proposed class is overly broad as it is not limited to cellular devices containing Qualcomm modem chips or for which royalty payments

were made to Qualcomm. I agree with the plaintiffs that this complaint has no practical consequences on their pleadings. Given that the plaintiffs say Qualcomm's technology was essential to operate a cellular device on the relevant communication standards and that Qualcomm had a "no license, no chips" policy, all cellular devices purchased during the class period would have resulted in royalty payments made to Qualcomm in some way or another. Further, there is room to argue that, given the size of Qualcomm's market share, any price changes or supply restrictions effected by Qualcomm could have affected prices across the cellular device market as a whole.

[198] However, the plaintiff is not opposed to an amendment in this regard, and I would permit amendment of the class to make it expressly clear that the claim is limited to persons who purchased and/or paid for some or all of the purchase price of a cellular device, including through a contract for wireless services for at least a portion of the class period that included the purchase or provision of a cellular device, where that cellular device contained modem chips manufactured by the defendants or for which royalties were paid to the defendants. I find this is the narrowest the class can be defined without excluding members who have a valid claim. The Supreme Court of Canada has recognized that it is appropriate to allow certification on condition of such an amendment: *Hollick* at para. 21.

[199] The defendants also submit that the class is overly broad because it includes statute-barred class members. I have already determined that Qualcomm's limitations defence should be addressed at trial, as it is not plain and obvious that it is bound to succeed. I would therefore not give effect to the defendants' argument in this regard. Moreover, the fact that some class members may ultimately be unsuccessful in establishing a claim against the defendants does not make the class overbroad: *MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093 at para. 82, rev'd on other grounds 2022 BCCA 151.

[200] With the amendment discussed above, I find that the definition of the class is sufficient to meet the requirements of s. 4(1)(b).

Section 4(1)(c): Whether the Proposed Claims Raise Common Issues

[201] The plaintiffs propose to certify the common issues attached hereto at Schedule “A.” Those issues may be divided into the following categories: conduct-related common issues; loss- and causation-related common issues (for the purposes of determining liability); and damages-related common issues (for the purposes of determining relief).

[202] The defendants argue that there is no basis in fact to show that the proposed common issues exist. They say that the requirement of a rational relationship between the proposed class, the claims, and proposed common issues has not been made out: *Hollick* at para. 19.

a) The Proper Approach

[203] The Court of Appeal has held that “[t]he commonality threshold is low; a triable factual or legal issue which advances the litigation when determined will be sufficient”: *Finkel .v Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 22.

[204] In *Microsoft*, the Court held as follows at para. 108:

In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that “[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis” (para. 39). I list the balance of McLachlin C.J.’s instructions, found at paras. 39-40 of that decision:

- (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.
- (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[205] The Court went on to address the impact of differences among the proposed class members:

[109] Microsoft argues that the differences among the proposed class members are too great to satisfy the common issues requirement. It argues that the plaintiffs allege they were injured by multiple separate instances of wrongdoing, that these acts occurred over a period of 24 years and had to do with 19 different products, and that various co-conspirators and countless licences are implicated. Microsoft also argues that the fact that the overcharge has been passed on to the class members through the chain of distribution makes it unfeasible to prove loss to each of the class members for the purposes of establishing common issues.

...

[112] The differences cited by Microsoft are, in my view, insufficient to defeat a finding of commonality. *Dutton* confirms that even a significant level of difference among the class members does not preclude a finding of commonality. In any event, as McLachlin C.J. stated, “[i]f material differences emerge, the court can deal with them when the time comes” (*Dutton*, at para. 54).

[Emphasis added.]

[206] The parties disagree on the proper approach to dealing with the question of common issues. The defendants submit that the some-basis-in-fact standard requires a two-step approach by which the plaintiffs must adduce evidence on (a) the existence of an issue, and (b) the commonality of that issue. However, I would not adopt a two-part test as urged by the defendants.

[207] In my view, the dicta provided by the Supreme Court of Canada in *Microsoft* is inconsistent with a requirement for the plaintiffs to provide evidence in support of the merits of their position on the common issues. The language in s. 4(1)(c) of the *CPA* asks only whether the claims of the class members raise common issues. The underlying question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. Hence, the language and purpose of the section are focussed on the commonality of the issues, not on their merits. As the Court noted in *Microsoft SCC* at para. 110:

...In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage

goes only to establishing whether these questions are common to all the class members.

[Emphasis added.]

[208] As further noted in *Sun-Rype* at para. 114, “the requirement that there be an evidentiary foundation—or some basis in fact—to support the certification criteria does not include a preliminary merits test and does not require the plaintiffs to indicate the evidence upon which they will rely to prove these claims”; see also *Fischer* at para. 42.

[209] Similarly, in *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 57, our Court of Appeal held that “[t]he certification judge is not to conduct an adjudication on the merits. There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis.”

[210] In any event, I think little turns on taking a one-step versus a two-step approach to commonality. In *O’Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 at para. 263, Chief Justice Hinkson held that “whether the one-step or two-step articulation of the test is used, the outcome is the same” because it would be difficult to conceive of a situation where “the plaintiff can meet [their] burden of showing that an issue can be proven in common for the class without providing some basis in fact that there is a common issue in the first place.” Justice Matthews agreed with this observation in *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 at para. 135: “[i]n most cases, evidence of commonality will often also be evidence of the existence of the matter the issue seeks to address.” In this particular case, I similarly find that using the one-step over the two-step test has little practical effect; my following findings with regard to commonality also support the existence of the issues in the first place.

[211] Accordingly, I find that the proper approach is to consider whether the evidence provides some basis in fact that the issues are common to the class members. While positive findings under this approach necessarily support a basis in

fact that the issues themselves exist, evidence as to the merits of those issues need not be considered.

b) Conduct-Related Common Issues

[212] In Schedule “A”, the plaintiffs set out several conduct-related common issues that focus on the behaviour and knowledge of the defendants. These include questions such as whether Qualcomm engaged in conspiratorial conduct (at statute or common law), whether Qualcomm engaged in an unlawful means tort, whether Qualcomm breached anti-monopolies legislation, and whether Qualcomm was unjustly enriched to the detriment of class members. Many of these questions address the existence, scope and impact of the alleged misconduct as it relates to the charging of supra-competitive royalties and the extent to which that conduct was directed towards the plaintiffs and class.

[213] I am satisfied that these conduct-related issues can be determined without reference to the circumstances of individual class members. The pleadings and evidence disclose some basis in fact that these are issues of central or overriding concern for all class members.

c) Loss- and Causation-Related Common Issues

[214] For the purposes of grounding liability for the conduct alleged, the plaintiffs seek to certify loss- and causation-related common issues at e, i, n, t, w, and bb of Schedule “A”.

[215] This is an indirect purchaser case. In *Microsoft SCC* at para. 115, the Court held that “[t]he role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole.” To determine if the loss-related issues meet the “some basis in fact” standard, “some assurance is required that the questions are capable of resolution on a common basis. [And] [i]n indirect purchaser actions, plaintiffs generally seek to satisfy this requirement through the use of expert evidence in the form of economic

models and methodologies”: *Microsoft SCC* at para. 114. The Court went on to say that:

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

[Emphasis added.]

[216] In *Godfrey SCC* at para. 102, the Court added that “it is not necessary, in order to support certifying loss as a common question, that a plaintiff’s expert’s methodology establish that each and every class member suffered a loss.” It went on to say that:

[102] ...in order for loss-related questions to be certified as common issues, a plaintiff’s expert’s methodology need only be sufficiently credible or plausible to establish loss reached the requisite purchaser level...

[Emphasis added.]

[217] As discussed above, the plaintiffs have filed expert evidence from Dr. Netz, an economist who is knowledgeable in the consumer electronics industry. Her opinion is that economic theory supports that overcharges are passed through to downstream purchasers, particularly in cases such as this where the alleged price increase was imposed on all purchasers. To establish class-wide loss, Dr. Netz intends to analyze whether Qualcomm had market power and whether the alleged misconduct would have impacted the prices of OEM devices.

[218] She also presents common methodologies for establishing that loss reached the requisite purchaser level. For example, she opines that the passing on of at least some part of Qualcomm’s overcharges to indirect purchasers can be calculated

by regressing the price paid by the downstream purchaser of a Cellular Device on the upstream cost of the Cellular Device; that is, the pass-through rate can be estimated by regressing price on cost. Mathematically, the regression equation for these studies can be represented by

$$\text{price} = \alpha + \beta \text{ cost} + \varepsilon \text{ or } p = \alpha + \beta c + \varepsilon,$$

where p is the price of the Cellular Device, c is the cost of the Cellular Device, and ε represents the error term. In the equation above, the coefficient (β) on the upstream cost variable gives the pass-through rate.

[219] This regression analysis can be used to control for other factors affecting prices, such as cameras, memory, and branding.

[220] The defendants criticize Dr. Netz's methodologies; however, they have not submitted a responding report from another expert. Dr. Netz's evidence is grounded in the facts of the case, and, contrary to the defendants' submissions, I find that it provides some evidence of the data to which the methodologies are to be applied. For example, Dr. Netz opines that "actions against Qualcomm by agencies in China, Japan, U.S., and the European Union are reasonably likely to provide useful information for measuring overcharges" and that "[t]he number of overcharged units will almost certainly be available in Qualcomm's royalty payments data and modem chip transaction data." Dr. Netz also cites the availability of cost and sales data from cell service providers, public sources, and market analysts such as Strategy Analytics (now TechInsights).

[221] I am satisfied that the plaintiffs have introduced realistic expert evidence from Dr. Netz that provides a sufficiently credible and plausible methodology to establish some basis in fact that loss reached the requisite purchaser level as a result of Qualcomm's conduct. Consequently, I am satisfied that the question of this loss and its causation is common to all class members.

d) Damages-Related Common Issues

[222] The plaintiffs seek to certify several kinds of damages-related common issues, and I will deal with each in turn.

Damages Arising from Conduct

[223] Issues f, j, o, u, and y of Schedule "A" ask whether the class members are entitled to recover damages or restitution for the specific misconduct alleged (i.e., breach of the *Competition Act*, predominant purpose conspiracy, unlawful means

conspiracy, unlawful means tort, and unjust enrichment). The amount of damages that class members are entitled to recover for each allegation of misconduct is intrinsically linked to whether, and to what extent, the class members suffered loss or deprivation as a result of the misconduct. As I have already found that Dr. Netz's evidence provides some credible and plausible methodologies for establishing loss at the class level, I take no issue with finding that the question of the extent of this loss (i.e., the damages to which the class is entitled) is a question common to the class that is supported on the pleadings and evidence.

Aggregate Damages

[224] Issue c of Schedule "A" asks if damages for the class members can be measured on an aggregate basis, and if so, in what amount. Section 29 of the *CPA* allows for the court to make an aggregate monetary award.

[225] The Supreme Court of Canada has pointed out that s. 29 is purely remedial and is only available after all common issues have been determined, including liability: *Microsoft SCC* at para. 134. Aggregate damages can be certified as a common issue, but only if the aggregate damages provisions are not used to establish proof of loss: *Microsoft SCC* at para. 134. This requirement is met here.

[226] Whether aggregate damages are certified as a common issue or not, "it is for the trial judge to determine, following the common issues trial, whether the statutory criteria are met such that [s. 29 of the *CPA*] can be applied to award damages": *Godfrey SCC* at para. 113. To invoke the aggregate damages provisions, "the trial judge must be satisfied, following the common issues trial, either that *all* class members suffered loss, or that [they] can distinguish those who have not suffered loss from those who have": *Godfrey SCC* at para. 118. It is therefore possible that a methodology sufficient for certifying loss as a common issue (i.e., one that merely shows loss reached the indirect purchaser level) will be insufficient at common issues trial for the purposes of invoking the aggregate damages provisions (i.e., establishing that loss reached all class members): *Godfrey SCC* at para. 119.

[227] The plaintiffs intend to rely again on Dr. Netz’s evidence to demonstrate that there is a methodology available to determine aggregate damages, along with Dr. Ghafele’s evidence that provides a methodology for determining a FRAND rate (a value that must be input into Dr. Netz’s methodology). I have already held that Dr. Netz’s evidence is sufficiently credible and plausible for the purpose of determining loss-related common issues.

[228] Without making a finding on the sufficiency of Dr. Netz’s and Dr. Ghafele’s evidence with respect to the availability of a method for assessing aggregate damages, I would heed the comments in *Microsoft SCC* and *Godfrey SCC* and leave the issue of aggregate damages to the common issues trial judge. I point out that the failure to certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking those *CPA* provisions if considered appropriate once liability is found: *Microsoft SCC* at para. 134.

Punitive Damages

[229] The plaintiffs seek to certify, at ff and gg of Schedule “A”, the issues of whether the defendants are liable for exemplary or punitive damages, and if so, in what amount.

[230] As Justice Watchuk summarized in *Sherry v. CIBC Mortgage Inc.*, 2015 BCSC 490 at para. 28:

The certification judge should not certify punitive damages as a common issue if the reprehensibility of the defendant’s conduct cannot be assessed without considering the plaintiff’s individual circumstances: [*Chalmers v. AMO Canada Company*, 2010 BCCA 560] at para. 31. However, if the assessment of the defendant’s conduct will be focused on systemic wrongdoing against the group, rather than wrongdoing towards individual class members, then certification may be appropriate: [*Rumley v. British Columbia*, 2001 SCC 69] at para. 34.

[Emphasis added.]

More recently, our Court of Appeal held that there must be some basis in fact beyond the pleadings for the certification of punitive damages as a common issue: *MacKinnon v. Pfizer Canada Inc.*, 2022 BCCA 151 at para. 7.

[231] I would certify ff and gg. I find that the plaintiffs have focussed on systemic wrongdoing against the class by the defendants, and that the issue of punitive damages does not require individual class member participation or assessment. The FAN OCC alleges the following:

Cellular Devices are ubiquitous in Canadian society and a necessary element of almost all Canadians' personal and working lives. Qualcomm was well aware that its actions would have a significant adverse impact on the Plaintiffs and Class. The conduct of Qualcomm was high-handed, reckless, without care, deliberate and in disregard of the Plaintiffs' and the Class Members' rights. Qualcomm's conduct purposely stifled innovation worldwide...

...Qualcomm deliberately sought to shield its behaviour from regulatory or court supervision by coercing others into silence...

[232] The evidence provided by the plaintiffs provides some basis in fact to support the allegations that Qualcomm "silenced" OEMs, and, as discussed above with respect to s. 4(1)(a), that its alleged conduct was systemic, was designed to harm competition to its benefit and to the detriment of alternate technologies, and deliberately adversely affected purchasers of cellular devices during the class period.

Administration and Distribution of Damages

[233] Issues dd, ee, and hh of Schedule "A" deal with the administration and distribution of damages to class members, along with the question of court-ordered interest. As I would not certify the aggregate damages issue, and I find these issues are inherently linked to it, I will not certify these issues.

[234] The CPA broadly authorizes the common issues trial judge to determine remedial relief, including its manner of distribution and related issues like costs of distribution and interest: see e.g. *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168 at para. 252; *Microsoft SCC* at para. 134.

e) Conclusion on Certification of Common Issues

[235] I find, therefore, that I need not certify issues cc, dd, ee, and hh in Schedule "A" as common issues. Potential certification of such issues is left for the trial judge

to consider. The remaining issues meet the requirements of s. 4(1)(c); I certify issues a–bb, ff and gg in Schedule “A” as common issues.

Section 4(1)(d): Whether a Class Proceeding is the Preferable Procedure

[236] Section 4(2) of the *CPA* provides as follows:

(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.

[237] In addressing this provision, I would keep in mind the three goals of class proceedings: improving access to justice, enhancing judicial economy and encouraging behaviour modification: *Hollick* at para. 27.

[238] The defendants say a class action is not the preferable procedure in this case because loss must be established individually for class members. Again, they submit that there is an absence of a methodology to establish loss and damages on a class-wide basis, and that the claims asserted on behalf of the putative class members would require highly particularized evidence and individualized fact-finding. They point to the expansive proposed class and argue that:

[t]o determine liability or loss/damage would ultimately require a transaction-by-transaction or device-by-device evaluation at the retail level and through the supply chain of hundreds of thousands if not millions of purchases and transactions to determine liability for any particular transactions and to assess loss or damage. Even if some aggregation is possible, into regions, or time periods, it is clear that there will need to be a very complex matrix of assessments for different OEMs, retailers, wireless service providers and others over different points of time, and there would be hundreds if not

thousands of different analyses necessary and the complexity and weight of that would be unmanageable in this proceeding.

[239] I disagree with the defendants and find that the first factor—whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members—favours a class proceeding. The proposed common issues predominantly concern liability. Other than proof of individual entitlement (methodologies for which have been adduced by the plaintiffs), there are unlikely to be individual liability-related issues remaining after the resolution of the common issues.

[240] The second factor—whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions—does not militate against a class action procedure here.

[241] The third factor, whether the class proceeding would involve claims that are or have been the subject of any other proceedings, is relevant in that foreign proceedings have taken place in other jurisdictions such as South Korea, Taiwan, China and the European Union. However, I am not satisfied that regulatory or other types of foreign proceedings offer a more adequate means of addressing allegations that Qualcomm engaged in anticompetitive conduct that caused harm to Canadian consumers.

[242] On the fourth factor, I find that other means of resolving the claims are less practical and less efficient. In my view, alternative procedures such as individual actions, test cases or regulatory proceedings would be unlikely to efficiently resolve the dispute between the parties. The same issues would still need to be considered in any individual litigation, but in a less controlled procedural environment. Regulatory proceedings would not grant the plaintiffs compensation for their losses. And the complexities of the action make individual litigation cost-prohibitive for litigants.

[243] Further, a class action is likely the best means of promoting behaviour modification in this case. The plaintiffs allege that Qualcomm has continued its

anticompetitive behaviour. The plaintiffs point out that it is unlikely the Competition Bureau will take action against Qualcomm given the passage of time, and there is no evidence that if the class action does not proceed, the objectives of behaviour modification and deterrence will be met: see *Microsoft SCC* at para. 141.

[244] On the final factor, I find that the administration of the class proceeding would not create greater difficulties than those likely to be experienced if relief were sought by other means. There is no reason to presume that the administration of this case as a class action would be unduly burdensome to judicial resources. As noted, the plaintiffs have put forward expert evidence showing how the claim can be analysed on a class-wide basis. Dr. Netz opines that regression analysis can be used to control for variations within the class, such as the make and model of the device and the time period in which it was purchased.

[245] Overall, having regard to the nature of the proposed action in this case, I assess that the proposed class proceeding meets the general purposes of class actions, being improvement of access to justice, enhancing judicial economy and encouraging behaviour modification. A class action is a fair and efficient procedure, and would be manageable with regard to the common issues in the context of the action as a whole. I find that the plaintiff has met the preferable procedure requirement.

[246] I am satisfied that the requirements of s. 4(1)(d) have been made out.

Section 4(1)(e): Representative Plaintiff(s) and the Litigation Plan

[247] Section 4(1)(e) of the *CPA* requires the existence of 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.

[248] The proposed representative plaintiff, Ms. Oliver, is prepared to represent the interests of the class members and is aware of the duties entailed in acting as a class representative. She attests that she is not aware of any conflicts with other class members with respect to the proposed common issues.

[249] The defendants are critical of the litigation plan put forward. However, I find that Ms. Oliver has put forward a litigation plan that, while admittedly largely boilerplate, provides a workable method for advancing the litigation and represents a reasonable framework. Perfection is not required at this stage. If necessary, the plan can be amended as the litigation moves forward. On the defendants' point that the plan does not address the individual issues that would inevitably remain even if all proposed common issues were certified, I find that the issue of addressing aggregate damages can be worked into the plan at a later date.

[250] I am satisfied that the requirements of s. 4(1)(e) of the *CPA* are made out and that the plaintiffs have put forward a representative plaintiff who will fairly and adequately represent the interests of the class, who has provided a workable plan for advancing the proceedings, and who does not have, on the common issues, an interest that is in conflict with the interests of other class members.

THE SUMMARY JUDGMENT APPLICATION

[251] The defendants seek summary judgment dismissing the plaintiffs' claim in its entirety. As noted above, however, I find that many of the defendants' arguments are properly considered as part of the s. 4(1)(a) analysis.

Legal Principles

[252] Rule 9-6 allows for the summary determination of a claim in a procedure that engages evidence but does not assume the character of a summary trial: *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32. An application under Rule 9-6 "is an assertion that the claim or the defence is factually without merit": *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at para. 9 [*International Taoist*].

[253] Summary judgment serves an important purpose in the civil litigation system as:

...[t]rying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

See *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 10.

[254] The bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is “no genuine issue of material fact requiring trial”: *Lameman* at para. 11.

[255] If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48. But, if the plaintiff submits evidence contradicting the defendant’s evidence in some material respect or if the defendant’s evidence in support of a Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff’s pleadings, the application must be dismissed: *Beach* at para. 48.

[256] Rule 9-6(5) provides that upon hearing an application for summary judgment, the court,

- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
- (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
- (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
- (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

Analysis

[257] To the extent Qualcomm has concerns with the sufficiency of the plaintiffs' pleadings, I find this issue is more properly considered as part of the s. 4(1)(a) analysis or on an application to strike (under Rule 9-5). An application for summary judgment is not an appropriate avenue to advance an argument that the pleadings fail to disclose a cause of action; Rule 9-5 is the proper vehicle through which to attack the pleadings (*Taoist Church* at para. 9). In any event, for the same reasons given above in respect of s. 4(1)(a), I find the plaintiffs' pleadings are sufficiently particularized and it would be inappropriate to order summary judgment on this basis (and, as mentioned above, I would be wary to dismiss claims at this stage of certification that can be fixed by amendment: *Watson BCCA* at para. 106).

[258] For the reasons above in relation to the certification analysis, I would not give effect to the defendants' arguments that the plaintiffs' case is unmeritorious, that there is no genuine issue for trial, and that its various claims ought to be dismissed. I agree with the plaintiffs that this is a complex case involving conflicting evidence on the core issues, including the assertions of anticompetitive conduct and abuse of market power to the detriment of consumers: see also *Williams v. Audible Inc.*, 2022 BCSC 834 at paras. 117, 120. In particular, the fundamental disputes in the evidence and the theories of the parties with respect to licensing, the standard-setting process and Qualcomm's role therein, the effect of agreements, Qualcomm's market power, and the nature of the alleged anti-competitive conduct render summary judgment problematic. The record raises numerous genuine issues for trial, and I find that the various conflicts in the evidence render summary judgement inappropriate.

[259] This case should proceed to the merits phase with the benefit of discovery. At this stage, the defendants have not made out a case for dismissing the plaintiffs' claims on summary judgment.

CONCLUSION

[260] An order for certification is made consistent with the reasons above.

[261] An order defining the class as proposed by the plaintiff is granted, subject to the amendment noted above.

[262] Allison Oliver is appointed as the representative plaintiff.

[263] The order sought to appoint class counsel is granted.

[264] An order stating the nature of the claims as asserted on behalf of the class, as sought by the plaintiffs, is granted.

[265] An order stating the relief sought by the class, as summarized in para. 6 of the plaintiffs' Notice of Application, is granted.

[266] An order certifying the common issues as set out in Schedule "A" is granted, subject to the exceptions noted above.

[267] An order approving the proposed litigation plan in Schedule B of the plaintiffs' Notice of Application is granted.

[268] An order to amend the FANOCC as sought by the plaintiffs is granted.

[269] The defendants' request for summary judgment and dismissal of the plaintiffs' action is dismissed.

[270] Pursuant to s. 37 of the *CPA*, I decline to order costs to any party in relation to the application for certification.

"Brundrett J."

Schedule "A"
Proposed Common Issues

Breach of the Competition Act

- a. Between the start of the Class Period and March 11, 2009, did the defendants or any of them, engage in conduct that was contrary to section 61 of the *Competition Act*, RSC 1985, c 34 (the "*Competition Act*"), as it existed prior to March 11, 2009?
- b. Between the start of the Class Period and March 11, 2010, did the defendants, or any of them, engage in conduct that was contrary to section 45 of the *Competition Act*, as it existed prior to March 11, 2010?
- c. Between March 12, 2010 and the end of the Class Period, did the defendants, or any of them, engage in conduct that was contrary to section 45 of the *Competition Act*?
- d. During the Class Period, did Qualcomm Canada, Inc. engage in conduct that was contrary to section 46 of the *Competition Act*?
- e. Did Class Members suffer loss or damage as a result of the breach of the *Competition Act* by the defendants, or any of them?
- f. What damages, if any, are Class Members entitled to recover from the defendants, or any of them, pursuant to section 36 of the *Competition Act*?
- g. What amounts, if any, should the defendants, or any of them, pay Class Members for the costs of any investigation in connection with this matter and for the costs of these proceedings pursuant to section 36 of the *Competition Act*?

Predominant Purpose Conspiracy

- h. Did the defendants, or any of them, conspire or agree to harm Class Members by, directly or indirectly, requiring them to pay artificially inflated prices for Cellular Devices and to illegally increase their profits by the sale of Modem Chips?
- i. Did Class Members suffer loss as a result?
- j. What damages, if any, are payable by the defendants, or any of them, to Class Members?

Unlawful Means Conspiracy

- k. Did the defendants, or any of them, act in combination or by agreement in requiring Class Members to pay artificially inflated prices for Cellular Devices?
- l. Was the conduct of the defendants, or any of them, unlawful? In particular, was the conduct of the defendants, or any of them:

- (i) an unlawful restraint of trade at common law and equity;
 - (ii) an offence related to competition contrary to s. 61 of the *Competition Act* as it existed prior to March 11, 2009, s. 45 of the *Competition Act* as it existed prior to March 11, 2010, s. 45 of the *Competition Act*, and/or s. 46 of the *Competition Act*,
 - (iii) an offence contrary to s. 1 of the *Sherman Act*, CH 647, 26 Stat. 209, 15 U.S.C. and the applicable U.S. state competition laws;
 - (iv) a breach of Qualcomm's FRAND contractual undertakings;
 - (v) an offence contrary to Article 101 of the *Treaty on the Functioning of the European Union*, OJ No. C 326/47; and/or,
 - (vi) illegal acts contrary to the competition laws of South Korea, China and Taiwan among others?
- m. Was the conduct of the defendants, or any of them, directed towards Class Members? Did the defendants, or any of them, know, or ought they to have known, that their conduct would likely cause injury to Class Members?
- n. Did Class Members suffer loss as a consequence of the conspiracy?
- o. What damages, if any, are payable by the defendants, or any of them, to Class Members?

Unlawful Means Tort

- p. Did the defendants, or any of them, engage in unlawful and/or prohibitive acts against third parties?
- q. If so, does the conduct of the defendants, or any of them, support third-party civil actions for damages or compensation under Canadian law, under the law of the jurisdiction in which the acts took place, and/or under the law of the applicable contract in respect of the following claims:
- (i) breach of contract, including Qualcomm's breach of its contractual FRAND licensing undertakings;
 - (ii) breach of the duty of good faith in contractual relations;
 - (iii) civil conspiracy;
 - (iv) unjust enrichment;
 - (v) the tort of intimidation;
 - (vi) damages arising under s. 36 of the *Competition Act* for conduct contrary to s. 61 of the *Competition Act* as it existed prior to March 11, 2009, for conduct contrary to s. 45 of the *Competition Act* as it existed

prior to March 11, 2010, for conduct contrary to s. 45 of the *Competition Act*, and/or for conduct contrary to s. 46 of the *Competition Act*;

- (vii) damages arising from breaches of the *Sherman Act*, ss. 1 and 2 and the U.S. state competition laws;
 - (viii) damages arising from breaches of Articles 101 and 102 of the *Treaty on the Functioning of the European Union*; and
 - (ix) damages arising from breaches of competition laws in other jurisdictions, including but not limited to South Korea, China, and Taiwan.
- s. In engaging in the unlawful and/or prohibitive acts, did the defendants, or any of them, intend to cause economic harm to Class Members, either as an end in itself or as a necessary means of achieving an end that serves some ulterior motive, namely, to enrich themselves?
 - t. Did Class Members suffer economic loss?
 - u. What damages, if any, are payable by the defendants, or any of them, to Class Members?

Unjust Enrichment

- v. Were the defendants, or any of them, enriched by receipt of inflated royalties for their Modem Chip standard essential patents (SEPs) and/or inflated Modem Chip prices?
- w. Did Class Members suffer a corresponding deprivation as a consequence of paying inflated prices for Cellular Devices?
- x. Is there a juristic reason why the defendants, or any of them, should be entitled to retain the inflated royalties and/or inflated Modem Chip prices, given the defendants' prohibited and unlawful acts, including breaches of the *Competition Act*?
- y. What restitution, if any, is payable by the defendants, or any of them, to Class Members?

Overcharge and Pass Through

- z. Did the conduct of the defendants, or any of them, extract an unlawful overcharge in the form of inflated royalties for their Modem Chip SEPs and/or inflated Modem Chip prices?
- aa. If so, what was the amount of the unlawful overcharge?
- bb. Was the unlawful overcharge passed through to Class Members (purchasers of Cellular Devices), and if so, how much?

Damages and Distribution

- cc. Can damages for Class Members be measured on an aggregate basis and, if so, what are the aggregate damages?
- dd. What is the appropriate distribution of damages and/or restitution, including interest, to Class Members?
- ee. Who should pay the cost of that distribution?

Exemplary and Punitive Damages

- ff. Are the defendants, or any of them, liable to pay punitive or exemplary damages to Class Members?
- gg. If yes, how much is payable by the defendants, or any of them, to Class Members?

Interest

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