Federal Courts Reports
Recueil des décisions des Cours fédérales

T-809-18

2021 FC 1185

Proposed Class Proceeding

Chelsea Jensen and Laurent Abesdris (*Plaintiffs*)

v.

Samsung Electronics Co. Ltd., Samsung Semiconductor Inc., Samsung Electronics Canada, Inc., SK Hynix Inc., SK Hynix America, Inc., Micron Technology, Inc., and Micron Semiconductor Products, Inc. (*Defendants*)

INDEXED AS: JENSEN V. SAMSUNG ELECTRONICS CO. LTD.

Federal Court, Gascon J.—By videoconference, October 26-28; Ottawa, November 5, 2021.

Practice — Class Proceedings — Motion seeking order to certify underlying action as class proceeding under Federal Courts Rules, r. 334.16(1) — Plaintiffs alleging that manufacturers of Dynamic Random Access Memory chips (DRAM) conspired to limit global supply, raise price of DRAM — Contending that alleged conspiracy disclosed cause of action under Competition Act (Act), s. 36 for breach of Act, ss. 45, 46 — Maintaining satisfying all required legal elements for certification — Alleging that conspiracy between defendants formed, achieved through direct communications in private meetings between defendants as well as through public statements, or "signalling", to each other — Certification motion following parallel class action commenced earlier in the U.S. — Plaintiffs advancing that their certification motion typical competition law class action raising allegation of price-fixing conspiracy — Claiming no meaningful differences between this case, previous DRAM case (Infineon Technologies AG v. Option consommateurs (Infineon)) where certification confirmed by Supreme Court — Seeking to certify class proceeding on basis of six common questions — Submitting that some-basis-in-fact standard requiring "one-step approach" which focuses solely on commonality, that applying "two-step approach" would infuse merits analysis in certification test — Main issue whether alleged conspiracy, wrongful conduct existing in this case — Plaintiffs not satisfying reasonable cause of action requirement for certification — Distinctive feature of this case plaintiffs' core allegation of conspiracy about supply suppression — Competition law class action herein rare case where existence of alleged conspiracy at source of claim for loss, damages under Competition Act, s. 36 challenged at certification stage — Existence of an alleged conspiracy typically not an issue in such class actions — Infineon precedent not shedding any light on main issue in dispute — Whether "plain and obvious" that pleadings disclosing no reasonable cause of action, that no claim exists — Here, adequate allegations in pleadings and minimal evidentiary background that defendants explicitly or tacitly agreeing to act in furtherance of common goal both missing in plaintiffs' motion — Pleadings purely speculative — Failed to provide material

facts — Must be supported by sufficient particularization, not be bare assertions or conclusory legal statements based on assumptions or speculation — Presumption that allegations of fact true having some limits — Allegations not assumed to be true if not precise enough or if only speculative — Court cannot weigh evidence at certification stage — Allegations, factual foundation of circumstantial events must go to establishment of an agreement, to the conduct of parties — Here, strictly no allegations, no material facts, let alone any evidentiary basis, of any "facilitating practices" in terms of conduct by defendants — Public statements relied on by plaintiffs not offering material facts to support allegation of agreement between defendants — Merely showing parallel conduct not enough to ground conspiracy claim, speculate from it that agreement must be at source of parallel conduct — Statement of claim added up to fishing expedition — Plaintiffs' limited allegations not meeting Federal Courts Rules, rr. 174, 181 requirements — Plaintiffs also failing to show, on some-basis-in-fact standard of proof, that proposed common issues about alleged wrongful acts under ss. 45, 46 existed in fact — Some-basis-in-fact standard requiring two-step approach to common issues requirement — Two-step test still governing in certification decisions across Canada — No conflict between Supreme Court decisions in Pro-Sys Consultants Ltd. v. Microsoft Corporation, Hollick v. Toronto (City) establishing that there must be some evidentiary basis to show that common issue existing beyond bare assertion in pleadings — Pro-Sys supporting two-step approach to common issues requirement — Not departing from Hollick as governing authority on some-basis-in-fact standard — Plaintiffs mischaracterized, misunderstood two-step approach when presenting it as merits-based test — Two-step approach preventing certification of artificial claims — Pro-Sys not lowering already low bar to certification to the point of absolving plaintiffs of obligation to lead any minimal level of evidence that alleged wrong existing in fact — Here, various categories of "evidence" falling short of mark, not meeting low threshold of some basis in fact — Legal memberships in legal trade associations not constituting any basis in fact supporting existence of conspiracy — References to U.S. pleadings alleging same conspiracy not appropriate evidence — Procedural dimension of class proceedings never meant to downsize certification process to meaningless one, or to become fig leaf to cover naked shortcomings of plaintiff's motion — Court's role, even at procedural stage of certification, to filter out untenable, unfounded, speculative claims — Motion dismissed.

Competition — Plaintiffs seeking order to certify underlying action as class proceeding under Federal Courts Rules, r. 334.16(1) — Alleging that manufacturers of Dynamic Random Access Memory chips (DRAM) conspired to limit global supply, raise price of DRAM — Contending that alleged conspiracy disclosed cause of action under Competition Act (Act), s. 36 for breach of Act, ss. 45, 46 — Advancing that their certification motion typical competition law class action raising allegation of price-fixing conspiracy — Seeking to certify class proceeding on basis of six common questions — Whether alleged conspiracy, wrongful conduct existing in this case — Competition law class action herein rare case where existence of alleged conspiracy at source of claim for loss, damages under Competition Act, s. 36 challenged at certification stage — S. 45 conspiracy offence at source of plaintiffs' proposed class action rooted in existence of agreement to engage in prohibited conduct — Pleadings purely speculative, not supported by material facts — "Conscious parallelism" falling short of conduct prohibited by s. 45 — Incorrect to use terms "tacit agreement", "tacit collusion", "conscious parallelism" interchangeably to describe similar reality — Key difference between "conscious parallelism", other conduct is absence of agreement — No precedent in Canada recognizing that unilateral "public signalling" amounting to conspiracy prohibited by s. 45 — S. 46 establishing offence for persons beyond those directly involved in conspiracies covered by s. 45 — Without s. 46, courts only having jurisdiction to impose sanctions against conspirators themselves as opposed to entities in Canada who merely implement it without being direct party to conspiracy — Conspiracy claims contained in plaintiffs' general statements simply mirroring language of Act — Plaintiffs' statement of claim added up to fishing expedition —To allow plaintiffs' proposed class action to go forward on basis of record before Court would set dangerous precedent opening door to file s. 36 claims on sole basis of apparent anti-competitive effects accompanied with unfounded allegations, speculation regarding collusive conduct of alleged conspirators — S. 45 not contemplating that evidence of anti-competitive effects constituting proof of illegal agreement between competitors, without material facts or evidentiary basis regarding concerted conduct of competitors — Presence of express or tacit agreement beating heart of conspiracy provision — Absence of any investigation by Competition Bureau on impugned conduct,

while not determinative of potential existence of s. 45 conspiracy, certainly telling.

This was a motion seeking an order to certify the underlying action as a class proceeding under subsection 334.16(1) of the *Federal Courts Rules*. In their proposed competition law class action, the plaintiffs alleged that the leading manufacturers of Dynamic Random Access Memory chips (DRAM) conspired to limit the global supply and raise the price of DRAM[1].

The plaintiffs contended that the alleged conspiracy disclosed a straightforward cause of action under section 36 of the *Competition Act* (Act), for breach of sections 45 and 46 of the Act. The plaintiffs sought damages or compensation on behalf of all persons or entities in Canada who purchased DRAM manufactured and/or sold by the defendants, or products containing DRAM manufactured and/or sold by the defendants, excluding the defendants and their parent companies, subsidiaries and affiliates (Class). The plaintiffs maintained that they satisfied all the required legal elements for certification, namely, (i) that there was a reasonable cause of action; (ii) that there was an identifiable class; (iii) that there were common questions of law and fact; (iv) that a class proceeding was the preferred procedure; and (v) that they were appropriate representatives of the Class. The defendants stated that (i) the statement of claim did not disclose a reasonable cause of action; (ii) the issues identified by the plaintiffs did not qualify as common issues as the plaintiffs failed to provide some basis in fact for the existence or commonality of their liability or harm issues; and (iii) without liability and harm certifiable as common issues, a class proceeding is not the preferred procedure. The plaintiffs alleged that the conspiracy between the defendants was formed and achieved through direct communications in private meetings between the defendants as well as through public statements—or "signalling"—to each other. The plaintiffs also alleged that this supply reduction resulted in supra-competitive pricing for DRAM and DRAM products that would not have occurred absent the conspiracy and, further, that this "overcharge" was passed on to end-consumers, including the plaintiffs. The certification motion filed by the plaintiffs followed a parallel class action commenced earlier in the U.S., on which the claim in this proposed class action was directly based. The U.S. District Court found that the U.S. plaintiffs' allegations of "plus factors" combined and viewed together fell short of alleging a plausible cause of action based on conspiracy, and that their claim amounted to nothing more than "conscious parallelism".[2] The plaintiffs advanced that their certification motion was a typical competition law class action raising an allegation of price-fixing conspiracy. They claimed that there are no meaningful differences between this case and a previous DRAM case where certification was confirmed by the Supreme Court in *Infineon Technologies AG v. Option consommateurs* (*Infineon*). The defendants challenged three of the five requirements to be met to certify a class proceeding: the reasonable cause of action, the existence of common issues of law or fact, and the preferred procedure. The plaintiffs asked the Court to certify this class proceeding on the basis of six common questions. The first and second common issues related to the existence and scope of the alleged conspiracy and the defendants' liability under sections 45 and 46 of the Act. The third and fourth dealt with allegations of loss and harm flowing from the alleged wrongful acts. The last two concerned additional issues of follow-on interest and investigation costs. The plaintiffs submitted that the some-basis-in-fact standard requires a so-called "one-step approach" which focuses solely on commonality, and that applying a "two-step approach" would infuse a merits analysis in the certification test.

The main issue raised by the plaintiffs' certification motion was whether the alleged conspiracy and wrongful conduct existed in this case.

Held, the motion should be dismissed.

The plaintiffs did not satisfy the reasonable cause of action requirement for certification. This proposed competition law class action differed significantly from the usual price-fixing class actions brought before Canadian courts under the conspiracy provision of the Act (i.e., section 45 and its

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[1] DRAM is a type of semiconductor memory chip used in most computer products that allows information to be electronically stored and rapidly retrieved.

[2] Conscious parallelism refers to situations where, in the absence of an agreement to limit competition, competitors unilaterally adopt similar or identical business practices or pricing, as a result of rational and profit-maximizing strategies based on observations of market trends and activities of competitors.

predecessors). The conspiracy alleged by the plaintiffs in this case was not a typical price-fixing conspiracy under section 45 of the Act; it was instead an alleged conspiracy to suppress the supply of DRAM, which allegedly resulted in an increase in prices for DRAM. The plaintiffs' core allegation of conspiracy was about supply suppression. This was a distinctive feature of this case. There is no precedent where the primary focus of a competition law class action alleging a breach of section 45 of the Act was output suppression. This competition law class action was a rare case where the very existence of the alleged conspiracy at the source of the claim for loss and damages under section 36 of the Act was disputed and challenged at the certification stage. The existence of an alleged conspiracy is typically not an issue in such class actions. *Infineon* could not predetermine the result of the present certification motion as there is a fundamental difference with the current case relating to the issue of the alleged conspiracy. The *Infineon* precedent did not shed any useful light on the main issue in dispute. The test to be applied on the first criterion for certification—namely, that the pleadings disclose a reasonable cause of action—is whether it is "plain and obvious" that the pleadings disclose no reasonable cause of action and that no claim exists. For the remaining four certification criteria, the plaintiffs have the burden of adducing evidence to show "some basis in fact" that the requirements have been met. Here, the section 45 conspiracy offence at the source of the plaintiffs' proposed class action was rooted in the existence of an agreement to engage in the prohibited conduct. There had to be adequate allegations in the pleadings as well as some minimal evidentiary background that the defendants explicitly or tacitly agreed to act in the furtherance of a common goal. Both were missing in the plaintiffs' motion. The pleadings were purely speculative, were not supported by material facts, and therefore did not disclose a reasonable cause of action. The plaintiffs' pleadings failed to provide material facts showing that the defendants entered into an agreement to suppress the supply of DRAM, either directly or indirectly, and arrived at a mutual understanding. In order for allegations in pleadings to be considered as material facts, they must be supported by sufficient particularization, and must not be bare assertions or conclusory legal statements based on assumptions or speculation. The presumption that allegations of fact are true has some limits. There has to be some specific, tangible facts, and allegations will not be assumed to be true if they are not precise enough or if they are only speculative. The documents referred to by the plaintiffs in their statement of claim formed an integral part of their claim. However, at the stage of a certification motion, it is not the certification judge's task to look at these documents in detail and to determine whether or not the plaintiffs have correctly interpreted them, as this would amount to weighing evidence, something the Court cannot do at the certification stage. Canadian law has long recognized that "conscious parallelism" falls short of conduct prohibited by section 45 of the Act, since it represents the independent response by each competitor to the perceived and predicted conduct of others. It is incorrect to use the terms "tacit agreement", "tacit collusion" and "conscious parallelism" interchangeably to describe a similar reality. The key difference between "conscious parallelism" and other conduct is the absence of an agreement. So using "tacit agreement" or "tacit collusion" to describe such parallel behaviour is an oxymoron. There is no precedent in Canada that has recognized that unilateral "public signalling", i.e. conspiring through direct communications in private meetings and through public statements to each other, can amount to a conspiracy prohibited by section 45. Section 46 of the Act adds and complements section 45 by establishing an offence for persons beyond those who are directly involved in the conspiracies covered by section 45. Without section 46, the courts would only have jurisdiction to impose sanctions against the conspirators themselves as opposed to entities in Canada who merely implement it without being a direct party to the conspiracy. To properly plead a conspiracy, a plaintiff must notably specify the agreement to conspire between the defendants, and its purpose or object, as well as any specific conduct, described with clarity and precision, that is alleged to have been adopted by each of the conspirators in furtherance of the conspiracy. None of that transpired from the general statements made by the plaintiffs in the statement of claim. The conspiracy claims contained in the plaintiffs' general statements simply mirrored the language of the Act. The allegations and factual foundation of circumstantial events must go to the establishment of an agreement, and to the conduct of the parties. The plaintiffs could not simply allege general observed changes in prices without any material facts relating to the conduct of the defendants. Here, there were strictly no allegations and no material facts, let alone any evidentiary basis, of any "facilitating practices" in terms of conduct by the defendants. The public statements relied on by the plaintiffs did not offer material facts to support any allegation of an agreement between the defendants to suppress DRAM supply, or even to support any suppression, restriction or limitation of supply as

such. A unilateral action by a defendant does not become collusive simply because it happens to be preceded or followed in time by another, similar unilateral action by a competitor. Merely showing parallel conduct is not enough to ground a conspiracy claim and to speculate from it that an agreement must be at the source of such parallel conduct. The statement of claim added up to a fishing expedition on its allegation of an illegal conspiracy. Accepting the plaintiffs' allegations as being sufficient to support a cause of action based on a section 45 conspiracy would turn section 45 on its head, and strip away from this cornerstone provision of the Act what is now its most essential and central element, namely, the conduct of the alleged conspirators. The plaintiffs' limited allegations did not meet the requirements established by rules 174 and 181 of the *Federal Courts Rules* and confirmed by the Federal Court of Appeal precedents.

The plaintiffs also failed to show, on the some-basis-in-fact standard of proof, that the proposed common issues about the alleged wrongful acts under sections 45 and 46 existed in fact. The some-basis-in-fact standard requires a two-step approach to the common issues requirement. It is clear that the two-step test still governs in certification decisions across Canada. The vast majority of the courts, prior to and following the Supreme Court decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* (*Pro-Sys*), have continued to apply the two-step approach and to require a plaintiff to adduce some evidence (i.e., some basis in fact) for both the existence of the proposed common issues and for the commonality of each of the proposed common issues. There is no conflict between the decisions in *Pro-Sys*, *Hollick v. Toronto (City)* and the long line of cases establishing that there must be some evidentiary basis to show that a common issue exists beyond a bare assertion in the pleadings. When the *Pro-Sys* decision is read as a whole and properly considered in context, it supports the two-step approach to the common issues requirement. *Pro-Sys* does not stand for the proposition that a plaintiff is under no obligation to establish that the alleged grounds of a cause of action need to be anchored in reality. *Pro-Sys* cannot be read or interpreted as an attempt to depart from *Hollick* as the governing authority on the some-basis-in-fact standard. The plaintiffs mischaracterized and misunderstood the two-step approach when they presented it as being a merits-based test. There is a fundamental difference between weighing the merits of the claim (which the courts cannot do at certification) and determining whether some minimal evidence exists to support the existence of the claim (i.e. the two-step test). The two-step approach prevents the certification of claims that would be entirely artificial, detached from reality and devoid of some minimal evidence pertaining to the alleged wrongful acts or cause of action. Neither *Pro-Sys* nor any other class action precedent of the Supreme Court intended to lower the already low bar to certification to the point where plaintiffs would be absolved of the obligation to lead any minimal level of evidence that the wrong they allege exist in fact. Here, the various categories of "evidence" that the plaintiffs offered fell well short of the mark and did not meet the low threshold of some basis in fact. For one, evidence regarding a foreign government's investigation cannot establish a basis in fact for a conspiracy offence in Canada, when there is no evidence on the actual nature of the investigation and on the specific anti-competitive behaviour being investigated; no evidence or findings from the foreign regulators; no evidence that the scope of the investigation includes or extends to Canada; and no evidence on the foreign law and on whether the anti-competitive behaviour investigated in the foreign country, and possibly sanctioned in that country, is also conduct and behaviour that would constitute an illegal agreement under Canadian law. Furthermore, the mere fact that the DRAM industry is an oligopoly, which is not in itself anti-competitive, was not enough evidence to authorize the certification of the class action in this case. The oligopolistic characteristics of an industry are just as likely to be consistent with innocent behaviour as with an unlawful one. No Canadian court has certified a competition class action in an oligopolistic market on the basis that conscious parallelism is a defence on the merits. Perfectly legal memberships in perfectly legal trade associations, or even on the attendance of participants at perfectly legal trade association meetings, did not constitute any basis in fact supporting the existence of a conspiracy between the defendants. There was no evidence describing suspected or actual interactions between the defendants at trade association meetings, nor any interactions suggesting the establishment of an agreement to restrain the supply of DRAM or to increase DRAM prices. Trade association meetings cannot, in and of themselves, be probative of an unlawful agreement without any evidence of improper conduct by the members of such trade associations. References to U.S. pleadings alleging the same conspiracy are not appropriate evidence since those pleadings are drafted by lawyers and simply constitute opinions or legal argumentation. The common issues

requirement requires the plaintiffs to show some basis in fact for their proposed common issues, not some allegations made in a foreign proceeding. Finally, simply tendering an expert report is not sufficient to amount to some basis in fact of a proposed common issue. In conclusion, to allow the plaintiffs' proposed class action to go forward on the basis of the record before the Court regarding the alleged agreement would have set a dangerous precedent that would open the door to file section 36 claims on the sole basis of apparent anti-competitive effects accompanied with unfounded allegations and speculation regarding the collusive conduct of the alleged conspirators. Section 45 does not contemplate that evidence of actual or likely anti-competitive effects constitutes proof of the presence of an illegal agreement between competitors, without any material facts or evidentiary basis regarding the concerted conduct of the competitors. The presence of an express or tacit agreement is the beating heart of the conspiracy provision, even more so with the new section 45 prohibiting hard-core cartels as *per se* infractions under the Act. The procedural dimension of class proceedings was never meant to downsize the certification process to a meaningless one, or to become a fig leaf to cover the naked shortcomings of a plaintiff's motion. It is the Court's role, even at the procedural stage of certification, to filter out untenable, unfounded and speculative claims. While the absence of any investigation by the Competition Bureau on an impugned conduct is not determinative of the potential existence of a section 45 conspiracy. But it is certainly telling.

STATUTES AND REGULATIONS CITED

Competition Act, R.S.C. 1985, c. C-34, ss. 36, 45, 46.

Federal Courts Rules, SOR/98-106, rr. 174, 181, 334.16(1),(2), 334.18, 334.39.

CASES CITED

NOT FOLLOWED:

Crosslink v. BASF Canada, 2014 ONSC 4529 (CanLII), 244 A.C.W.S. (3d) 780 (as to the need for evidence establishing a conspiracy).

APPLIED:

Hollick v. Toronto (City), 2001 SCC 68, [2001] 3 S.C.R. 158; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Condon v. Canada*, 2015 FCA 159, 474 N.R. 300; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 420 D.L.R. (4th) 534; *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949; *Atlantic Sugar Refineries Co. Ltd. et al. v. Attorney General of Canada*, [1980] 2 S.C.R. 644, 115 D.L.R. (3d) 21; *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219; *Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215, 299 A.C.W.S. (3d) 391.

DISTINGUISHED:

Infineon Technologies AG v. Option consommateurs AG, 2013 SCC 59, [2013] 3 S.C.R. 600, affg 2011 QCCA 2116 (CanLII), 213 A.C.W.S. (3d) 557, revg 2008 QCCS 2781 (CanLII), 2008 CarswellQue 5729; *Crosslink v. BASF Canada*, 2014 ONSC 1682 (CanLII), 238 A.C.W.S. (3d) 547, affd 2014 ONSC 4529 (CanLII), 244 A.C.W.S. (3d) 780.

CONSIDERED:

In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Litigation, Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, U.S. District Court, Northern District of California, November 24, 2020, 2020 WL 8459279 (Case No. 4:18-cv-2518-JSW-KAW, Dkt. No. 119); *Hazan c. Micron Technology Inc.*, 2021 QCCS 2710 (CanLII); *Watson v. Bank of America Corporation*, 2014 BCSC 532 (CanLII), 242 A.C.W.S. (3d) 775, var'd 2015 BCCA 362 (CanLII), 389 D.L.R. (4th) 577; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295; *Fanshawe College v. LG Philips LCD Co.*, 2011 ONSC 2484 (CanLII), 201 A.C.W.S. (3d) 897; *Irving Paper*

Ltd. v. Atofina Chemicals Inc., 99 O.R. (3d) 358, [2009] O.J. No. 4021 (QL) (S.C.J.), leave to appeal ref'd 2010 ONSC 2705 (CanLII), 103 O.R. (3d) 296 (Div. Ct.); *Lin v. Airbnb, Inc.*, 2019 FC 1563, 315 A.C.W.S. (3d) 642; *Canada (Attorney General) v. Jost*, 2020 FCA 212, 332 A.C.W.S. (3d) 25; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, [2019] 2 S.C.R. 831; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 634, revg in part 2020 FC 119, 314 A.C.W.S. (3d) 866; *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, [2020] 3 S.C.R. 298; *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 (CanLII), 271 A.C.W.S. (3d) 705; *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143, 229 A.C.W.S. (3d) 935; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, [2010] 3 F.C.R. D-16; *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112, 402 N.R. 95; *Das v. George Weston Limited*, 2017 ONSC 4129 (CanLII), 283 A.C.W.S. (3d) 78, affd 2018 ONCA 1053 (CanLII), 301 A.C.W.S. (3d) 530; *Johnston v. Canada*, 2021 FC 20, 328 A.C.W.S. (3d) 195; *Regina v. Armco Canada Ltd. and 9 other corporations*, (1976) 13 O.R. (2d) 32, 70 D.L.R. (3d) 287; *Proulx v. R.*, [2016] Q.J. No. 11393 (QL); *Regina v. Canadian General Electric Company Ltd. et al.*, (1976) 15 O.R. (2d) 360, 1976 Carswell Ont. 449; *Gosselin v. R.*, [2017] Q.J. No. 988 (QL); *Pelletier v. Canada*, 2020 FC 1019, 328 A.C.W.S. (3d) 45; *Baird v. Canada*, 2007 FCA 48, 155 A.C.W.S. (3d) 50; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718 (CanLII), 300 A.C.W.S. (3d) 29; *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487 (CanLII), 301 A.C.W.S. (3d) 248, affd 2020 ONSC 128 (CanLII), 149 O.R. (3d) 521; *Dine v. Biomet*, 2015 ONSC 7050 (CanLII), 262 A.C.W.S. (3d) 300; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545.

REFERRED TO:

Jones v. Micron Technology Inc., 400 F.Supp.3d 897 (N.D. Cal. 2019); *re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015); *Prokuron Sourcing Solutions Inc. v. Sobeys Inc. and Lexmark Canada Inc.*, 2019 ONSC 7403 (CanLII), 314 A.C.W.S. (3d) 724; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp*. (2009), 96 O.R. (3d) 252, 2009 CanLII 23374, [2009] O.J. No. 1874 (QL) (Div. Ct.), affd (2010), 100 O.R. (3d) 721, 2010 ONCA 466 (CanLII); *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, 87 O.R. (3d) 352, [2007] O.J. No. 3327 (QL) (S.C.J.); *Airia Brands v. Air Canada*, 2015 ONSC 5352 (CanLII), 257 A.C.W.S. (3d) 530; *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 (CanLII), 320 A.C.W.S. (3d) 547; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (CanLII), 312 D.L.R. (4th) 419; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357 (CanLII), 287 A.C.W.S. (3d) 21, revd on other grounds 2019 BCCA 187 (CanLII), 305 A.C.W.S. (3d) 706; *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148 (CanLII), 390 D.L.R. (4th) 87, affd 2018 ONCA 819 (CanLII), 429 D.L.R. (4th) 514; *Ford v. F. Hoffman-La Roche Ltd.* (2005), 74 O.R. (3d) 758, *sub nom. Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.*, [2005] O.J. No. 1118 (QL) (S.C.J.); *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (QL), 111 A.C.W.S. (3d) 413; *Buffalo v. Samson First Nation*, 2008 FC 1308, [2009] 4 F.C.R. 3, affd 2010 FCA 165, [2010] 3 F.C.R. D-15; *Kenney v. Canada (Attorney General)*, 2016 FC 367, 265 A.C.W.S. (3d) 851; *Canada v. John Doe*, 2016 FCA 191, 486 N.R. 223; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Simpson v. Facebook*, 2021 ONSC 968 (CanLII), 329 A.C.W.S. (3d) 695; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 (CanLII), 111 O.R. (3d) 745; *Murphy v. Compagnie Amway Canada*, 2015 FC 958, 257 A.C.W.S. (3d) 529; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481; *Shah v. LG Chem Ltd.*, 2018 ONCA 819 (CanLII), 429 D.L.R. (4th) 514; *Painblanc v. Kastner* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68; *Evertz Technologies Limited v. Lawo AG*, 2019 ONSC 1355 (CanLII), 303 A.C.W.S. (3d) 274; *Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 5331 (QL), 2003 CarswellOnt 5574; *Carten v. Canada*, 2010 FC 857, 192 A.C.W.S. (3d) 1125; *McLarty v. Canada*, 2002 FCA 206, 291 N.R. 396; *Bouchard v. Canada*, 2016 FC 983, 269 A.C.W.S. (3d) 660; *Paul v. Canada*, 2001 FCT 1280, 222 F.T.R. 65, [2002] 2 F.C. D-19; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 (CanLII), 136 O.R. (3d) 654; *Nicholson v. CWS Industries Ltd.*, 2002 FCT 1225, [2003] 3 F.C. D-36; *Margem Chartering Co. Inc. v. Bocsa (The)*,

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MOTION seeking an order to certify the underlying action as a class proceeding under subsection 334.16(1) of the *Federal Courts Rules*. Motion dismissed.

APPEARANCES

James C. Orr, *Kyle R. Taylor*, *Annie (Qurrat-ul-ain) Tayyab*, *James Sayce*, *Nathalie Gondek* and *Adam Tanel* for plaintiffs.

Subrata Bhattacharjee, *Caitlin R. Sainsbury*, *Pierre N. Gemson* and *Graham Splawski* for defendants Samsung Electronics Co. Ltd., Samsung Semiconductor Inc., Samsung Electronics Canada, Inc.

David W. Kent, *James B. Musgrove* and *Samantha Gordon* for defendant Micron Technology Inc.

Sandra A. Forbes, *Chantelle Cseh* and *Trevor N. May* for defendant SK Hynix.

SOLICITORS OF RECORD

Orr Taylor LLP and *Koskie Minsky LLP*, Toronto, for plaintiffs.

Borden Ladner Gervais LLP, Toronto, for for defendants Samsung Electronics Co. Ltd., Samsung Semiconductor Inc., Samsung Electronics Canada, Inc.

McMillan LLP, Toronto, for defendant Micron Technology Inc.

Davies Ward Phillips & Vineberg LLP, Toronto, for defendant SK Hynix.

The following are the reasons for order and order rendered in English by

GASCON J.:

I. Overview

[1] The plaintiffs, Ms. Chelsea Jensen and Mr. Laurent Abesdris, seek an order certifying this action as a class proceeding under subsection 334.16(1) of the *Federal Courts Rules*, SOR/98-106 (Rules). In their proposed competition law class action, the plaintiffs allege that the three leading manufacturers of Dynamic Random Access Memory chips (DRAM) have conspired to limit the global supply and raise the price of DRAM. DRAM is a type of semiconductor memory chip used in most computer products that allows information to be electronically stored and rapidly retrieved. The manufacturers targeted by this proposed class action are Samsung Electronics Co. Ltd., Samsung Semiconductor Inc. and Samsung Electronics Canada, Inc. (together, Samsung), SK Hynix Inc. and SK Hynix America, Inc. (together, SK Hynix) and Micron Technology, Inc. and Micron Semiconductor Products, Inc. (together, Micron) (collectively, the defendants).

[2] The plaintiffs contend that the alleged conspiracy discloses a straightforward cause of action under section 36 of the *Competition Act*, R.S.C. 1985, c. C-34 (Act), for breach of sections 45 and 46. Broadly speaking, section 45 makes it a criminal offence for competitors or potential competitors to conspire, agree or arrange to fix prices, allocate markets or restrict output. Section 46 provides that it is a criminal offence for a corporation carrying on business in Canada to implement a directive or communication from a controlling person outside Canada, for the purpose of giving effect to a conspiracy entered into outside of Canada that, if entered into in Canada, would have been in contravention of section 45. For its part, section 36 of the Act grants a statutory right of private action to recover damages for harm suffered as a result of certain criminal conduct prohibited by the Act, including conduct covered by sections 45 and 46, as well as the cost of investigation and prosecution. Here, the plaintiffs allege that the defendants have conspired, through direct communications in private meetings and through public statements—or “signalling”—to each other, in order to suppress the supply of DRAM and increase DRAM prices.

[3] As the proposed representative plaintiffs for the class members, the plaintiffs seek damages or compensation from the defendants in the amount of $1,000,000,000 on behalf of all persons or entities in Canada who, from June 1, 2016, to February 1, 2018 (Class Period), purchased DRAM manufactured and/or sold by the defendants, or products containing DRAM manufactured and/or sold by the defendants, excluding the defendants and their parent companies, subsidiaries and affiliates (Class).

[4] The plaintiffs maintain that they satisfy all the required legal elements for certification, namely, (i) that there is a reasonable cause of action; (ii) that there is an identifiable class; (iii) that there are common questions of law and fact; (iv) that a class proceeding is the preferred procedure; and (v) that they are appropriate representatives of the Class. The defendants oppose certification of the Class and contend that the plaintiffs have failed to meet their burden of showing that this action should be certified as a class proceeding. More specifically, the defendants submit that the conduct alleged by the plaintiffs does not constitute a criminal violation of the Act and does not amount to an actionable conspiracy under section 45 or an unlawful foreign directive under

section 46. Hence, say the defendants, (i) the statement of claim does not disclose a reasonable cause of action; (ii) the issues identified by the plaintiffs do not qualify as common issues as the plaintiffs have failed to provide some basis in fact for the existence or commonality of their liability or harm issues; and (iii) without liability and harm certifiable as common issues, a class proceeding is not the preferred procedure. The defendants do not challenge that there would be an identifiable class or that the plaintiffs would be appropriate representatives of the Class.

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

[6] However, this case is different and turns on the alleged wrongful conduct underlying the plaintiffs' proposed competition law class action. This, in my view, is the determinative issue in the plaintiffs' certification motion.

[7] For the reasons detailed below, I will dismiss the plaintiffs' motion for certification, as their case fails on the alleged section 45 conspiracy at the heart of their proposed class action. I conclude that it is plain and obvious that the pleadings disclose no reasonable cause of action based on sections 36, 45 and 46 of the Act, since the allegations of an actionable section 45 conspiracy and of a prohibited section 46 foreign directive are not anchored in material facts, are speculative and boil down to bald assertions. In addition, I find that there is no basis in fact for the common issues advanced by the plaintiffs with respect to an alleged section 45 conspiracy. In this regard, the plaintiffs fall well short of providing the minimal evidentiary basis required to support the existence of the alleged conspiracy. This is sufficient to dismiss the plaintiffs' motion and to deny certification. In the circumstances and without common issues dealing with the alleged wrongful conduct, none of the other proposed common issues relating to the alleged loss or harm can be certified. Absent common issues, a class proceeding is not the preferred procedure for the just and efficient resolution of the claims of the putative Class members, and will not achieve the three principles underpinning class actions, namely, judicial economy, behavioural modification and access to justice.

II. Background

A. *The parties*

[8] The plaintiffs are indirect end-consumers of DRAM who live in Toronto, Ontario. Ms. Jensen purchased a mobile phone containing DRAM in June 2017. Mr. Abesdris purchased a laptop containing DRAM in January 2018.

[9] The defendant Samsung manufactures, distributes and sells semiconductor products, including DRAM. Samsung also manufactures consumer electronics and other products that use DRAM as one of their components. Samsung Electronics Co. Ltd. is a corporation headquartered in South Korea. Samsung Semiconductor Inc. is a subsidiary of Samsung Electronics Co. Ltd. based in the United States (U.S.), whose headquarters are located in California. Samsung Electronics Canada, Inc. is a Canadian subsidiary of Samsung Electronics Co. Ltd.; its registered office is in Ontario and it is in the business of selling electronic devices, but not DRAM.

[10] The defendant SK Hynix manufactures, distributes and sells semiconductor products, including DRAM. SK Hynix Inc. is a corporation headquartered in South Korea and has manufacturing facilities in South Korea and China. SK Hynix America, Inc. is a U.S. subsidiary of SK Hynix Inc., and its headquarters are located in California.

[11] The defendant Micron also manufactures, distributes and sells semiconductor products, including DRAM. Micron Technology Inc. is a Delaware corporation headquartered in Idaho, and has production facilities in Taiwan, Singapore, the U.S., Japan and China. Micron Semiconductor Products, Inc. is Micron's Idaho-incorporated subsidiary.

B. *Factual context*

[12] DRAM is a type of digital memory device that stores bits of data in capacitors situated in integrated circuits, allowing computers, smartphones and other digital electronic products to retain information. DRAM is a component found in virtually every electronic product, including personal computers, smartphones, tablets, televisions, cameras, servers and other items that perform a computing function. DRAM is a standalone product which has no independent utility: it must be inserted into a device (such as a smartphone or a computer) to serve any function.

[13] The defendants all manufacture and sell DRAM for use in various types of end-products. They primarily sell DRAM to original equipment manufacturers (OEMs) such as computer, mobile phone, flash drive, and memory card makers. These OEMs then incorporate DRAM into various DRAM products and sell them to consumers or to retailers who then sell the items to consumers. Direct purchasers of DRAM use it in the products they manufacture. Indirect purchasers of DRAM are purchasers of products that contain DRAM. The Class includes both direct and indirect purchasers.

[14] DRAM supply is a highly concentrated industry, and the plaintiffs have described the production and manufacture of DRAM as an oligopoly market, namely, a highly concentrated market structure where a few sellers dominate the supply of a product or service. The defendants are the three largest manufacturers of DRAM and are estimated to have manufactured 96-98 percent of DRAM sold globally in 2017-2018. During the Class Period, the defendants accounted for the bulk of worldwide DRAM sales. The Canadian market for DRAM accounts for approximately 10 percent of the global DRAM market, which was estimated to be worth $72.5 billion in 2017.

[15] The plaintiffs estimate that the Class is likely to consist of almost all adults in Canada as most Canadian households have one or more devices containing DRAM and that the defendants control over 96 percent of the global DRAM market.

C. *Procedural context*

[16] The action was commenced in May 2018 and the plaintiffs filed their "Amended Amended Statement of Claim" on April 23, 2019 (Statement of Claim). In their motion for certification, the plaintiffs are seeking the following orders from the Court:

a. an order certifying this action as a class proceeding pursuant to the rules;

b. an order appointing Ms. Chelsea Jensen and Mr. Laurent Abesdris as the representative plaintiffs for the Class;

c. an order defining the Class as:

   i. All persons or entities in Canada who, from June 1, 2016 to February 1, 2018 purchased DRAM manufactured and/or sold by the defendants or products containing DRAM manufactured and/or sold by the defendants. Excluded from the Class are the defendants and their parent companies, subsidiaries, and affiliates;

d. or such other class definition as may be approved by the Court;

e. an order that the within proceeding is certified on the basis of the six following common issues:

   i. Did the defendants, or any of them, breach section 45 of the Act?

   ii. Did the defendants, or any of them, breach section 46 of the Act?

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

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

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

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

f. an order appointing Koskie Minsky LLP and Affleck Greene McMurtry LLP as Class counsel;

g. an order approving the proposed litigation plan;

h. an order staying any other proceeding based on the facts giving rise to this proposed class proceeding;

i. an order declaring that no other proceeding based upon the facts giving rise to this proceeding may be commenced without leave of the Court; and

j. an order for such further and other relief as counsel may advise and this Court deems just.

[17] The plaintiffs supported their motion for certification with the following evidentiary record:

- The affidavit, dated April 22, 2019, of Annie (Qurrat-ul-aim) Tayyab, a lawyer of Affleck Greene McMurtry LLP, one of the two Class counsel, to which 54 exhibits were attached (Tayyab Affidavit). The exhibits attached to the Tayyab Affidavit include articles regarding an investigation by China's economic regulator (9 exhibits); financial reports and documents related to the defendants (8 exhibits); public statements and transcripts of earnings calls and investor calls involving the defendants (Public Statements) (35 exhibits); documents from trade associations in the DRAM industry (3 exhibits); and documents related to a prior conspiracy involving the defendants (4 exhibits).

- The supplementary affidavit of Annie (Qurrat-ul-aim) Tayyab, dated February 13, 2020, to which was attached the "Indirect Purchaser Plaintiffs' Consolidated Amended Class Action Complaint" (Amended U.S. Complaint) filed in a related class action litigation commenced in the U.S. and based on facts closely similar to this matter.

- The affidavit, dated April 22, 2019, of the plaintiff Chelsea Jensen.

- The affidavit, dated April 21, 2019, of the plaintiff Laurent Abesdris.

- The affidavits, dated April 22, 2019, and February 12, 2020, of Dr. Hal J. Singer. Dr. Singer is an economist and managing director at Econ One Research, Inc. in Washington, D.C. Dr. Singer submitted an expert report and a reply expert report (Singer Reports). Dr. Singer was cross-examined.

[18] The defendants resisted the motion for certification with the following evidentiary record:

- The affidavit, dated December 19, 2019, of Trevor May, an articling student at Davies Ward Phillips and Vineberg LLP, counsel to SK Hynix, to which 10 exhibits were attached. These exhibits include financial documents and transcripts of various earnings calls and investor calls involving the defendants.

- The affidavit dated December 19, 2019, of Dr. Mark A. Israel. Dr. Israel is an economist and Senior Managing Director at Compass Lexecon, an economic consulting firm, in Washington, D.C. He submitted an expert report in response to Dr. Singer. Dr. Israel was not cross-examined.

D. *Summary of the plaintiffs' allegations*

[19] In their Statement of Claim, the plaintiffs assert a single statutory cause of action under section 36 of the Act, for breach of section 45 forbidding conspiracies and of section 46 on implementation of a foreign directive.

[20] Under section 45, the plaintiffs allege that the defendants conspired, agreed or arranged to fix, maintain, increase, or control the price for the supply of DRAM; to allocate sales, territories, customers, or markets for the production or supply of DRAM; and to fix, maintain, control, prevent, lessen, or eliminate the production or supply of DRAM (Statement of Claim, at paragraph 135). This paragraph of the plaintiffs' pleading essentially echoes the language of section 45 of the Act. However, I note that, throughout the Statement of Claim, the plaintiffs repeatedly refer to a much narrower

conspiracy and to the defendants conspiring to “suppress DRAM supply and increase DRAM prices” (see, e.g., Statement of Claim, at paragraphs 2, 5, 18, 22, 26, 45, 50, 52, 128, 129 and 130).

[21] Under section 46, the plaintiffs allege that the defendants implemented a foreign directive, instruction, intimation of policy or other communication, which communication was for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered outside Canada that, if entered in Canada, would have been in contravention of section 45 of the Act (Statement of Claim, at paragraph 136). Again, this paragraph reproduces the language of the Act.

[22] In summary, the plaintiffs claim that, prior to 2016, the defendants competed vigorously over market shares but that, in early 2016, the defendants conspired to reduce the supply of DRAM in order to drive up DRAM prices. Throughout 2015 and the first half of 2016, DRAM prices had steadily declined. However, after the second quarter of 2016, prices reversed course and began a sharp ascent to record highs, for all types of DRAM, all sizes and all markets. According to the Statement of Claim, at that point in time, the defendants adopted the same policy of refusing to increase their own supplies of DRAM. They signalled, through public statements made to investors and at industry conferences, what the plaintiffs present as coordinated decisions to limit the supply of DRAM. According to the plaintiffs, Micron’s and Samsung’s public statements reassured each other and SK Hynix of their continued participation in the conspiracy. The plaintiffs further allege that the nature of the DRAM market, an oligopoly where the defendants were responsible for at least 96 percent of worldwide DRAM sales, fostered this collusion.

[23] According to the plaintiffs, the defendants’ reduction of DRAM supply below market demand marked a departure from prior market behaviour, where the defendants and other market participants competed primarily, if not solely, on price, aiming to increase their own market share.

[24] The plaintiffs allege that the conspiracy between the defendants was formed and achieved through direct communications in private meetings between the defendants as well as through public statements—or “signalling”—to each other, both of which, say the plaintiffs, are actionable forms of conspiracy conduct well recognized by the case law in Canada. In terms of evidentiary basis, the plaintiffs’ allegations rely on what they called four main indicia of breaches of section 45 of the Act. First, a regulatory investigation initiated by the Chinese antitrust authorities (China Investigation); second, massive and coordinated supply restrictions and price increases in the Class Period, resulting in steep increases in prices for DRAM products and in revenues for the defendants; third, the continuous and repeated statements made in private and in public by the defendants’ senior executives that they would restrict DRAM supply and that their competitors would do likewise; fourth, a similar anti-competitive conduct admitted by the defendants a few years ago in the same DRAM industry.

[25] The plaintiffs allege that this supply reduction resulted in supra-competitive pricing for DRAM and DRAM products that would not have occurred absent the conspiracy and, further, that this “overcharge” was passed on to end-consumers (i.e. indirect purchasers), including the plaintiffs, who purchased DRAM products. The overcharge and harm to the plaintiffs and Class members is the difference between the

price actually paid as a result of the alleged conspiracy and the price that would have been in place in the absence of such conspiracy.

[26] The plaintiffs contend that the alleged conspiracy ended after news broke of the China Investigation undertaken by the Chinese antitrust authorities on alleged suspicions of DRAM price-fixing.

[27] As mentioned above at paragraph 16, the plaintiffs propose six common issue questions. The first two questions concern the alleged wrongful conduct and liability issues for breach of sections 45 and 46 of the Act. The next two questions concern harm or loss issues resulting from the alleged wrongful conduct. Finally, the last two questions relate to follow-on interest and investigation costs issues.

E. *The parallel U.S. class action*

[28] It is important to observe that the certification motion filed by the plaintiffs follows a parallel class action commenced earlier in the U.S., on which the claim in this proposed class action is directly based. The allegations made in the U.S. class action are closely similar to what is pleaded in this case. The two plaintiffs in fact indicate, in their respective affidavits, that it was the news reports on the U.S. class action that prompted them to get involved in this class action lawsuit in Canada. In their written materials submitted in this matter, the plaintiffs indeed referred to the parallel proceeding in the U.S. District Court for the Northern District of California involving most of the defendants (U.S. defendants), namely *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Litigation*. Moreover, the plaintiffs filed the Amended U.S. Complaint submitted by the U.S. plaintiffs as an exhibit to one of their affidavits provided in support of this motion. This Amended U.S. Complaint had been filed following a decision by the U.S. District Court which granted in part the U.S. defendants' motion to dismiss the original complaint for failure to state a claim in conspiracy in violation of the U.S. federal antitrust laws but also allowed the U.S. plaintiffs to amend (*Jones v. Micron Technology Inc.*, 400 F.Supp.3d 897 (N.D. Cal. 2019) (*Jones*)).

[29] On November 24, 2020, after the hearing of the certification motion before this Court, the U.S. District Court issued another decision, dismissing in part the Amended U.S. Complaint, again for failure to state a claim of conspiracy in violation of the U.S. federal antitrust laws (*In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Litigation*, Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, U.S. District Court, Northern District of California, November 24, 2020 [2020 WL 8459279] (see Case No. 4:18-cv-2518-JSW-KAW, Dkt. No. 119)). In an oral direction issued on December 7, 2020, I determined that, in the circumstances, this latest U.S. decision was relevant to the certification motion before this Court and that it could be accepted for filing. Of course, even though they relate to the same factual background as in the case at bar, these U.S. precedents are not binding on this Court, and I am mindful of the fact that a U.S. motion to dismiss a class action is subject to a standard different from the Canadian standard on certification motions and involves a more extensive weighing of evidence. I am also aware that the November 24, 2020, decision of the U.S. District Court was appealed to the U.S. Court of Appeal for the Ninth Circuit in January 2021, and that this appeal is still pending.

[30] That said, it is worth noting that, in those decisions, the U.S. District Court found that the U.S. plaintiffs' allegations of "plus factors" combined and viewed together fell

short of alleging a plausible cause of action based on conspiracy, and that their claim amounted to nothing more than “conscious parallelism”. Broadly speaking, conscious parallelism refers to situations where, in the absence of an agreement to limit competition, competitors unilaterally adopt similar or identical business practices or pricing, as a result of rational and profit-maximizing strategies based on observations of market trends and activities of competitors. This type of conduct is frequent in oligopolistic markets where competitors base their actions in part on the anticipated reactions of their rivals. In the U.S., such parallel conduct is not unlawful on its own under the applicable federal antitrust legislation, and a plaintiff must plead some “factual enhancement” (called “plus factors” in the U.S.) showing further circumstances pointing toward a meeting of the minds of the alleged conspirators. These factual enhancements are economic actions and outcomes that are largely inconsistent with unilateral, lawful conduct but largely consistent with explicitly coordinated action (*In re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015), at page 1194).

[31] While the U.S. plaintiffs presented allegations of parallel conduct between the U.S. defendants, the U.S. District Court found that there was insufficient evidence of “plus factors” pointing toward the meeting of the minds of these defendants, whether express or tacit. More specifically, the U.S. District Court found that the general oligopolistic market conditions prevailing in the DRAM industry were not “plus factors” allowing one to conclude that there was a conspiracy, as they were just as likely to be consistent with innocent behaviour as with unlawful one. The U.S. District Court also determined that membership in trade associations and attendance at trade association meetings offered nothing more than an opportunity to collude for the U.S. defendants, and that an opportunity without more was insufficient to state a conspiracy.

[32] With respect to the U.S. defendants’ public statements and allegations of public signalling, the U.S. District Court found that the statements alleged in the pleadings were made in public settings during earnings calls with investors or at industry conferences, that they were the individual U.S. defendants’ indications of their own future behaviour, descriptions of their past behaviour, predictions of industry trends and observations about competitors’ behaviour, and that such statements were insufficient to support an inference of conspiracy because they were not “largely inconsistent with unilateral, lawful conduct”. On the contrary, said the U.S. District Court, the U.S. defendants’ behaviour and statements were consistent with lawful conscious parallelism, and did not constitute circumstantial evidence of a conspiracy in that case.

[33] The U.S. District Court also concluded that allegations relating to past investigations in the DRAM industry or previous guilty pleas by the U.S. defendants were not sufficient to suggest a contemporary conspiracy, and that allegations of investigations or cases outside the U.S. were unpersuasive as foreign laws (in this case, China’s) may prohibit behaviour that is lawful under U.S. laws.

[34] I should also add that, in late June 2021, the Superior Court of Quebec dismissed an application for authorization to institute a class action alleging the same conspiracy to restrict the production and increase the prices of DRAM that underlies the plaintiffs’ certification motion (*Hazan c. Micron Technology Inc.*, 2021 QCCS 2710 (CanLII), 2021 CarswellQue 10368 (*Hazan*)). In that case, the court concluded that the Quebec criteria for the authorization of the class action were not met due to vague,

imprecise and general allegations, and to the absence of some evidence establishing, even summarily, the existence of the alleged conspiracy. Thus, said the court, the application did not present an “arguable case”.

[35] Again, even though the *Hazan* decision relates to the same factual background as in the case at bar, this precedent is not binding on this Court, and I am mindful of the fact that an application for authorization of a class action in Quebec is not subject to the exact same standard governing certification motions before this Court. However, I should observe that the “arguable case” requirement applicable in Quebec has been described by the S.C.C. as a “less demanding” evidentiary burden and a less rigorous standard than the some-basis-in-fact standard that applies in other parts of Canada and before this Court (*Infineon Technologies AG v. Option consommateurs AG*, 2013 SCC 59, [2013] 3 S.C.R. 600 (*Infineon*), at paragraph 128). As is the case for the parallel U.S. decision referred to above, the *Hazan* decision is currently under appeal.

F. *The particular nature of this case*

[36] It is also necessary, at the outset, to underscore the particularities of this proposed class action. The plaintiffs advance that their certification motion is a typical competition law class action raising an allegation of price-fixing conspiracy. They further claim that there are no meaningful differences between this case and a previous DRAM case where certification was confirmed by the Supreme Court of Canada (S.C.C.) in *Infineon*, and that there is no reason to depart from this binding precedent.

[37] With respect, I disagree with the plaintiffs.

(1) This is a supply suppression case

[38] First, this proposed competition law class action differs significantly from the usual price-fixing class actions brought before Canadian courts under the conspiracy provision of the Act (i.e. section 45 and its predecessors). Despite the repeated attempts by counsel for the plaintiffs to portray it as such, the conspiracy alleged by the plaintiffs in this case is not a typical price-fixing conspiracy under section 45 of the Act; it is instead an alleged conspiracy to suppress the supply of DRAM, which has allegedly resulted in an increase in prices for DRAM. When the Statement of Claim is read in context and in its entirety, it is clear that the plaintiffs’ core allegation of conspiracy is about supply suppression.[3] In fact, in the last iteration of their Statement of Claim, the plaintiffs systematically replaced the references to a “price-fixing conspiracy” or to a “conspiracy to fix the price of DRAM” by references to a “conspiracy to suppress the global supply of DRAM and increase the price of DRAM”. In my view, on any fair reading of the pleadings, the plaintiffs’ claim does not describe any standalone, independent price-fixing conspiracy, but rather an alleged conspiracy to restrict output, the alleged consequence of which was an increase in DRAM prices.

[39] This is a distinctive feature of this case, and I am aware of no precedent where the primary focus of a competition law class action alleging a breach of section 45 of the Act was output suppression as it is here.

[3] In these Reasons, the words “suppress,” “restrict” or “limit” are used interchangeably to describe the alleged conspiracy to suppress DRAM supply claimed by the Plaintiffs.

(2) The alleged conspiracy is in dispute

[40] Second, this competition law class action is a rare case where the very existence of the alleged conspiracy at the source of the claim for loss and damages under section 36 of the Act is disputed and challenged at the certification stage. A review of the Canadian case law on competition law class actions involving price-fixing and other competition-related conspiracies under section 45 and its predecessors reveals that the existence of an alleged conspiracy is typically not an issue in such class actions. In fact, the battleground is usually beyond the allegation of an illegal agreement and focuses on whether the harm or loss allegedly resulting from the actionable conspiracy is common to the class members.

[41] This has been the situation for various reasons. In some instances, there were express agreements, rules or contracts at the source of the impugned unlawful conspiracy. In other matters, there were admissions on the conspiracy element of the impugned conduct, or guilty pleas had been previously entered by the defendants in related criminal proceedings in Canada or abroad. In yet other cases, there was an existing criminal investigation by the Canadian competition authorities or by foreign authorities (and affecting Canada). All of these situations meant that there were not only ample material facts supporting the conspiracy allegations made in the pleadings but also the minimal required evidentiary basis (i.e. some basis in fact) for the proposed common issues relating to the alleged wrongful conduct.

[42] Save for one exception (to which I will turn in a moment), this is indeed what the various precedents cited by the plaintiffs in this case actually reflect. Examples of competition law class actions where there were express agreements, rules or contracts anchoring the alleged conspiracy include *Prokuron Sourcing Solutions Inc. v. Sobeys Inc. and Lexmark Canada Inc.*, 2019 ONSC 7403 (CanLII), 314 A.C.W.S. (3d) 724 (*Prokuron*); *Watson v. Bank of America Corporation*, 2014 BCSC 532 (CanLII), 242 A.C.W.S. (3d) 775 (*Watson*), var'd 2015 BCCA 362 (CanLII), 389 D.L.R. (4th) 577 (*Watson C.A.*); *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp*. (2009), 96 O.R. (3d) 252, 2009 CanLII 23374, [2009] O.J. No. 1874 (QL) (Div. Ct.), affd (2010), 100 O.R. (3d) 721, 2010 ONCA 466 (CanLII); and *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, 87 O.R. (3d) 352, [2007] O.J. No. 3327 (QL) (S.C.J.). Examples where the underlying criminal investigation left no doubt about the existence of an alleged conspiracy in Canada include *Watson*; *Airia Brands v. Air Canada*, 2015 ONSC 5352 (CanLII), 257 A.C.W.S. (3d) 530 (*Airia*); and *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 (CanLII), 320 A.C.W.S. (3d) 547 (*Mancinelli*). Examples where there was an underlying criminal investigation and either guilty pleas or admissions had been made by the defendants regarding the alleged conspiracy include *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295 (*Godfrey*); *Infineon*; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (CanLII), 312 D.L.R. (4th) 419; *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357 (CanLII), 287 A.C.W.S. (3d) 21, revd on other grounds 2019 BCCA 187 (CanLII), 305 A.C.W.S. (3d) 706; *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148 (CanLII), 390 D.L.R. (4th) 87 (*Shah*), affd 2018 ONCA 819 (CanLII), 429 D.L.R. (4th) 514; *Fanshawe College v. LG Philips LCD Co.*, 2011 ONSC 2484 (CanLII), 201 A.C.W.S. (3d) 897 (*Fanshawe*); *Irving Paper Ltd. v. Atofina Chemicals Inc.*, 99 O.R. (3d) 358, [2009] O.J. No. 4021 (QL) (S.C.J.), leave to appeal ref'd 2010 ONSC 2705 (CanLII), 103 O.R. (3d) 296 (Div. Ct.) (*Irving Paper*); Ford *v. F. Hoffman-La Roche Ltd.* (2005), 74 O.R. (3d) 758, *sub nom. Vitapharm Canada Ltd. v. F.*

Hoffman-La Roche Ltd., [2005] O.J. No. 1118 (QL) (S.C.J.); and *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (QL), 111 A.C.W.S. (3d) 413 (*Alfresh*).

[43] The present case is definitely different from all these precedents, as the formation and existence of the alleged conspiracy at the source of this proposed class action is not admitted or unchallenged, but is rather strongly disputed by the defendants. In fact, this is the main battleground between the parties with respect to both the viable cause of action requirement and the common issues requirement. The above list of precedents is by no means exhaustive, but it illustrates the highly exceptional nature of the proposed class action advanced by the plaintiffs in this matter.

[44] I pause to add one comment. Contrary to what the plaintiffs argued, the fact that some of these prior price-fixing class actions (such as *Mancinelli*, *Shah* or *Watson*) may have involved cases certified by the courts in concentrated industries and oligopolies does not have much relevance in the case at bar and to the main issue raised by the plaintiffs' certification motion, namely the existence of the alleged conspiracy and wrongful conduct. The reason is simple. In every single case cited by the plaintiffs where price-fixing class actions have been certified in oligopolistic industries, the issue of the existence of the alleged conspiracy was simply not in dispute.

[45] The only notable exception, heavily relied on by the plaintiffs in their written and oral submissions before this Court, is the *Crosslink* case (*Crosslink v. BASF Canada*, 2014 ONSC 1682 (CanLII), 238 A.C.W.S. (3d) 547 (*Crosslink 1*), affd 2014 ONSC 4529 (CanLII), 244 A.C.W.S. (3d) 780 (*Crosslink 2*)). In *Crosslink*, as in the current case, the alleged conspiracy was challenged by the defendants on the basis that the plaintiffs had failed to plead material facts to support a claim of conspiracy and omitted to provide the sufficient basis in fact for the alleged conspiracy. In that matter, the Ontario Superior Court of Justice found that the requirements for certification were met for both the reasonable cause of action and the existence of some basis in fact for the common issues (*Crosslink 1,* at paragraph 71; *Crosslink 2,* at paragraph 51). As will be discussed in detail later, I respectfully conclude that the facts in the case at bar are distinguishable from the *Crosslink* matter, and thus lead me to a different conclusion.

(3) This case differs from *Infineon*

[46] The plaintiffs also claim that there are no meaningful differences between this case and the *Infineon* case decided by the S.C.C. in 2013, and that there are no reasons to depart from this binding precedent at this certification stage. In *Infineon*, the S.C.C. dealt with a Quebec class action involving the DRAM industry, the same products, the same types of claims, some of the same defendants and the same types of indirect purchasers of electronic goods containing DRAM. In that matter, the S.C.C. affirmed the "authorization" (as the certification process is known in Quebec) of a very similar action brought by indirect purchasers of products containing DRAM.

[47] However, this precedent cannot predetermine the result of the present certification motion as there is a fundamental difference between the current case and the S.C.C. decision in *Infineon*. This difference, once again, relates to the issue of the alleged conspiracy. In *Infineon*, the alleged conspiracy was to fix the prices of DRAM and it was not in dispute at all, since the international price-fixing conspiracy had in fact been admitted by the defendants in that case (*Infineon,* at paragraph 5; *Option Consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), 213

A.C.W.S. (3d) 557, at paragraph 16). Moreover, there was some evidence, originating directly from the U.S. and European competition agencies involved, relating to the existence of the alleged global conspiracy, the ongoing investigations by these government authorities, and the plea agreements entered into by the defendants (*Infineon,* at paragraphs 80–139). Here, to reiterate, the very existence of the alleged conspiracy to suppress DRAM supply is the main battleground between the parties, and the *Infineon* precedent therefore does not shed any useful light on the main issue in dispute.

III. Legal framework for certification

[48] Against that background, the legislative framework and general principles governing the certification of class actions in this Court can be summarized as follows.

A. *Legislative framework*

[49] Part 5.1 of the Rules sets out the framework for establishing and managing class proceedings before this Court. Subsections 334.16(1) and (2) and rule 334.18 are the main provisions governing the certification of class proceedings. They are reproduced in their entirety in Annex A of these Reasons.

[50] Subsection 334.16(1) prescribes that a class action shall be certified if the following five conditions are met: (i) the pleadings disclose a reasonable cause of action; (ii) there is an identifiable class of two or more persons; (iii) the claims raise common questions of law or fact; (iv) a class proceeding is the preferable procedure for the just and efficient resolution of those common questions; and (v) there is an appropriate representative plaintiff. The first condition echoes a requirement applicable to all actions brought by a plaintiff. The other four conditions are more specific to class proceedings.

[51] Subsection 334.16(1) uses mandatory language, meaning that the Court shall grant certification where all five elements of the test are satisfied. Since the test is conjunctive, if a plaintiff fails to meet any of the five listed criteria, the certification motion must fail (*Lin v. Airbnb*, *Inc.*, 2019 FC 1563, 315 A.C.W.S. (3d) 642 (*Airbnb*), at paragraph 21; *Buffalo v. Samson First Nation*, 2008 FC 1308, [2009] 4 F.C.R. 3 (*Buffalo*), at paragraph 35, affd 2010 FCA 165, [2010] 3 F.C.R. D-15, at paragraph 3). Conversely, the Court may not exercise discretion and refuse to award certification if all the criteria are met (*Airbnb*, at paragraph 21).

[52] Rule 334.18 describes factors which cannot by themselves, either singly or combined with the other factors listed, provide a sufficient basis to decline certification (*Airbnb*, at paragraph 22; *Kenney v. Canada (Attorney General)*, 2016 FC 367, 265 A.C.W.S. (3d) 851 (*Kenney*), at paragraph 17; *Buffalo*, at paragraph 37). However, these factors may be relevant considerations on a motion for certification, provided the overall conclusion underlying a potential refusal is based on other concerns as well (*Airbnb*, at paragraph 22; *Kenney*, at paragraph 17).

[53] The certification criteria established in subsection 334.16(1) are akin to those applied by the courts in Ontario and British Columbia (*Canada (Attorney General) v. Jost*, 2020 FCA 212, 332 A.C.W.S. (3d) 25 (*Jost*), at paragraph 23; *Canada v. John Doe*, 2016 FCA 191, 486 N.R. 223 (*John Doe FCA*), at paragraph 22; *Buffalo v.*

Samson Cree National, 2010 FCA 165, [2010] 3 F.C.R. D-15, at paragraph 8; *Airbnb*, at paragraph 23). It is therefore not uncommon to see this Court and the Federal Court of Appeal (F.C.A.) refer to case law arising from these provinces in matters relating to class actions, as such case law is instructive in this Court.

B. *General principles*

[54] In *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, [2019] 2 S.C.R. 831 (*Oratoire*), the S.C.C. reminded that the procedural vehicle of class actions has several objectives, "namely to facilitate access to justice, to modify harmful behaviour and to conserve judicial resources" (*Oratoire*, at paragraph 6, citing *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (*Hollick*), at paragraph 15, *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (*Dutton*), at paragraphs 27-29, and *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3 (*Vivendi*), at paragraph 1). The certification criteria mentioned above should always be assessed while keeping in mind these three overarching purposes of class proceedings. First, foremost consideration should be given to the fact that class actions serve judicial economy as this specific procedural method avoids unnecessary duplication of fact-finding and legal analysis. Actions brought individually can indeed be less practical and less efficient than class proceedings (*Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (*Rumley*), at paragraph 38). Second, class actions improve access to justice by making it more economical to prosecute claims that any one class member would find too costly to initiate and bring forward on his or her own (see, e.g., *Crosslink 1*, at paragraph 113). Third, class actions serve efficiency and justice by ensuring that wrongdoers modify their behaviour by taking full account of the harm that they have caused or might cause (*Airbnb*, at paragraph 25). By doing so, class actions serve important policy objectives such as deterrence of wrongful conduct (see, e.g., *Alfresh*, at paragraph 16).

[55] Therefore, when interpreting class action legislation and applying it to a certification motion, it is "essential […] that courts [do] not take an overly restrictive approach to the legislation, but rather interpret [class action legislation] in a way that gives full effect to the benefits foreseen by the drafters" and to the greater overarching purposes of this specific procedural mechanism (*Hollick*, at paragraph 15; *Dutton*, at paragraphs 27-29; *Condon v. Canada*, 2015 FCA 159, 474 N.R. 300 (*Condon*), at paragraph 10).

[56] The main purpose of a certification motion is to determine whether a class action is the appropriate procedural means for the action to proceed. As the S.C.C. noted in *Hollick*, the certification stage focuses on the form of the action, not on the substance and merits of the actual claim. The question "is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action" (*Hollick*, at paragraph 16; *Vivendi*, at paragraph 37; *Infineon*, at paragraph 65). In other words, the courts must view the application as a procedural means, and the objective of certification is to determine if, from a procedural standpoint, the action is best brought in the form of a class action (*Hollick*, at paragraph 16; *Jost*, at paragraph 27).

[57] It is well established that the onus on a party seeking certification is not an onerous one, and the threshold for certification has generally been described as low. That said, a plaintiff must nonetheless come forward with sufficient pleadings and with a sufficient evidentiary basis to support certification. While certification remains a low

hurdle, it is nonetheless a hurdle (*Simpson v. Facebook*, 2021 ONSC 968 (CanLII), 329 A.C.W.S. (3d) 695 (*Simpson*), at paragraph 50).

[58] The test to be applied on the first criterion for certification—namely, that the pleadings disclose a reasonable cause of action—is similar to that applicable on a motion to strike or dismiss (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 (*Pro-Sys*), at paragraph 63; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 (*Alberta Elder*), at paragraph 20; *John Doe FCA*, at paragraph 23). The test is whether it is "plain and obvious", assuming the facts pleaded to be true, that the pleadings disclose no reasonable cause of action and that no claim exists (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420 (*Atlantic Lottery*), at paragraph 14; *Godfrey*, at paragraph 27; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (*Imperial Tobacco*), at paragraph 17; *Alberta Elder*, at paragraph 20; *Hollick*, at paragraph 25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 (*Hunt*), at page 980; *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 634 (*Greenwood*), at paragraph 91; *Jost*, at paragraph 29). Stated otherwise, if a claim has no reasonable prospect of success and is so clearly futile that it is certain to fail, it should not be allowed to proceed to trial (*Hunt*, at page 980). Pursuant to that test, the claim must be so clearly improper as to be "bereft of any possibility of success" (*Wenham v. Canada (Attorney General)*, 2018 FCA 199, 420 D.L.R. (4th) 534 (*Wenham*), at paragraphs 27-33; *Airbnb*, at paragraph 28). The test is best expressed in the negative, and the courts must be convinced that the contemplated action has no reasonable chance of success and is doomed to fail (*Wenham*, at paragraph 22).

[59] For the remaining four certification criteria, the plaintiffs have the burden of adducing evidence to show "some basis in fact" that the requirements have been met (*Hollick*, at paragraph 25; *Pro-Sys*, at paragraph 99). This some-basis-in-fact standard means that, for all certification criteria except the cause of action, some evidentiary foundation is needed to support the certification requirements; however, the use of the word "some" implies that the evidentiary record need not be exhaustive or be a record on which the merits will be argued (*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 (*Fischer*), at paragraph 41, citing *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 (CanLII), 111 O.R. (3d) 745, at paragraphs 75–76; *Greenwood*, at paragraph 94). Given the courts' limited scope of factual inquiry and their inability to "engage in the finely calibrated assessments of evidentiary weight" at the certification stage, this threshold is low (*Fischer*, at paragraph 40; *Pro-Sys*, at paragraphs 102 and 104). The courts must refrain from assessing the sufficiency of the alleged facts on their merits, and they are not tasked with resolving conflicts in the evidence. It is well recognized that the some-basis-in-fact standard falls below the standard of proof on a balance of probabilities (*Pro-Sys*, at paragraph 102; *John Doe FCA*, at paragraph 24). However, the some-basis-in-fact standard cannot be assessed in a vacuum, and it must rather be examined on a case-by-case basis, in light of the specific facts of each given case (*Fischer*, at paragraph 40; *Pro-Sys*, at paragraph 104; *Airbnb*, at paragraph 30).

[60] That said, it is important to emphasize that, even though it is a low one, there is still a threshold to be met at the certification stage, and that certification will be denied when there is no viable cause of action or where there is an insufficient evidentiary basis for the facts on which the claims of the class members depend. While a certification motion is not a merits-based screening intended to determine the actual

viability or strength of the contemplated class action, it must nonetheless operate as a “meaningful screening device” (*Pro-Sys*, at paragraph 103). In *Pro-Sys*, the S.C.C. expressly stated that the analysis into the sufficiency of the evidence under the some-basis-in-fact standard cannot be so superficial that it would “amount to nothing more than symbolic scrutiny” of the evidence (*Pro-Sys*, at paragraph 103). There must be sufficient facts to satisfy the certification 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 not having been met (*Pro-Sys*, at paragraph 104). More recently, in the context of motions for authorization brought under the Quebec class action regime and the application of the “arguable case” requirement under the Quebec legislation, the S.C.C. repeatedly reaffirmed that the authorization process “must not be reduced to ‘a mere formality’” (*Oratoire*, at paragraph 62; *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, [2020] 3 S.C.R. 298 (*Desjardins*), at paragraph 74).

[61] The courts therefore do play an important screening role at the certification stage. This role includes filtering out unfounded and frivolous claims, and ensuring that parties are not being forced to defend themselves against untenable claims and devote substantial resources to it (*Desjardins*, at paragraph 27; *Oratoire*, at paragraphs 7, 56 and 61; *Vivendi*, at paragraph 37; *Infineon*, at paragraphs 59, 61 and 65; *Airbnb*, at paragraph 25). As Justice Kasirer expressed it when he was at the Quebec Court of Appeal, “[a] lack of rigour at authorization can indeed weigh down the courts with ill-conceived claims, creating the perverse outcome that the rules on class actions serve to defeat the very values of access to justice they were designed to champion” (*Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 (CanLII), 271 A.C.W.S. (3d) 705, at paragraph 14).

[62] I pause to underline that the overarching objectives of judicial economy and access to justice governing class proceedings cannot be considered from the sole perspective of the plaintiffs. True, a key purpose of the certification process is to facilitate access to the courts for plaintiffs, avoid duplication and protect the interests of potential class members who would otherwise have no say in the litigation. But the certification process is also there to prevent defendants, even deep-pocketed corporate defendants, from facing groundless suits and being forced to invest significant resources to contest large-scale, time-consuming actions that have no chance of success or do not have the minimal evidentiary foundation required. Stated differently, preventing baseless class actions from monopolizing the judicial system to the detriment of other litigants’ actions is also part of preserving access to justice for all litigants. Cases are interconnected, and class actions sit before the courts alongside hundreds of other needy cases. As Justice Stratas summarily put it, “[d]evoting resources to one case for no good reason deprives the others for no good reason” (*Coote v. Lawyers’ Professional Indemnity Company*, 2013 FCA 143, 229 A.C.W.S. (3d) 935, at paragraph 13).

IV. Analysis

[63] Three of the five requirements to be met to certify a class proceeding are challenged by the defendants in this matter: the reasonable cause of action, the existence of common issues of law or fact, and the preferred procedure.

[64] For the reasons detailed below, I find that the plaintiffs' certification motion fails on the reasonable cause of action criterion and on the common issues requirement. The section 45 conspiracy offence at the source of the plaintiffs' proposed class action is rooted in the existence of an agreement to engage in the prohibited conduct. There had to be adequate allegations in the pleadings as well as some minimal evidentiary background that the defendants explicitly or tacitly agreed to act in the furtherance of a common goal. I find that both are missing in the plaintiffs' motion. First, the pleadings of the alleged wrongful act, namely a section 45 conspiracy, are purely speculative, are not supported by material facts, and therefore do not disclose a reasonable cause of action. Second, the plaintiffs' motion fails on the common issues requirement as their core allegation of an actionable conspiracy between the defendants under section 45 of the Act is not supported by the minimum evidentiary basis required under the some-basis-in-fact standard.

[65] This suffices to dismiss certification and, in light of those conclusions, I do not need to address the other arguments raised by the defendants at any length, though I will make some brief comments about them.

[66] Each of these two main findings will be discussed in turn, bearing in mind that there will be some overlap in the analysis of the two certification criteria relating respectively to the cause of action and to the common issues.

A. *Paragraph 334.16(1)(a) [of the Rules]: Reasonable cause of action*

[67] As mentioned above, the plaintiffs' Statement of Claim invokes one single cause of action based on sections 36, 45 and 46 of the Act. In essence, the plaintiffs submit that the defendants engaged in acts that satisfy the constituent elements under those provisions of the Act as: (i) the defendants were competitors; (ii) the defendants' Canadian subsidiaries followed the instructions of their foreign parent companies; (iii) the defendants conspired, agreed and arranged to fix, maintain and control the supply and/or the price of DRAM; and (iv) the Class members suffered loss as a result of the conspiracy, agreement or arrangement.

[68] The alleged conspiracy, agreement or arrangement is the main element at the source of the plaintiffs' cause of action. The plaintiffs plead that the defendants conspired, through direct private communications and through public signalling, to restrict the supply of DRAM and raise DRAM prices. They submit that their allegations of direct private communications as well as their public signalling allegations are recognized by Canadian law as actionable anti-competitive conduct constituting breaches of section 45 of the Act. The plaintiffs further argue that the S.C.C. has established in *Atlantic Sugar Refineries Co. Ltd. et al. v. Attorney General of Canada*, [1980] 2 S.C.R. 644, 115 D.L.R. (3d) 21 (*Atlantic Sugar*) that an anti-competitive agreement may be "established by inference" (*Atlantic Sugar*, at page 656). They claim that, in order to conclude to an anti-competitive agreement under section 45, they must demonstrate "a course of conduct from which acceptance may be inferred" and "communication of this offer" (*Atlantic Sugar*, at page 657). They add that, pursuant to subsection 45(3) of the Act, an actionable conspiracy claim can be made out on the basis of circumstantial evidence and that "parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices, may be sufficient to prove that an agreement was concluded between the parties" (Competition Bureau Canada,

Competitor Collaboration Guidelines (Gatineau: Competition Bureau, 2009) (CC Guidelines), at page 7).

[69] I am not convinced by the plaintiffs' arguments and instead find that the Statement of Claim falls short of containing the main constituent elements to plead a reasonable cause of action under section 36 for breach of sections 45 or 46. More specifically, I agree with the defendants that the Statement of Claim does not contain a sufficient description of the essential and prominent component of a section 45 conspiracy, namely the existence of an unlawful agreement. The plaintiffs' pleadings fail to provide material facts showing that the defendants entered into an agreement to suppress the supply of DRAM, either directly or indirectly, and arrived at a mutual understanding. An unlawful agreement being the most essential requirement underlying the claim in damages brought by the plaintiffs, this radical defect is fatal to their cause of action.

(1) The test for the cause of action criterion

[70] In order to reject a certification motion on the cause of action requirement, the Court must be convinced, while assuming that the pleaded facts are true, that it is plain and obvious that a claim does not exist or has no reasonable chance of success. For this criterion, no evidence may be considered and the analysis is limited to the pleadings (*Atlantic Lottery*, at paragraph 87; *Imperial Tobacco*, at paragraph 23; *John Doe FCA*, at paragraphs 23 and 37; *Condon*, at paragraph 13; *Murphy v. Compagnie Amway Canada*, 2015 FC 958, 257 A.C.W.S. (3d) 529 (*Murphy*), at paragraph 41). The pleadings should be read as a whole and be given a generous interpretation, with a view to accommodating any inadequacies in the allegations or drafting deficiencies, and without fastening on to matters of form (*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, at paragraph 14; *Wenham*, at paragraph 34; *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219 (*Mancuso*), at paragraph 18; *John Doe FCA*, at paragraph 51; *Condon*, at paragraphs 21–22; *Shah v. LG Chem Ltd.*, 2018 ONCA 819 (CanLII), 429 D.L.R. (4th) 514, at paragraphs 74 and 76).

[71] It is, however, incumbent to the party seeking certification to plead facts that are sufficient to support a legally recognized cause of action and upon which he or she intends to rely on in advancing his or her claim (*Atlantic Lottery*, at paragraph 89; *Pro-Sys*, at paragraph 63; *Imperial Tobacco*, at paragraph 22; *Mancinelli*, at paragraph 129). A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The facts pleaded are instead the firm basis upon which the possibility of success of the claim must be evaluated by the Court.

[72] In proceedings before this Court, rule 174 establishes the specific requirement to plead "material facts": "[e]very pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved." The purposes of this requirement to plead material facts are to provide notice to the other parties so they can prepare a statement of defence, to define the issues to be tried with reasonable precision, to frame the discovery process, to allow counsel to advise their clients, prepare their case and map a trial strategy, and to establish the parameters of relevancy of evidence at discovery and trial (*Mancuso*, at paragraphs 16–17; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184,

[2010] 3 F.C.R. D-16 (*Merchant*), at paragraph 38). Rule 181 further requires every pleading to contain particulars of every allegation contained therein.

[73] The failure to establish a cause of action will usually arise when the allegations in a statement of claim do not adequately plead all the constituent elements of a recognized cause of action, or when the allegations in a statement of claim do not come within a recognized cause of action (*Mancinelli*, at paragraph 129).

[74] This leads me to make three remarks on the test to be applied by the Court on the first condition for certification, and which have particular relevance in this case: the requirement for sufficient particulars, the limits to the presumed trueness of allegations, and the contents of the pleadings.

(a) *Sufficient particulars*

[75] First, as the F.C.A. explained in *Mancuso*, it is fundamental to the trial process that a plaintiff pleads material facts in sufficient detail to support the claim and the relief sought. The Court and opposing parties cannot be left to speculate as to how the facts might be arranged to support a cause of action. What constitutes a material fact will be determined based on the cause of action and remedy sought in each particular case. A plaintiff must therefore plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleadings must tell the defendant who, when, where, how and what gave rise to its liability. A plaintiff cannot file inadequate pleadings and rely on a defendant to request particulars, nor can a plaintiff submit insufficient pleadings to make them sufficient through particulars (*Mancuso*, at paragraphs 19–20). Assumptions, speculation and facts that lack sufficient particularity are not enough to constitute material facts.

[76] In essence, the pleading must define the issues with sufficient precision to make the pre-trial and trial proceedings both “manageable and fair” (*Mancuso*, at paragraph 18). In deciding whether pleadings are manageable and fair, the Court “should consider the whole of the circumstances, including the relative knowledge and means of knowledge of the parties” (*Enercorp Sand Solutions Inc. v. Specialized Desanders Inc.*, 2018 FCA 215, 160 C.P.R. (4th) 79 (*Enercorp*), at paragraph 36). Although the conditions for certification, including the sufficiency of the alleged facts, must be interpreted flexibly and applied broadly, the Court cannot go so far as to presume the existence of an element that is essential to the establishment of a cause of action.

[77] In the same vein, allegations of material facts cannot be simply constituted of bald assertions of conclusions, as this does not support a cause of action (*John Doe FCA*, at paragraph 23; *Mancuso*, at paragraph 27; *Merchant*, at paragraph 34). If the Court were to allow parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues (*Mancuso*, at paragraphs 16–17).

[78] In *Merchant*, the F.C.A. held that, if it were not for rule 174, “parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition” (*Merchant*, at paragraph 34). The F.C.A. went on to quote *Painblanc v. Kastner* (1994), 58 C.P.R. (3d) 502, [1994] F.C.J. No. 1671 (QL) , stating that “an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court’s process” (*Merchant*, at

paragraph 34). Similarly, in *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112, 83 C.P.R. (4th) 241 (*AstraZeneca*), the F.C.A. held that, although one must not confuse material facts with "the evidence by which those facts may be proven […], an allegation made without any evidentiary foundation is an abuse of process" (*AstraZeneca*, at paragraph 5). Where a pleading fails to disclose material facts, it can be struck on the basis of being frivolous, vexatious and abusive, as it is shown to provide no rational argument to support the claim (*Evertz Technologies Limited v. Lawo AG*, 2019 ONSC 1355 (CanLII), 303 A.C.W.S. (3d) 274, at paragraph 23, citing *Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 5331 (QL), 2003 CarswellOnt 5574 (S.C.J.), at paragraphs 16–21).

[79] In summary, in order for allegations in pleadings to be considered as material facts, they must be supported by sufficient particularization, and must not be bare assertions or conclusory legal statements based on assumptions or speculation (*Das v. George Weston Limited*, 2017 ONSC 4129 (CanLII), 283 A.C.W.S. (3d) 78 (*Das*), at paragraph 17, affd 2018 ONCA 1053 (CanLII), 301 A.C.W.S. (3d) 530 (*Das CA*), at paragraph 74).

[80] When determining the sufficiency of a pleading, there is no relaxation of the rules for class actions; the Court must read the pleading as it is drafted rather than how it might have been drafted (*Merchant*, at paragraph 40). As this Court recently reminded in *Johnston v. Canada*, 2021 FC 20, 328 A.C.W.S. (3d) 195 (*Johnston*), the normal rules of pleading apply with equal force to a proposed class action. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants, and "[c]omplying with the Rules is not trifling or optional; it is mandatory and essential" (*Johnston*, at paragraph 20, citing *Merchant*, at paragraph 40).

(b) *Trueness*

[81] Turning to the presumption that allegations of fact are true, it must be stressed that this presumption has some limits. The alleged facts are assumed to be true, except when "they are manifestly incapable of being proven" (*Imperial Tobacco*, at paragraph 22). Allegations of fact are presumed to be true, provided that they are sufficiently precise to ensure that they effectively support the existence of the right being claimed (*Oratoire*, at paragraph 59; *Infineon*, at paragraphs 67 and 114). Allegations of facts confined to vague or imprecise statements, or to generalities, cannot be assumed to be true as they are more akin to personal opinion, speculation or conjecture (*Oratoire,* at paragraph 59). In such cases, a court can neither presume the existence of something that the allegations do not contain nor infer something that could have been included in them. There has to be some specific, tangible facts, and allegations will not be assumed to be true if they are not precise enough or if they are only speculative.

[82] While the Court must accept as true the material facts as pleaded, this obligation does not extend to bare allegations and bald conclusory legal statements based on assumptions or speculations as these are incapable of proof. In other words, allegations which rely upon assumptions and speculations unsupported by material facts cannot be assumed to be true (*Carten v. Canada*, 2010 FC 857, 192 A.C.W.S. (3d) 1125, at paragraph 29; *Das CA*, at paragraph 74). Also, the Court is not bound to accept as necessarily true allegations of fact that "are inconsistent with common sense, the

documents incorporated by reference, or incontrovertible evidence proffered by both sides for the purpose of the motions" (*Das*, at paragraph 27; *Das CA*, at paragraph 74).

[83] There is no bright line between evidence, material facts and bald allegations; they are rather points on a continuum (*Mancuso*, at paragraph 18). It is the responsibility of the certification judge, looking at the pleadings as a whole and at all the circumstances, to ensure and be satisfied that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

(c) *Contents of the pleadings*

[84] I make one last comment on the contents of the pleadings for the purpose of the reasonable cause of action criterion. At the hearing before the Court, counsel for both parties made submissions regarding the issue of whether the documents quoted, paraphrased or referred to in the pleadings should be considered as being incorporated by reference and forming part of the pleadings, when the Court assesses whether the reasonable cause of action criterion has been met. In this case, the plaintiffs' Statement of Claim contains multiple allegations referring, directly or indirectly, to documents, reports, transcripts or articles which have been attached as exhibits to the Tayyab Affidavit filed by the plaintiffs in support of the certification motion (see, e.g., the Public Statements). While those documents are not specifically identified or attached to the Statement of Claim, the quotes and paraphrases contained in the pleadings can easily be traced back to specific documents attached to the plaintiffs' affidavits. If the documents are incorporated by reference, this allows the Court to look at them when assessing whether the reasonable cause of action criterion has been met.

[85] I agree with the defendants that, as a general proposition, the documents referred to in the pleadings are incorporated by reference since, by referring to them, the parties are asserting their contents as facts (*McLarty v. Canada*, 2002 FCA 206, 291 N.R. 396, at paragraph 10; *Bouchard v. Canada*, 2016 FC 983, 269 A.C.W.S. (3d) 660, at paragraph 18; *Paul v. Canada*, 2001 FCT 1280, 222 F.T.R. 65, [2002] 2 F.C. D-19, at paragraph 23; *Das CA*, at paragraph 74; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 (CanLII), 136 O.R. (3d) 654, at paragraph 14). However, this needs to be slightly nuanced. The mere mention of a document in a pleading is not enough for it to be part of such pleading; a document will be considered part of the pleading if it is incorporated by reference and if it is central enough to the claim to form an essential element or an integral part of the claim itself (*Nicholson v. CWS Industries Ltd.*, 2002 FCT 1225, [2003] 3 F.C. D-36, at paragraphs 13, 16–17; *Margem Chartering Co. Inc. v. Bocsa (The)*, [1997] 2 F.C. 1001 (T.D.), at paragraph 17; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 (CanLII), 116 O.R. (3d) 429 (*McCreight*), at paragraph 32; *Das*, at paragraph 15). In other words, it must be part of the factual matrix of a statement of claim (*McCreight*, at paragraph 32).

[86] In those circumstances, it is appropriate for the certification judge to read the quotes and paraphrases contained in the pleadings in their context, by referring to their originating documents. If a plaintiff has ascribed a meaning to those paraphrases and quotes that is not consistent, on a plain reading, with the documents from which they originate, and if the documents referred to in the pleadings do not actually say what the plaintiffs allege they say, the Court cannot consider these allegations as material facts, as they would not be true and would be incapable of proof. Indeed, counsel for the plaintiffs conceded at the hearing before this Court that, if the allegations made in the

Statement of Claim contain statements, paraphrases or facts that happen to be false or incorrect when compared to what the underlying documents actually contain, it is appropriate for the Court not to consider them or to give them no weight.

[87] In the case at bar, I am therefore satisfied that the documents referred to by the plaintiffs in their Statement of Claim, whether it is through direct quotes, summaries or paraphrases of the documents, form an integral part of their claim. The plaintiffs rely upon these documents, more specifically on excerpts, paraphrased or directly quoted, from the Public Statements made by the defendants at industry conferences, investor calls and earnings calls, to support their allegation that the defendants have entered into the alleged conspiracy. These documents can be considered as incorporated by reference to the plaintiffs' pleadings. However, I agree with the plaintiffs that, at the stage of a certification motion, it is not the certification judge's task to look at these documents in detail and to determine whether or not the plaintiffs have correctly interpreted them, as this would amount to weighing evidence, something the Court cannot do at the certification stage. What the Court can do is to determine whether the references made by the plaintiffs in the Statement of Claim accurately reflect what has been expressly stated in the excerpts from the documents.

(2) Legal background for the plaintiffs' claims

[88] In light of the issues raised by this matter regarding the alleged conspiracy between the defendants, it is important to lay out the legal framework regarding the competition law claims made by the plaintiffs. The relevant portions of sections 36, 45 and 46 of the Act are reproduced in their entirety in Annex B of these Reasons.

(a) *The scheme of the Act*

[89] The Act is a federal statute of general application which is targeted at anti-competitive commercial behaviour in Canada. Like most competition regimes around the globe, the Act deals with three broad areas: coordinated conduct between competitors, unilateral conduct by firms with market power, and mergers. Somewhat unusually compared to many other competition or antitrust law regimes, the Act also deals with a number of specific "reviewable" practices as well as a variety of deceptive marketing practices, such as misleading advertising.

[90] The Act adopts a bifurcated approach to anti-competitive behaviour. On the one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions. Currently, there are some 25 criminal offences under the Act, the most prominent being section 45 prohibiting price-fixing and other "hard-core" cartel-like agreements between competitors. Conversely, other types of conduct are considered only potentially anti-competitive, are not treated as crimes and are instead subject to civil review and potential forward-looking prohibition once the impugned conduct has been established to have had, have or be likely to have anti-competitive effects. These notably include agreements between competitors that do not fall within the scope of section 45 as well as unilateral conduct by firms with market power, such as abuse of dominance, exclusive dealing, tied selling, price maintenance or refusal to deal. These behaviours are not prohibited unless they cause, or are likely to cause, a substantial lessening or prevention of competition or some adverse effects on competition in the relevant market, in which case the Competition Tribunal (Tribunal) can order the conduct to cease.

(b) *Section 36*

[91] Section 36 of the Act confers a right of private action to any person who has suffered loss or damage as a result of conduct in breach of one of the criminal provisions of the Act, or as a result of a failure to comply with an order of the Tribunal or another court under the Act. Conversely, non-criminal anti-competitive conduct, even one having serious anti-competitive effects, does not give rise to a recourse in damages by private plaintiffs.

[92] When a breach of a criminal provision is alleged, recourses under section 36 may be commenced without there having been a criminal conviction, or even an investigation by the competition authorities into the impugned conduct. However, a plaintiff still has the burden of proving the elements of the prohibited criminal conduct. The right of action in section 36 has a relatively short limitation period. An action must be brought within two years from the later of the day on which the conduct was engaged in or the day on which any criminal proceedings are disposed of. However, the discoverability rule applies to section 36 claims (*Godfrey*, at paragraphs 31–50). It means that the start of the limitation period is postponed until the time that the plaintiff knew or ought to have known of the anti-competitive conduct, though the discoverability rule does not extend to the two-year limitation period following the disposition of a criminal proceeding.

[93] To establish a claim under paragraph 36(1)(a), a plaintiff must plead that the defendants breached a provision of Part VI of the Act (which addresses “Offences in Relation to Competition”) and that the plaintiff suffered actual loss or damage as a result of the impugned criminal conduct. The right to pursue an action in damages and to seek recovery of certain investigation costs is subject to some important limits, including a limit to pursuing compensatory damages (i.e. no punitive damages or injunctive relief).

[94] Section 36 is the provision effectively creating the plaintiffs’ cause of action in this case (*Godfrey*, at paragraph 76; *Murphy*, at paragraphs 83–85; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (CanLII), 184 A.C.W.S. (3d) 320, at paragraphs 107–108). To eventually succeed, the plaintiffs must therefore prove: (i) that the defendants’ conduct satisfies all constituent elements of the underlying criminal offence (in this case, section 45 or 46); (ii) the loss or damage suffered; and (iii) a causal link between the loss or damage suffered and the criminal offence.

(c) *Section 45*

[95] The prohibition in section 45 is generally considered as the cornerstone of the Act. The Canadian regime governing conspiracies was substantially modified by 2009 amendments which entered into force on March 12, 2010. Those 2009 amendments created a revised criminal enforcement regime for the most egregious forms of cartel agreements between competitors, while at the same time removing the threat of criminal sanctions for legitimate collaborations to avoid discouraging competitors from engaging in potentially beneficial alliances. Section 45 now makes it *per se* illegal for competitors or potential competitors to agree to: (i) fix, maintain, increase or control the price for the supply of a product; (ii) allocate sales, territories, customers or markets for the production or supply of a product; or (iii) fix, maintain, control, prevent, lessen or eliminate the production or supply of a product. As a result of the 2009 amendments, proof of the conspiracy, agreement or arrangement on one of the three topics captured

by section 45 is sufficient to establish the offence, without any need to prove actual or likely anti-competitive effects or harm to competition in a market.

[96] Therefore, since the 2009 amendments entered into force, the focus of the assessment under section 45, and the key constituent of the provision, is whether there is an agreement between competitors to engage in a prohibited conduct (as competitors are defined in subsection 45(8)). The existence of actual or likely anti-competitive effects is no longer relevant, since the previous element that required a demonstration of specific anti-competitive effects, such as an "undue" lessening or prevention of competition, was eliminated. Competitive injury is now presumed and implicit for conduct covered by section 45. In other words, section 45 describes three categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of sanction without a detailed inquiry into their actual competitive effects (CC Guidelines, at section 2.1; see also *Mohr v. National Hockey League*, 2021 FC 488, [2021] 4 F.C.R. 408, at paragraph 57).

[97] A person therefore commits an offence under section 45 when that person: (i) conspires, agrees or arranges; (ii) with a competitor of that person with respect to a product or service; (iii) to do any of the three things mentioned in subsection 45(1), namely, fix prices; allocate sales, territories, customers or markets; or control output. Of course, since section 45 is a criminal offence, the requisite criminal intent or *mens rea* must also be demonstrated.

(i) Requirement for an agreement

[98] The main constituent element and basic threshold requirement to establish a section 45 conspiracy is the existence of an agreement between the collaborating parties. The words used in section 45 (namely, "conspires, agrees or arranges") all express the act of agreeing and contemplate a "mutual arriving at an understanding or agreement" (*Regina v. Armco Canada Ltd. and 9 other corporations*, (1976) 13 O.R. (2d) 32, 70 D.L.R. (3d) 287 (*Armco*), at page 41). In order to determine that a criminal agreement was formed, it is necessary to prove that there is a "meeting of the minds" between two or more unaffiliated persons who are "competitors". The agreement can be express or tacit, and subsection 45(3) of the Act specifically provides that a court may infer the existence of an agreement from circumstantial evidence, even in the absence of any evidence of "direct communication" between the parties to the alleged conspiracy. However, the requirement that there be a mutual meeting of the minds makes some form of two-way communications an essential aspect of a conspiracy. In other words, even if there is no direct evidence of an agreement, there must at least be some indirect or circumstantial evidence of some type of communications between the parties in order for an agreement to be inferred: "[a]dopting a comparable or identical pricing policy without an agreement – which by definition requires a meeting of the minds – does not fall within the scope of s. 45" (*Proulx v. R.*, [2016] Q.J. 11393 (QL) (*Proulx*), at paragraph 32). As the Ontario Supreme Court stated it in *Regina v. Canadian General Electric Company Ltd. et al.*, (1976) 15 O.R. (2d) 360, 1976 Carswell Ont. 449 (*GE*) some 45 years ago, "[c]ommunication is the essence of every conspiracy for only by it can common purpose be proved" (*GE*, at paragraph 158).

[99] This was confirmed by the S.C.C. in *Atlantic Sugar*, a criminal case. In that seminal case on the Canadian conspiracy offence under the Act, as it was previously worded, major sugar refiners were accused of conspiracy to fix the price of sugar and to

allocate market shares. The major sugar refiners operated in a highly concentrated, oligopolistic market and had relatively stable market shares for many years. At one point in time, they entered into a price war to compete for market share, but ultimately reverted to their previous positions. Similar to the current case, *Atlantic Sugar* involved allegations that the parties' abandonment of competition on market share constituted collusion through "signalling", contrary to the conspiracy provisions of the Act. The S.C.C. upheld the acquittals ordered by the trial judge and confirmed that a "tacit agreement" arising without two-way communications was not within the scope of the conspiracy provision of the Act.

[100] The S.C.C. accepted that "a conspiracy may be effected in any way and may be established by inference" (*Atlantic Sugar*, at page 656), but it imported certain contractual concepts of agreement (i.e. the communication of an offer and the acceptance of such offer) into the analysis of the elements of conspiracy: "[i]n order to make an agreement by tacit acceptance of an offer there must not only be a course of conduct from which acceptance may be inferred, there must also be communication of this offer" [emphasis added] (*Atlantic Sugar*, at page 657).

[101] With respect to the sugar refiners' uniform prices and the charges of price fixing, the S.C.C. confirmed the trial judge's conclusions, who had found that there was no "tacit agreement" even though the accused published their price lists, making them immediately known to their competitors. The S.C.C. accepted the trial judge's finding that this was a "result of independent decisions called 'conscious parallelism' which is not illegal" (*Atlantic Sugar*, at page 656) and that this did not constitute an unlawful conspiracy, even though the price lists were immediately made known to the competitors. With respect to the traditional sales policy based on market share, the S.C.C. agreed that there was no evidence that the policy was made known to the competitors and no evidence of communication of that policy. The S.C.C. also confirmed the trial judge's finding that there was no "tacit agreement" in this situation.

[102] In other words, so-called "tacit agreements" cannot amount to an illegal conspiracy without some form of communication and course of conduct from which acceptance may be inferred. A conscious but independent adoption of a uniform or parallel course of action by different parties, without such a meeting of the minds, assent, promise or coordination among them is not an agreement contemplated by the conspiracy provision. The mere expectation that a competitor will act in a certain way is insufficient to establish the required agreement (i.e. a meeting of the minds or a mutual understanding).

[103] In their respective submissions, both parties indicated that a conspiracy claim under section 45 must therefore provide, among other things, material facts and full particulars on (i) the agreement and its purpose or objects and (ii) any overt acts, described with clarity and precision, that are alleged to have been done by each of the conspirators in furtherance of the conspiracy (*Prokuron*, at paragraphs 28–29; *Mancinelli*, at paragraphs 142–143). I pause to note that these requirements relate to pleading an "unlawful means" civil conspiracy, not the criminal offence under section 45 of the Act. While the presence of overt acts may, depending on the circumstances, give rise to an inference that an unlawful agreement exists, it should be underlined that the section 45 offence resides in the agreement itself, not in carrying it out by overt acts.

(ii) Conscious parallelism

[104] A word needs to be said about conscious parallelism. Contrary to what the plaintiffs appear to suggest in their written and oral submissions, Canadian law has long recognized that “conscious parallelism” falls short of conduct prohibited by section 45 of the Act. Conscious parallelism has been described as “a phenomenon which occurs when parties not involved in a price-fixing conspiracy deliberately *choose* to adjust their prices in order to match those of their competitors, in the absence of any actual collusion between them” [emphasis in original] (*Godfrey*, at paragraph 190, Justice Côté dissenting, but not on this point). Stated differently, it is the act of independently adopting a common course of conduct with an awareness of the likely response of competitors or in response to the conduct of competitors. Conscious parallelism refers to those situations where, in the absence of an agreement, competitors unilaterally adopt similar or identical business practices or pricing, as a result of rational and profit-maximizing strategies based on observations of market trends and activities of each other’s past behaviour. Such parallel conduct is frequent in oligopoly markets where leading firms may closely monitor their rivals’ reactions to changes in their behaviour, and each firm accounts for the reaction of others in deciding on prices, production and output.

[105] Since it represents the independent response by each competitor to the perceived and predicted conduct of others—in contrast to a conspiracy prohibited by section 45, which requires an agreement and some form of two-way communications—, “conscious parallelism” is not illegal and has never been found to fall within the purview of the conspiracy provision of the Act, whether section 45 or its predecessors. Canadian courts have repeatedly recognized that conscious parallelism cannot be equated with an agreement and that a pricing policy resulting from conscious parallelism, if conducted without collusion, does not constitute a conspiracy offence (see, e.g., *R. v. Cominco Ltd.*, (1980) 46 C.P.R. (2d) 154, [1980] A.J. No. 524 (QL) (Alta. S.C. (T.D.)); *R. v. Aluminum Co. of Canada Ltd.*, (1976) 29 C.P.R. (2d) 183, 1976 Carswell 94 (Que. S.C.); *R. v. Canada Cement Lafarge Ltd.*, (1973) 12 C.P.R. (2d) 12, 1973 CarswellOnt 1031 (Ont. Prov. Ct.) (*Lafarge*)). The mere communication or exchange of views between parties that arouses only an expectation that each party will act in a certain way was also found not to be an agreement prohibited by a previous iteration of section 45 (*R. v. Canada Packers Inc.*, (1988) 19 C.P.R. (3d) 133, 1988 CarswellAlta 745 (Alta. Q.B.)).

[106] Again, this was also clearly confirmed and settled by the S.C.C. in *Atlantic Sugar*, where the Court found conscious parallelism, but not an agreement, and therefore acquitted the sugar refiners despite the fact that there was less than vigorous competition between them. The S.C.C. affirmed that conscious parallelism is not illegal (*Atlantic Sugar*, at page 656) and notably observed that “[n]one of the refiners was obliged to compete more strongly than it felt desirable in its own interest. Each refiner was entitled to decide not to seek to increase its market share as long as this was not done by collusion” (*Atlantic Sugar*, at page 657).

[107] I recognize that *Atlantic Sugar* may lead to some confusion as it is not always clear in that decision what the S.C.C. exactly meant by “tacit agreement”. The S.C.C. used the words “tacit agreement” in quotation marks throughout its decision as this was the language used by the trial judge to describe his finding about what the accused sugar refiners had done with regard to market shares. In *Atlantic Sugar*, the trial judge had found that the maintenance of traditional market shares was the result of a “tacit

agreement" between the accused, but that it did not amount to a prohibited conspiracy because there was no communication between them. What the trial judge described as a "tacit agreement" was in fact conscious parallelism and, in my view, the use of quotation marks by the S.C.C. reflects the court's understanding that "tacit agreement" (as expressed by the trial judge) amounted in fact to what the S.C.C. described as conscious parallelism.

[108] I pause to mention that, in many court decisions and in the legal and economic literature, there is often confusion between the terms "tacit agreement", "tacit collusion" and "conscious parallelism", as they are used interchangeably to describe a similar reality. In my view, this is incorrect. The key difference between "conscious parallelism" and other conduct is the absence of an agreement. So using "tacit agreement" or "tacit collusion" to describe such parallel behaviour is an oxymoron. For greater clarity, under the Canadian conspiracy provision, the term "tacit agreement" should be reserved for those situations where an agreement can be inferred from circumstantial evidence and indirect communications between the parties. A tacit agreement requires some form of communication of an offer as well as a course of conduct from which the acceptance of the offer may be inferred (*Atlantic Sugar*, at page 657). Conversely, the words "agreement" or "collusion" should not be used to describe situations of "conscious parallelism" as these imply unilateral, parallel conduct with no form of two-way communications and mutual acceptance, whether express or tacit, between the parties involved.

[109] I add that the Commissioner of Competition (Commissioner), who is responsible for administering and enforcing the Act, shares the view that "conscious parallelism" does not fall within the ambit of section 45. In the CC Guidelines, the Competition Bureau expressly affirms that it "does not consider that the mere act of independently adopting a common course of conduct with awareness of the likely response of competitors or in response to the conduct of competitors, commonly referred to as 'conscious parallelism', is sufficient to establish an agreement for the purpose of subsection 45(1) [of the Act]" (CC Guidelines, at section 2.2). I observe that this was recently reaffirmed by the Competition Bureau without any change or revision in its new, updated *Competitor Collaboration Guidelines* released on May 6, 2021.

[110] However, if there is something in addition to the consciously parallel conduct, it could constitute sufficient circumstantial evidence to satisfy the element of agreement needed to establish the offence of conspiracy under section 45 of the Act. Indeed, in the CC Guidelines, the Competition Bureau indicates that it views "parallel conduct coupled with facilitating practices, such as sharing competitively sensitive information or activities that assist competitors in monitoring one another's prices," [emphasis added] as potentially sufficient to establish an agreement between the parties under section 45 (CC Guidelines, at section 2.2). These "facilitating practices" are reminiscent of the so-called "plus factors" identified by U.S. courts and may include, for instance: enforcement activities by the competitors involved; advance announcements of price changes; exchange of confidential information on prices or costs; simultaneous adoption of new pricing programs; campaigns to convince competitors to adopt an open price policy; or efforts to keep meetings or communications covert (see, e.g., *Armco* or *Lafarge*). Importantly, these facilitating practices will typically refer to the conduct of the competitors, and will imply some form of prior or ongoing mutual communications between competitors.

[111] Incidentally, in light of the foregoing, conscious parallelism cannot be qualified as a novel issue under section 45. The requirement of an agreement, express or tacit, is a matter of law that is well settled in the jurisprudence, and Canadian courts have been saying for nearly 50 years that parallel, unilateral conduct without collusion does not amount to a conspiracy offence under the Act, and clearly falls outside the perimeter of section 45.

(iii) Signalling

[112] I make one last comment on the issue of "signalling" at the centre of the plaintiffs' allegations of a section 45 conspiracy in this case. Relying on *Atlantic Sugar* and *Gosselin v. R.*, [2017] Q.J. No. 988 (QL) (*Gosselin*), the plaintiffs submit that "public signalling" is recognized by Canadian law as constituting a breach of section 45 or its predecessor provisions. With respect, this is an incorrect statement of the law. Just as no case has ever recognized that conscious parallelism amounted to a prohibited conspiracy under the Act, I am unaware of any precedent in Canada which has recognized that unilateral "public signalling," in and of itself, can amount to a conspiracy prohibited by section 45. In fact, neither of the two cases cited by the plaintiffs offers any support for that proposition.

[113] As indicated above, *Atlantic Sugar* has confirmed that unilateral conduct is not caught by the conspiracy provision of the Act. To the extent that *Atlantic Sugar* could be considered as a "signalling" case, it makes it clear that there cannot be an unlawful agreement under section 45 without some form of two-way communications between the co-conspirators, involving an offer or invitation and some conduct from which acceptance of the offer may be inferred. Turning to the *Gosselin* case, it does not provide any useful assistance. This case was not one of price signalling or conscious parallelism, as the existence of the conspiracy in that matter had been proven with extensive wiretap evidence obtained through electronic surveillance, revealing ongoing communications and express agreements between the competitors in the retail gasoline industry in a region of Quebec. Moreover, there were guilty pleas entered by some of the co-accused and the existence of a conspiracy had been clearly admitted. In fact, in that case, the trial judge rejected the defence of "conscious parallelism" advanced by the defendant in light of the extensive evidence of discussions and conversations between the competitors confirming the existence of an actual agreement (*Gosselin*, at paragraphs 58–60).

[114] The plaintiffs also mentioned the *Fanshawe* case as an example where the court allegedly relied on public statements and findings in other proceedings. However, in that case, the defendants had pleaded guilty to a price-fixing conspiracy, and no finding was made on any issue related to public signalling.

(d) *Section 46*

[115] Turning to section 46 of the Act, it provides that it is a criminal offence for a corporation carrying on business in Canada to implement in Canada a directive or communication from a controlling person outside Canada, 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. Section 46 therefore adds and complements section 45 by establishing an offence for persons beyond those who are directly involved in the conspiracies covered by section

45. Therefore, section 46 allows one to target subsidiaries operating in Canada that implement a foreign communication, whether or not they know they are implementing a conspiracy, and despite the fact that they are not immediate parties to the conspiracy. Without section 46, the courts would only have jurisdiction to impose sanctions against the conspirators themselves as opposed to entities in Canada who merely implement it without being a direct party to the conspiracy.

[116] In terms of the constituent elements of the section 46 offence, the requirements therefore include the elements of the conspiracy offence under section 45 as well as: (i) a corporation carrying on business in Canada; (ii) which implements a directive, an instruction, an intimation of policy, or other communication; (iii) from a person in Canada who is in a position to direct or influence the policies of the corporation; and (iv) where the directive, instruction, intimation of policy or communication is for the purpose of giving effect to conspiracy entered outside of Canada that would breach section 45.

(3) Analysis

[117] In my opinion, the plaintiffs have failed to put forward pleadings that disclose a reasonable cause of action. Despite the length of the Statement of Claim which exceeds 140 paragraphs, the pleadings are insufficient to establish a cause of action in breach of section 45 or 46, as the plaintiffs do not provide material facts with respect to the existence of an unlawful agreement between the defendants. This is the main constituent element of a section 45 conspiracy and, without a proper pleading with regard to the alleged agreement, there are no grounds for the plaintiffs' conspiracy claim. Even if it is read generously, the Statement of Claim does not contain material facts as to how and when an agreement could have been formed and entered into between the defendants, what if anything could have been agreed upon between the defendants, any meeting of the minds with regard to the commission of the alleged conspiracy offence, or any overt acts undertaken by the defendants in furtherance of an alleged conspiracy. The Statement of Claim is too sparse in detail and insufficient on the alleged wrongful act, making it plain and obvious that the plaintiffs' claim cannot succeed. When all is said and done, the Statement of Claim contains only vague and general allegations that amount to mere speculation and conjecture on an alleged agreement between the defendants. The same is true for the alleged wrongful conduct under section 46 of the Act.

(a) *Section 45*

(i) Plaintiffs' allegations

[118] In their Reply Memorandum, the plaintiffs have identified those allegations made in their Statement of Claim which, in their view, provide the required background for the constituent elements of the conspiracy offence. With respect to the alleged agreement between the defendants, the plaintiffs have listed the following paragraphs of the Statement of Claim:

- [5] The defendants met and communicated with each other among their senior executives, directly and indirectly, in person, over the phone, and at meetings of the industry's various trade organizations.

- [61] The defendants entered a conspiracy to restrict DRAM capacity, illegally suppress DRAM supply, and increase DRAM prices.

- [64-70] Examples of statements:

  o [64] …on November 17, 2015, Micron CFO Ernie Maddock predicted at the UBS Global Technology Conference that the defendants would make some "really rational decisions," including "lower supply growth" and no "significant DRAM capacity expansion".

  o [66] Samsung quickly announced it was changing course from its previous plan to grow supply. On January 29, 2016, at its fourth quarter 2015 earnings call, Samsung stated: "This year our main focus will be on profitability rather than increasing volume".

  o [70] On May 25, 2016, just before the start of the Class Period, at the J.P. Morgan Global Technology Media & Telecom Conference, Micron CEO Mark Durcan cautioned against supply growth in the industry: "we all are going to either benefit or be hurt by excess supply in the marketplace".

- [73] Throughout the Class Period, the defendants confirmed their adherence to the conspiracy.

- [74-101] Examples of statements:

  o [74] …on June 16, 2016, at the Nasdaq Investors Program Conference, Micron CFO Ernie Maddock expressed confidence in the industry consensus: "at least thus far many of the public comments that have been made, a lot of which have been made by the equipment companies collaborate this idea that that is a general reduction in DRAM CapEx planned by our Korean competitors and that we believe is very consistent with other messages that we're hearing in the marketplace".

  o [76] On September 8, 2016, at the Citi Global Technology Conference, Maddock reiterated the industry's commitment to limit supply: … "but there's no sign anywhere in the market that suggests there's a plan to expand DRAM wafer capacity", and "Well, I mean we have basically announced what we intend to do in terms of bit growth and we're sticking to that".

  o [90] On May 24, 2017, at the J.P. Morgan Global Internet, Media, and Technology Brokers Conference, Micron CFO Ernie Maddock emphasized the industry consensus to maintain supply discipline: "Although we don't speak for the industry, the other participants have spoken and indicated a great deal of discipline".

- [129] The defendants' conduct is the product of a coordinated agreement or arrangement to suppress DRAM supply below market demand. This conduct was designed to increase the price of DRAM illegally so as to maximize the defendants' profits at the expense of the Class. This agreement or arrangement was achieved through the sharing of supply and pricing information between the defendants, signalling through publicly available means, such as

DRAMeXchange and earnings calls, and through private communications between the defendants.

[119] With respect to the purpose of the defendants being to conspire and agree on suppressing the supply and/or increasing the prices of DRAM (i.e. the intent), the plaintiffs have listed the following paragraphs:

- [62] One method the defendants used to implement and monitor their conspiracy was through public statements to each other at earnings calls, meetings, and conferences.

- [129] The defendants' conduct is the product of a coordinated agreement or arrangement to suppress DRAM supply below market demand. This conduct was designed to increase the price of DRAM illegally so as to maximize the defendants' profits at the expense of the Class.

[120] The defendants respond that only seven scattered conclusory paragraphs of the Statement of Claim (i.e., paragraphs 5–6, 61–62, 101–103 and 129) contain allegations with respect to the formation and existence of an agreement, and that these amount to bald pleadings of conclusory facts.

[121] In essence, the plaintiffs allege that the unlawful agreement between the defendants was formed, achieved and maintained through direct communications in private meetings between the defendants and by signalling through the Public Statements. I note that, according to the defendants, the plaintiffs' allegation is not that the alleged agreement was formed by signalling, but rather that it was implemented, enforced or confirmed by such signalling (Statement of Claim, at paragraphs 6 and 62). I acknowledge that, as drafted, the pleadings leave some doubt on the exact nature of the allegations with respect to signalling. However, for the purpose of these Reasons, I will assume that, as the plaintiffs argued, they have pleaded that the alleged agreement was both achieved and maintained by the defendants through these Public Statements.

(ii) General statements

[122] Before turning to the more specific allegations of direct private communications and "signalling," I will look at what I call the "general statements" made by the plaintiffs on the alleged agreement or conspiracy. These general allegations are found at paragraphs 5, 61–62, 129 and 135 of the Statement of Claim.

[123] I find that these general allegations of "enter[ing] a conspiracy" in 2016 or having a "coordinated agreement or arrangement" to suppress supply and increase prices of DRAM are nothing more than bald assertions of conclusory facts, with no allegations of material facts regarding the formation or existence of an agreement or any form of coordination. They are vague and general allegations that quite simply do not contain the level of detail that one would expect of allegations forming the basis of an action in damages pursuant to sections 36 and 45. More importantly, they have no factual underpinning. As pointed out by the defendants, there is only one bald reference to an "agreement or arrangement", without any explanation or elaboration. These conclusory statements are wholly insufficient to disclose a reasonable cause of action in conspiracy, as they do not provide the minimally required level of detail related to the "how" and "what" could give rise to the defendants' liability.

[124] More specifically, these general statements contain no material facts or particulars supporting any allegation regarding an agreement to fix or increase the prices for DRAM, nor any material facts or particulars supporting the formation or existence of an agreement to suppress DRAM supply. They only contain conclusory legal statements that paraphrase the language in section 45 of the Act and allege a cause of action as if it was a material fact, or provide speculations as if they were proven material facts. As a result, they fall well short of pleading with sufficient details the main constituent element of the cause of action raised.

[125] As mentioned above, a conspiracy within the meaning of section 45 of the Act requires a meeting of the minds. To properly plead a conspiracy, a plaintiff must notably specify the agreement to conspire between the defendants, and its purpose or object, as well as any specific conduct, described with clarity and precision, that is alleged to have been adopted by each of the conspirators in furtherance of the conspiracy. None of that transpires from the general statements made by the plaintiffs in the Statement of Claim.

[126] Even at the pleadings stage, conspiracy allegations require some particularity. The conspiracy claims contained in the plaintiffs' general statements simply mirror the language of the Act. I agree with the defendants that the conspiracy is so broadly and generically pleaded that it is not possible to discern precisely what is being alleged in terms of what gave rise to the liability of the defendants and how any alleged agreement may have been reached. There are no allegations on how the alleged agreement may have translated into a concerted suppression of DRAM supply and increase in DRAM prices. In fact, there are no material facts, and not a scintilla of evidence (I will come back to that in section IV.B below), supporting allegations that the supply of DRAM has been suppressed, restricted or limited by the defendants, let alone in a coordinated way. This does not comply with the requirements of the rules for pleading a cause of action nor with the F.C.A.'s directions in *Mancuso*.

[127] The bare allegations are not combined with any material facts supporting the possible existence of two-way communications or course of conduct from which an agreement or a conspiracy between the defendants could be inferred. I do not find it manageable and fair to the defendants to have pleadings with such bald allegations and no underlying facts. In sum, the plaintiffs make very serious legal claims of an unlawful conspiracy, and the law rightly requires that such assertions be backed up with reference to specifics and not be based on mere assertions or generalities.

[128] Apart from these general statements on an alleged conspiracy between the defendants, the plaintiffs also rely on more specific allegations of direct private communications between the defendants, of exchanges in the context of trade association meetings and of signalling through the Public Statements made by the defendants. Each will now be discussed in turn.

(iii) Direct private communications

[129] With respect to the allegations of direct private communications, the Statement of Claim only contains one allegation made at paragraph 5, and repeated almost *verbatim*, at paragraph 102, to the effect that the defendants "met and communicated with each other, directly and indirectly, over the phone and in person". These paragraphs also

refer to meetings of the industry's various trade organizations, which I will address in the next subsection.

[130] Again, these pleadings of direct communications between the defendants are vague, brief and conclusory. I do not find any material facts, in the pleadings themselves or in the documents referenced in the pleadings, regarding direct communications between the defendants that could be reflective of a meeting of the minds. In essence, the plaintiffs speculate, without any material facts or foundation, that the defendants "met and communicated with each other". These vague and generic allegations made by the plaintiffs essentially require a leap of faith in the existence of facts which remain entirely in the realm of speculation. Simply making a generic statement that alleged co-conspirators met and communicated "over the phone and in person", without more, is clearly not enough to plead a section 45 conspiracy or an agreement through direct communications, and does not amount to a material fact.

[131] Moreover, and I will also address this in section IV.B below, there is not a scintilla of evidence on the record to support the plaintiffs' speculation on such alleged direct communications between the defendants.

(iv) Trade association meetings

[132] The plaintiffs also allege that the defendants are members of industry trade associations which fostered information sharing, provided opportunities for direct communications and, in the plaintiffs' view, facilitated the alleged conspiracy. More specifically, at paragraphs 5, 51–52, 71 and 102–103 of the Statement of Claim, the plaintiffs allege that the defendants met and communicated with each other at scheduled meetings of different trade associations and industry organizations, and that DRAM prices increased in the months or years following these meetings. The plaintiffs focus on certain industry events that they outline in paragraph 103 of the Statement of Claim.

[133] I find that these paragraphs again amount to bald assertions incapable of supporting an allegation of unlawful agreement to suppress supply or increase prices. These paragraphs do not describe any particular suspected or actual interactions between the defendants at these trade association meetings, nor any interactions suggesting the establishment of an agreement to restrain the supply of DRAM or to increase DRAM prices. These paragraphs are silent on the conduct of the defendants. They do not allege what the defendants met and communicated about, or that the defendants agreed on anything further to those alleged meetings and communications at trade association meetings. There are no allegations, let alone any material facts or evidentiary foundation, that the defendants were present at the specific "key" meetings alleged to have taken place and identified in paragraph 103 of the Statement of Claim, that they communicated or discussed with one another at any such meetings, that there were communications or discussions about supply suppression of DRAM or about DRAM prices, or that the defendants had a mutual understanding or agreed on anything at those meetings. Nor do the plaintiffs allege that the supply of DRAM decreased after any of these events.

[134] The plaintiffs have not alleged anything more than the existence of these trade association meetings, and the unilateral, independent statements made by each defendant.

[135] The sole fact of being an industry participant and a member of trade associations cannot be enough, in itself, to constitute a material fact sufficient to show that a participant had communications with its competitors from which an inference of an unlawful agreement and coordination in violation of section 45 could be made. The Court needs more than general allegations about the existence and dates of regular meetings of trade associations and of opportunities to meet at such meetings, in order to find that such allegations may constitute proper allegations of an illegal conspiracy agreement. Throwing out a list of scheduled meetings of trade associations is not sufficient to allege the existence of an agreement, especially when there are no material facts to support who was in attendance, what was discussed, and whether there was any meeting of the minds.

[136] Membership in trade associations and attendance at trade meetings along with other industry participants present nothing more than an opportunity to meet or collude, and an opportunity, without more, is insufficient to state a claim under section 45. As mentioned by the plaintiffs themselves, these trade association meetings only offered opportunities to meet (Statement of Claim, at paragraphs 51 and 71).

[137] Even in the context of an alleged conspiracy, the obligation to make more than general, hypothetical or imprecise allegations remains, and it must retain its full meaning and significance. Here, the plaintiffs only make sweeping and general allegations that are limited to identifying trade associations and dates of regular meetings as places where the defendants were or could have been. There are no material facts, either alleged in the Statement of Claim or found in the documents referred to in the pleadings, that the defendants were present, met, discussed or agreed on anything. The plaintiffs have done nothing more than identify places where the defendants might have been present and might have met, and where an alleged meeting of the minds might have taken place. This is speculation. Trade association meetings cannot be probative of a conspiracy or support an allegation of unlawful agreement without any allegations of improper conduct by the members of such trade associations. Here, the plaintiffs make completely gratuitous allegations and provide no reference to any form of improper behaviour by the defendants.

[138] It should be underlined that trade associations serve perfectly legitimate functions and objectives, such as providing industry information to members, conducting research to further industry goals, establishing industry standards, and promoting demand for products and services. In light of all these valid purposes, attendance at trade events cannot, in and of itself, imply or allow to infer an anti-competitive agreement. Here, the plaintiffs' assertions are asking the Court to turn a perfectly legal activity into a conduit for presumptively illegal behaviour, without any material facts other than the existence of the perfectly legal behaviour. I do not agree and do not accept that being a member of a trade association or being present at trade association meetings, without more, can be sufficient to constitute proper allegations of a conspiracy between industry participants, or to amount to "some basis in fact" of an alleged wrongful act (as I will discuss below in section IV.B).

[139] Furthermore, to the extent that the plaintiffs attempt to allege that increases in DRAM prices correlate with certain trade association meetings, I am not convinced. There are no allegations that the DRAM price increases were a consequence of communications or discussions that the defendants had about supply suppression—

which is the plaintiffs' main conspiracy allegation—, or even about DRAM prices. In fact, I point out that the Statement of Claim is totally silent about any material facts relating to any form of exchanges or discussions between the defendants regarding DRAM prices.

(v) The Public Statements

[140] The plaintiffs further rely on their allegations of public "signalling" done by the defendants in various statements made by their executives at earnings calls, investor calls and industry conferences. These are described in detail over dozens of paragraphs in the Statement of Claim. In fact, the plaintiffs' claim depends largely on these defendants' Public Statements, which are a main focus of the Statement of Claim. They are found at paragraphs 6 and 56 to 101 of the Statement of Claim.

[141] I am not convinced by the plaintiffs' arguments on this front. When the allegations made on the basis of the Public Statements are read in their context—which the Court is entitled to do as the documents are incorporated into the Statement of Claim and thus form part of the pleadings—, I agree with the defendants that the plaintiffs have misquoted, selectively quoted and mischaracterized the statements attributed to the defendants, and that the defendants' public communications do not support any allegation of illegal conspiracy.

[142] The plaintiffs first maintain that "signalling" can be a form of unlawful agreement recognized by the case law, and can amount to circumstantial evidence from which a court can infer an agreement. As indicated above, I do not agree that unilateral signalling is, in itself, a form of agreement proscribed by section 45 of the Act. This is not the state of the law in Canada. Signalling is not an agreement under section 45, just as conscious parallelism is not an agreement either. Public signalling is nothing more than information being communicated unilaterally by a market participant and such unilateral conduct is not a recognized cause of action under section 45 in Canada. In the dozens of paragraphs dealing with examples of signalling in the Statement of Claim, there are no allegations nor any material facts providing any indication of two-way communications, mutual understanding or meeting of the minds between the defendants.

[143] To the extent that *Atlantic Sugar* could be considered as a "signalling" case, as argued by the plaintiffs, the S.C.C. made it clear that there cannot be an unlawful agreement under section 45 without some form of two-way communications between the co-conspirators stemming from their conduct, involving an offer or invitation and some form of acceptance. There are no allegations of that nature in the Statement of Claim, let alone any material facts suggesting the existence of any mutual exchanges or coordination between the defendants.

[144] That said, I agree that the plaintiffs could allege and demonstrate the existence of an agreement between competitors with circumstantial evidence, and that simultaneous public conduct, conscious parallelism or public signalling could be used in conjunction with other evidence to establish the existence of an unlawful agreement under section 45. These are the "facilitating practices" referred to by the Competition Bureau in the CC Guidelines. However, factual allegations relying on circumstantial evidence require material facts enabling the Court to infer that an impermissible agreement may exist. In other words, the allegations and factual foundation of circumstantial events must go to the establishment of an agreement, and to the conduct

of the parties. The plaintiffs cannot simply allege general observed changes in prices without any material facts relating to the conduct of the defendants. Here, there are strictly no allegations and no material facts, let alone any evidentiary basis, of any “facilitating practices” in terms of conduct by the defendants—such as sharing competitively sensitive information on production, capacity or prices; coordination between the defendants; or activities assisting in the monitoring of each other—that could point to circumstantial evidence of an agreement.

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

[146] In other words, further to my review of the documents referred to in the pleadings, I find that the extracts and documents relied on by the plaintiffs do not suggest any conspiracy, and that the plaintiffs’ statements allegedly summarizing their contents are twisting the facts to fit an appearance of conspiracy. The Statement of Claim essentially invents a fictitious scenario of intent, communications and coordination between the defendants that does not exist in or flow from the documents the plaintiffs claim to paraphrase. I do not find any material facts, nor any evidentiary foundation, supporting the possible existence of an agreement, of a meeting of the minds or of a mutual understanding between the defendants. Nor are there allegations of overt acts by any of the defendants that may suggest any form of two-way communications or course of conduct from which the acceptance of an offer could be reasonably inferred. There are only extracts showing what the state of mind and thinking of each separate defendant was. In the extracts and documents relied on by the plaintiffs, each defendant sets out and explains its own policy and approach, with reference to what others are doing. These are examples of a competitive industry at work, where the competitors follow and are aware of what is happening in the market. The observation by one industry player that its view of the industry is not very different from the views of other industry players (see, e.g., Micron’s statements in the Statement of Claim, at paragraphs 91–92) does not support any inference of an otherwise illegal agreement.

[147] In sum, none of the statements relied on by the plaintiffs suggests that any defendant had reached an unlawful agreement with its competitors, whether on DRAM supply or on DRAM prices. On the contrary, they recount unilateral acts regarding each

defendant's own supply, with no express or implied intention to suppress or limit supply nor any sharing of confidential supply information. The defendants' behaviour and statements are instead consistent with lawful unilateral conduct and conscious parallelism. Making observations about the behaviour of other competitors or about the state of the market is not an indication of a conspiracy or of an agreement.

[148] I further observe that the comments were made by the defendants in relatively public settings such as investor calls, earnings calls and industry conferences, mostly in response to investors' questions and addressing concerns or topics raised by these investors, as well as in speeches and presentations made to industry groups. This is the type of information that companies legitimately provide to their shareholders.

[149] I will now turn to more specific affirmations made in the Statement of Claim and which lubricate the plaintiffs' allegations flowing from the Public Statements. The plaintiffs make numerous allegations about a so-called "industry consensus" (Statement of Claim, at paragraphs 74, 83, 90, 91, 92, 94, 97 and 101), on the apparent basis of the documents emanating from the defendants. The word "consensus" suggests the existence of a widely accepted, general agreement. I suspect it has been chosen by the plaintiffs for that reason. However, the Public Statements contained in the pleadings, the specific quotes referred to by the plaintiffs and the documents themselves do not use the word "consensus". Nor do they say anything about an industry consensus. They instead simply show that the defendants were consistent in their respective independent approaches, and were each in line with the rest of the industry. Being consistent with other players cannot be equated with an "industry consensus", and certainly does not suggest or affirm any form of agreement or coordination. In my view, it is inaccurate and misleading for the plaintiffs to describe the statements made by the defendants as being reflective, or even potentially reflective, of an agreed-upon "consensus".

[150] On the contrary, any agreement or even communications between the defendants regarding the supply of DRAM was in fact expressly denied by some defendants in the extracts referred to by the plaintiffs at paragraphs 76 and 90 of the Statement of Claim.

[151] To avoid any misunderstanding, when I say "misleading," I do not mean to suggest that the plaintiffs or their counsel deliberately intended to deceive the Court in the Statement of Claim. The plaintiffs' allegations are misleading in the sense that, in an obvious effort to meet the requirements of section 45 and to satisfy an appearance of illegal conspiracy, they ended up being a mistaken description of the facts.

[152] The plaintiffs also make several allegations about an "intent to limit supply" (Statement of Claim, at paragraphs 69, 75 and 84) and about a "commitment" to suppress, restrict or limit supply (Statement of Claim, at paragraphs 6, 76, 77, 79, 85, 86, 88, 93 and 96) on the part of the defendants. The plaintiffs' use of the words "intent" and "commitment" ostensibly allude to the defendants' state of mind. Further to my review of the allegations and of the referenced documents, I conclude that this is once again an inaccurate and misleading description of what was actually said by the defendants in the various documents. The statements contained in the pleadings, the quotes referred to by the plaintiffs and the documents themselves never refer to a shared "commitment" to do anything nor to any "intent" to limit supply. Nor do they say that the supply of DRAM was purposely suppressed, restricted or limited by the defendants. On the contrary, the referenced documents say that there will be some

growth in the supply of DRAM, but that the magnitude of this growth in supply will be lower than the expected growth in demand, and that it will be lagging below market demand. A situation of undersupply is a far cry from one of suppression, restriction or limitation of supply. In my view, the Public Statements claimed to be relied on by the plaintiffs do not offer material facts supporting any agreement between the defendants to limit supply, any "intent" or "commitment" by the defendants to limit supply, or even any form of supply suppression, restriction or limitation.

[153] I would add that there is a fundamental difference between observing and stating that there will be "lower supply growth", as the defendants effectively said in the Public Statements and in their documents, and presenting this as an "intent to lower" supply growth, as the plaintiffs portrayed these references in the Statement of Claim. In fact, what the plaintiffs did in their Statement of Claim is to transform what was an adjective used by the defendants to qualify their respective expected growth in DRAM supply (i.e. "lower supply growth") into an active verb (i.e. to "lower supply growth"), in an apparent attempt to impute to the defendants an intent that just does not flow and cannot be inferred from the documents themselves. Allegations that are false, plainly incorrect or inconsistent when read in light of the documents from which they claim to emanate are not material facts and cannot be assumed to be true as they are incapable of proof. This is the case here with numerous allegations made by the plaintiffs on the basis of the Public Statements.

[154] I find that the documents referenced by the plaintiffs in the pleadings instead show unilateral decisions and announcements by each defendant with respect to its own activities, without any statements suggesting the expression of any agreement or of any invitations made to the other competitors with respect to the supply of DRAM or to DRAM prices.

[155] For example, Samsung was speaking of its main focus on profitability (paragraph 66 of the Statement of Claim), its expectations on the increases in the supply of DRAM (paragraph 69), its own range of "bit" (i.e. DRAM) growth (paragraphs 75 and 100), its focus not to increase its own market share but to maximize profits (paragraphs 78 and 95), and the fact that it had no plans to add capacity (paragraph 89).

[156] Micron was speaking of its own "future in which no additional DRAM wafer capacity is required" (paragraph 65), its focus not being on market share (paragraph 68), its plan for its own bit growth (paragraphs 76 and 77), its own level of growth in supply (paragraph 79), the increase of its own bit supply compared to the expected demand level (paragraph 83), its own plans not to add DRAM wafers (paragraph 86), its plan for supply growth in a range lower than market demand and the fact that it was not planning capacity additions (paragraph 87), and its views of the industry bit growth being moderately lower than market demand (paragraphs 93, 96 and 98).

[157] For its part, SK Hynix referred to its own "bit" growth (paragraph 75), its plans for having DRAM bit shipment growth of 20 percent, on par with the market (paragraphs 85 and 94), its projections of its supply growth level (paragraph 88), its view of bit growth being in line with the market in 2018 (paragraph 99), and its own additions of wafer capacity to match increased demand (paragraph 117). I agree with SK Hynix that none of the specific paragraphs of the Statement of Claim referring to public statements made by that defendant contains material facts able to support the allegations made. Whether they are direct quotes or paraphrases, they do not reflect what is said in the underlying

documents. There is nothing able to support the existence, affirmation or reaffirmation of any form of agreement. I find no discussion or affirmation of an intent or commitment to limit the supply of DRAM, or an effective limitation of supply, in any of the documents emanating from SK Hynix. On the contrary, the statements from SK Hynix refer to supply growth and increases of its DRAM supply. There are repeated statements about SK Hynix's rate of bit shipment growth, an intention to increase market share, an intent to meet the market demand for DRAM, and an intent to grow its capacity and supply of DRAM. In fact, the Public Statements of SK Hynix say the opposite of what the plaintiffs attribute to them.

[158] I therefore conclude that, in many respects, the plaintiffs' allegations in relation to the Public Statements present a troubling distortion of what is actually said in the defendants' documents, and cannot be accepted as true. The Public Statements do not reflect the formation or existence of any agreement between the defendants, nor do they allow to infer one. The documents do not support any allegation of supply restrictions. The documents do not reflect any acts in furtherance of a conspiracy. They rather refer to conduct in furtherance of unilateral, independent commercial behaviour. The documents relied on by the plaintiffs show that the intention and the reality is that the defendants have increased their supply of DRAM over the Class Period, though the increase in supply has lagged behind the increase in market demand for DRAM. Again, a situation of growth in supply lagging behind the growth in demand is quite different from alleging an intent or a commitment to "limit" or restrict supply. In this case, the plaintiffs have failed to provide any material facts supporting their allegations that the defendants jointly planned to limit DRAM supply below market demand. There are no material facts suggesting any collusive communications among the defendants preceding their respective supply decisions or allowing to infer an unlawful conspiracy.

[159] In the same vein, the only allegations regarding agreements to increase DRAM prices are the conclusory statements contained in paragraphs 129 and 135 of the Statement of Claim, devoid of any material facts. I point out that there are no references whatsoever to DRAM prices, let alone to any price signalling or agreement on prices, in the dozens of paragraphs of the Statement of Claim dealing with the defendants' Public Statements and in the defendants' documents relied on by the plaintiffs.

[160] At the hearing before the Court, counsel for the plaintiffs insisted that, at the certification stage, I should not venture into an assessment of the merits of the evidence. I do not dispute that. But I underline that the foregoing review of the Public Statements and of the plaintiffs' allegations relating to them is not an exercise of interpreting or weighing the merits of the evidence relied on by the plaintiffs in their Statement of Claim. It is rather observing that, on a plain reading of the material before the Court, the allegations made by the plaintiffs clearly misrepresent or incorrectly paraphrase what is effectively contained in the Public Statements made by the defendants and on which the plaintiffs' claim specifically relies.

[161] A unilateral action by a defendant does not become collusive simply because it happens to be preceded or followed in time by another, similar unilateral action by a competitor. Merely showing parallel conduct is not enough to ground a conspiracy claim and to speculate from it that an agreement must be at the source of such parallel conduct. Independent public announcements of a competitor's own expected level of increase in the supply of a product cannot be twisted into an invitation or signal to

conspire or to suppress supply, just because they happen to coincide with some increases in the price of the product, unlinked to any suppression of supply. This is not a situation where there were implicit invitations to collude, or where there were statements about what competitors had to do in terms of supply or capacity cuts, or where a defendant signalled its willingness to limit supply or cut capacity increases if the other defendants acted in concert, or where suggestions were made to work in conjunction. In the current case, I find no behaviour or conduct of the defendants from which an inference of a conspiracy or unlawful agreement could be drawn.

(vi) Conspiracies and the *Crosslink* case

[162] The plaintiffs argue that the lack of particulars and sufficient material facts with respect to the defendants' own secret arrangements is a defence to certification that has often been rejected by the courts, as "[w]hat may be pleaded by a plaintiff depends, of course, on the scope of information reasonably available to the plaintiff" (*Watson CA*, at paragraph 133; *Crosslink 1*, at paragraph 76).

[163] It is true that, in conspiracy cases, the courts cannot set a virtually impossible standard for plaintiffs to meet as conspiracies are secretive in nature, and the details of a conspiracy are often largely in the hands of the conspirators (*Crosslink 1*, at paragraph 27; *Mancinelli*, at paragraph 173). I further acknowledge that, at the certification stage, I am required to construe the pleadings generously, having notably regard to the plaintiffs' lack of access to key documents and discovery information at the pleadings stage. I also accept that this is an element which has particular relevance in conspiracy pleadings, where the conduct complained of is invariably outside a plaintiff's knowledge and the evidence lies in the hands and minds of the alleged conspirators.

[164] However, being generous with the pleadings does not mean being blind to what they do not contain. Even in conspiracy cases, the pleadings cannot boil down to mere speculation or to a fishing expedition. A conspiracy claim must still provide material facts and sufficient particularity to support the plea. Those facts include the parties to the conspiracy, their relationship, the agreement between them, the purpose of the conspiracy, any overt acts done in furtherance of the conspiracy and any injury to the plaintiff (*Prokuron*, at paragraphs 28–29; *Mancinelli*, at paragraphs 142–143). While a plaintiff is not required to prove his or her case in the Statement of Claim, he or she must nonetheless provide the material facts supporting the constituent elements of the claim being made.

[165] On my reading, the Statement of Claim adds up to a fishing expedition on its allegation of an illegal conspiracy. It does not set out material facts or any particulars on the alleged communications, coordination and agreement between the defendants, on the object or purpose of such agreement or on any overt acts that would have been done in furtherance of the alleged conspiracy (such as using some form of communication to coordinate and exchange confidential information on supply, capacity and production). In other words, while the Statement of Claim describes the parties to the alleged conspiracy and their relationship as well as the alleged injury or damages, it does not contain material facts dealing with the allegedly concerted behaviour or conduct of the defendants.

[166] In their submissions to the Court, the plaintiffs often referred to the *Crosslink* case, and emphasized that the allegations of conspiracy (and the evidentiary basis)

were found sufficient to meet the requirements for certification in that case. They invited the Court to draw a parallel with this case and argued that I should adopt the same reasoning, as the facts and allegations in both cases were largely similar. With respect, I disagree.

[167] In *Crosslink*, the plaintiffs had presented a motion to certify a proposed class proceeding relating to an alleged price-fixing conspiracy. Justice Rady, from the Ontario Superior Court of Justice, granted the motion and certified the class. With regard to the first step of the certification test, Justice Rady held that, although "sparse in detail", the pleadings did allege sufficient facts "to ground the cause of action in conspiracy" (*Crosslink 1*, at paragraph 76). Justice Rady found that, since the plaintiffs had laid out in their pleading "a description of the parties and their relationship; the agreement by the defendants to conspire; the purpose of the conspiracy; the overt acts done to further the conspiracy; and the injury caused as a consequence", this was sufficient for the court to conclude that the pleading was adequate (*Crosslink 1*, at paragraph 77).

[168] In *Crosslink*, the pleadings, which had been characterized as being "sparse in detail" on the conspiracy, nonetheless contained several allegations regarding how the defendants had allegedly agreed to fix the prices of the products at stake, what they had agreed on, and some overt acts undertaken by the co-conspirators. These allegations included several references to the conduct of the competitors, such as agreeing to implement "coordinated price increases"; agreeing to "allocate the volumes of sales, customers, and markets" among themselves; agreeing to "refrain from bidding or to submit intentionally high, complementary and non-competitive bids for particular … supply contracts"; exchanging "information regarding the prices and volumes of sales" of the products "for the purpose of monitoring and enforcing adherence to the agreed-upon prices, volumes of sales and markets"; instructing "members of the conspiracy not to divulge the existence of the conspiracy"; taking "active steps to conceal the unlawful conspiracy from their customers, the authorities, and the public"; and disciplining "any corporation that failed to comply with the conspiracy" (*Crosslink 1*, at paragraph 75).

[169] This is not the situation here, and the plaintiffs' allegations are far from providing a similar level of particularization on the conduct of the defendants. The facts underlying the plaintiffs' case are instead materially different from the factual background in *Crosslink*. When comparing the pleadings set out in *Crosslink* to what the plaintiffs have presented in the case at bar, I do not find similarly detailed allegations regarding the conduct of the defendants and how they agreed to limit the supply of DRAM or took coordinated actions in furtherance of any alleged agreement. There are only vague and general allegations that the defendants entered into an agreement through the sharing of supply and pricing information, private communications and signalling by publicly available means.

[170] At the hearing before the Court, counsel for the plaintiffs argued that, in their pleadings, the plaintiffs had presented more particulars than in *Crosslink* and had provided the places where the defendants met, the times that they met, who was there, what was discussed, the conduct constituting the alleged agreement, its formation and how it continued. With respect, I do not agree and I instead find that the plaintiffs' pleadings are far from containing this claimed level of particularity and material facts.

[171] I underline that the allegations in *Crosslink* were found to be borderline and "sparse in detail". The plaintiffs' allegations are even more limited in the current

case. There are only allegations of unilateral decisions taken by each defendant. I am not persuaded that an observation of consistent conduct by several competitors, without more, amounts to a material fact supporting an allegation of coordinated behaviour. Being consistent and acting in concert are two vastly different conduct. For all those reasons, the *Crosslink* case can be distinguished on its facts and does not provide support for the plaintiffs' position.

(vii) Conclusion on section 45

[172] In light of the foregoing, I conclude that the plaintiffs have not demonstrated the existence of a reasonable cause of action under section 45, as the pleadings are deficient on the main constituent element of the alleged wrongful conduct, namely the possible existence of an agreement between the defendants. In the absence of proper allegations on the alleged conspiracy, the plaintiffs' action is doomed to fail as it contains a radical defect. Put differently, I find it plain and obvious that, as they are developed by the plaintiffs in the Statement of Claim, the pleadings do not adequately expose a conspiracy.

[173] I am mindful of the fact that the test for a reasonable cause of action is low. But it cannot be as low as the plaintiffs would want it to be. Being generous in reading the pleadings does not mean that the Court should be complacent and insert the main constituent element of an alleged wrongful act when it is manifestly not there. The Court cannot connect the dots when there are no dots on the page. Here, it is not an issue of imperfection or lack of clarity in the pleadings, it is a situation where material facts supporting the plaintiffs' allegations of an illegal agreement are absent.

[174] If pleadings such as the Statement of Claim could be sufficient to meet the reasonable cause of action threshold and to certify a competition law class action based on a section 45 conspiracy, it would essentially mean that Canadian plaintiffs could file class actions on the simple observation of parallel pricing or supply decisions by competitors, or of simultaneous price increases of a certain magnitude, coupled with a bald, speculative statement that the competitors in the industry must have conspired to arrive at that, without more. Stated differently, accepting the plaintiffs' allegations as being sufficient to support a cause of action based on a section 45 conspiracy would mean that providing some facts on the appearance of actual or likely anti-competitive effects (such as price increases of a product) and simply uttering the word "conspiracy" in an allegation could be enough to trigger an action in damages based on sections 36 and 45 of the Act, even without any material facts on any meeting of the minds between the alleged conspirators or on the conduct of the conspirators. This, in my view, would turn section 45 on its head, and strip away from this cornerstone provision of the Act what is now its most essential and central element, namely, the conduct of the alleged conspirators.

(b) *Section 46*

[175] Turning to section 46, the plaintiffs' allegations are limited to the following four paragraphs of the Statement of Claim:

- [18] … Samsung Electronics Co., Ltd.'s management expressly directed Samsung Semiconductor, Inc. and Samsung Electronics Canada Inc. to participate in the illegal conspiracy to supress [*sic*] the supply and increase the price of DRAM.…

- [22] … SK Hynix, Inc.'s management expressly directed SK Hynix America, Inc. to participate in the illegal conspiracy to supress [*sic*] the supply and increase the price of DRAM. …

- [26] … Micron Technology, Inc.'s management expressly directed Micron Semiconductor Products, Inc. to participate in the illegal conspiracy to supress [*sic*] the supply and increase the price of DRAM. …

- [136] The defendants implemented a foreign directive, instruction, intimation of policy, or other communication, which communication was for the purpose of giving effect to a conspiracy, combination, agreement, or arrangement entered outside Canada that, if entered in Canada, would have been in contravention of section 45 of the *Competition Act*.

[176] The plaintiffs also argue that, by pleading the global DRAM sales of the defendants, they have properly pleaded that the defendants have sales in Canada.

[177] On any fair reading of the Statement of Claim, these plaintiffs' pleadings in respect of section 46 are brief and conclusory, and essentially amount to a mere recitation of the language contained in the provision. As was the case for their claim under section 45, I find that the plaintiffs have failed to plead any material facts or particulars with respect to any of the elements of a claim under section 46. The paragraphs cited above simply allege that each of the defendants implemented a foreign directive to give effect to a conspiracy that, if entered into in Canada, would have violated section 45 of the Act. Such conclusory pleadings are fatally flawed and are clearly insufficient to support a reasonable cause of action under section 46 as the plaintiffs do not provide any particulars on any of the main constituent elements of the alleged foreign directives. The plaintiffs' limited allegations are nothing more than bald assertions and conclusory legal statements, and do not meet the requirements established by rules 174 and 181 and confirmed by the F.C.A. precedents. Simply parroting the language of the Act and hoping that facts will eventually emerge from it is not a statement of material facts.

[178] As indicated above, the constituent elements of the section 46 offence include the elements of the conspiracy offence under section 45 as well as: (i) a corporation carrying on business in Canada; (ii) which implements a directive, an instruction, an intimation of policy, or other communication; (iii) from a person in Canada who is in a position to direct or influence the policies of the corporation; and (iv) where the directive, instruction, intimation of policy or communication is for the purpose of giving effect to conspiracy entered outside of Canada that would breach section 45. Apart from repeating or paraphrasing the language of section 46, no material facts are provided in the Statement of Claim regarding any foreign directives by any of the defendants or how such foreign directives could have been issued for the purpose of giving effect to an agreement entered outside of Canada.

[179] This is again a situation where the pleadings are not supported by any particularization, amount to bare assertions and conclusory legal statements based on speculation, and amount to a fishing expedition (*Merchant*, at paragraph 34; *Das CA*, at paragraph 74). Such vague, imprecise and general legal statements cannot be assumed to be true as they are not detailed enough and are speculative. The absence of material facts and particulars leaves the Statement of Claim without a sufficient foundation to support the allegations that have been made with respect to a wrongful conduct under section 46. This provides a sufficient basis for concluding that it is plain

and obvious that the Statement of Claim discloses no reasonable cause of action under section 46.

(4) Conclusion

[180] For all the reasons detailed above, I conclude that the plaintiffs do not satisfy the reasonable cause of action requirement for certification. Looking at the pleadings as a whole and at all the circumstances, I find that the plaintiffs' Statement of Claim does not define the issues with sufficient precision to make the proceedings both manageable and fair.

[181] The plaintiffs have argued that, should I conclude that their pleadings are deficient and do not show a reasonable cause of action, they should be granted leave to amend their Statement of Claim. I do not dispute that, when pleadings suffer from drafting deficiencies, do not meet the requirements of a reasonable cause of action and fail to provide the required particulars to support a cause of action, leave to amend is generally granted unless it is plain and obvious that the defect cannot be cured by an amendment (*Enercorp*, at paragraph 27; *Collins v. Canada*, 2011 FCA 140, 418 N.R. 23, at paragraph 26; *Simon v. Canada*, 2011 FCA 6, [2011] 1 F.C.R. D-15, at paragraph 8; *Pelletier v. Canada*, 2020 FC 1019, 328 A.C.W.S. (3d) 45 (*Pelletier 2020*), at paragraph 60; *Pelletier v. Canada*, 2016 FC 1356, 274 A.C.W.S. (3d) 292, at paragraph 28). A claim will only be struck without leave to amend when it is considered "beyond redemption" and where "amendments are simply not possible" (*Baird v. Canada*, 2007 FCA 48, 155 A.C.W.S. (3d) 50, at paragraph 3). However, if a pleading, once amended, would still result in another successful motion to strike for lack of legal foundation, the amendment should be refused (*Pelletier 2020*, at paragraph 62, citing *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 4496 (QL), 41 O.R. (3d) 780 (Ont. Gen. Div.)). A defect may be incurable when there are no facts disclosing a cause of action (*Enercorp*, at paragraph 27).

[182] In *Jost*, the F.C.A. recently reminded that, in light of the generous approach to the application of class action certification laws, "leave to amend a pleading in a proposed class proceeding will only be denied in the clearest cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment" (*Jost*, at paragraph 49). Indeed, some decisions of this Court have recognized that, on certification motions, leave to amend the pleadings should be granted to cure drafting deficiencies (see, e.g., *Poundmaker Cree Nation v. Canada*, 2017 FC 447, [2018] 1 F.C.R. D-4, at paragraph 25; *Sivak v. Canada*, 2012 FC 272, 7 Imm. L.R. (4th) 247, at paragraphs 1 and 94).

[183] In the case at bar, I do not have to decide whether leave to amend should be granted as the plaintiffs' motion fails on more than the first criterion of the certification test on reasonable cause of action. As will be discussed below in the next section of these Reasons, moving from assumed facts to the evidence proffered for this certification motion, the plaintiffs do not satisfy the common issues criterion because, on the some-basis-in-fact standard of proof, they fail to show that the proposed common issues about the alleged wrongful acts under sections 45 and 46 exist in fact. This entails that no purpose would be served by granting the plaintiffs leave to amend their pleadings to reapply for certification.

B. *Paragraph 334.16(1)(c) [of the Rules]: Common questions of law or fact*

[184] I now turn to the requirement that the plaintiffs demonstrate some basis in fact that the claims of the Class members raise common questions of law or fact, regardless of whether those common questions predominate over questions affecting only individual members.

[185] The plaintiffs are asking the Court to certify this class proceeding on the basis of six common questions. The first and second common issues relate to the existence and scope of the alleged conspiracy and the defendants' liability under sections 45 and 46 of the Act. The third and fourth common issues deal with allegations of loss and harm flowing from the alleged wrongful acts. The last two common issues concern additional issues of follow-on interest and investigation costs. The plaintiffs argue that conspiracy common issues, including whether the defendants breached section 45 or 46 of the Act, "depend solely on the conduct of the defendants" and "can be determined without reference to the individual circumstances of class members" (*Crosslink 2*, at paragraph 51). They claim that the allegations regarding the defendants' conduct are a significant component of each Class members' claim and will advance each claim, and thus meet the common issues requirement. The plaintiffs submit that the courts have consistently certified class actions with similar issues relating to the existence and scope of a conspiracy (*Shah*, at paragraphs 260–267; *Airia*, at paragraph 130; *Crosslink 2*, at paragraph 51; *Fanshawe*, at paragraphs 24 and 43; *Irving Paper*, at paragraph 114). They rely on the following evidence as demonstrating some basis in fact for their common issues: (i) an alleged regulatory investigation by the Chinese government (i.e. the China Investigation); (ii) alleged coordinated supply restrictions and price increases in the Class Period; (iii) alleged private communications and public statements by the defendants; and (iv) the defendants' admissions of involvement in a prior conspiracy concerning DRAM. They also referred to the Amended U.S. Complaint and to the Singer Reports.

[186] I am not persuaded by the plaintiffs' arguments and instead find that the plaintiffs have failed to provide any evidentiary basis to support the existence of an alleged conspiracy, and that there is therefore no basis in fact to support the common issues requirement. I agree with the defendants that the evidence tendered does not establish some basis in fact for the alleged conspiracy to suppress the supply of DRAM. Furthermore, the plaintiffs have also not provided any evidentiary basis to support their claim under section 46 of the Act that the defendants implemented a foreign directive, or indeed of the companies that either were or could have been the recipient of such alleged directives. I therefore conclude that the proposed common questions on conduct and liability are not certifiable. As of consequence, none of the other proposed common issues on loss, harm or payments flowing from the alleged wrongful acts can be certified.

(1) The common issues requirement

[187] The presence of common issues to be resolved is a central element to the class action process.

(a) *General principles*

[188] For an issue to be common, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim (*Hollick*, at paragraph 18). The task of the Court at this stage is not to precisely determine the common issues, but rather to "assess whether the resolution of the issue is necessary to the resolution of each class member's claim" (*Wenham*, at paragraph 72). In assessing the commonality of issues, the emphasis is not on the differences between the class members but on the identical, similar or related issues of law or fact (*Wenham*, at paragraph 72). The certification judge must therefore determine whether there are indeed common questions stemming from facts that are relevant to all the class members (*Airbnb*, at paragraph 116). If the fact is significant enough to advance the resolution of every class member's claim, the condition is met.

[189] In *Pro-Sys*, Justice Rothstein summarized the S.C.C.'s instructions for ascertaining the commonality requirement previously stated in *Dutton*. Underpinning the commonality question, as well as the overarching class action framework, is an inquiry into "whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (*Pro-Sys*, at paragraph 108, citing *Dutton*, at paragraph 39; *Airbnb*, at paragraph 117). In other words, the plaintiffs must properly demonstrate the presence of a rational connection between the class and the proposed common issues, and that the determination of each of these common issues can contribute to the advancement of the claim, regardless of it being for or against the class (*Airbnb*, at paragraph 120). Issues shall fail to be considered common where their resolution will rely upon individual findings of fact, which would be required for each class member (*Airbnb*, at paragraph 120).

[190] While ascertaining the commonality requirements, the courts must keep in mind the following principles: (i) commonality questions should be approached purposively; (ii) an issue will be common only where its resolution is necessary to the resolution of each class member's claim; (iii) it is not essential that class members be identically situated vis-à-vis the opposing party; (iv) it is not necessary that common questions predominate over non-common issues, though the class members' claims must share a substantial common ingredient to justify a class action, as the courts will examine the significance of the common issues in relation to individual issues; and (v) success for one class member must mean success for all, since all class members must benefit from the successful prosecution of the action, albeit not necessarily to the same extent (*Pro-Sys*, at paragraph 108; *Airbnb*, at paragraph 117).

[191] In *Vivendi*, the S.C.C. further underlined that the common success requirement should not be applied "inflexibly" (*Vivendi*, at paragraph 45). Thus, a common question can exist even if the answer may vary from one class member to another; success for one member does not necessarily entail success for all members, though success for one must not mean failure for another (*Vivendi*, at paragraph 45). In interpreting the principles laid down in *Dutton* and *Rumley*, the S.C.C. reiterated that a question will be considered common if it can serve to advance the resolution of every class member's claim, which may require nuanced and varied answers based on the situation of individual members (*Vivendi*, at paragraph 46; *Airbnb*, at paragraph 118). In other words, the commonality requirement does not call for identical answers for all class members or even that each member must benefit to the same extent. Rather, it is "enough that the answer to the question does not give rise to conflicting interests among the members" (*Vivendi*, at paragraph 46).

[192] Common issues are at the heart of the class action process because resolving common issues is what allows a class action to efficiently provide access to justice, resulting in economic use of judicial resources and behaviour modification (*Airbnb*, at paragraph 120). In *Pro-Sys*, the S.C.C. described the commonality requirement as the central notion of class proceedings, whose purpose is to allow individuals who have litigation concerns in common to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings (*Pro-Sys*, at paragraph 106; *Mancinelli*, at paragraph 212).

(b) *One-step vs two-step tests*

[193] In their written and oral submissions on the common issues requirement, the plaintiffs emphasized that certification of a common issue simply requires a plaintiff to show some evidence that the proposed issue is common, and not some evidence for the existence of the common issue itself. In essence, they submit that the some-basis-in-fact standard requires a so-called "one-step approach" which focuses solely on commonality, and that applying a "two-step approach" would infuse a merits analysis in the certification test. The one-step approach amounts to solely assessing whether there is some basis in fact for the commonality of the proposed common issues, whereas the two-step approach requires a certification judge to determine whether there is "some basis in fact" in the evidence that the proposed common issues (1) actually exist in fact and (2) can be answered in common across the entire class.

[194] In support for the one-step approach, the plaintiffs rely on the often-quoted passage from *Pro-Sys*, at paragraph 110, where Justice Rothstein stated the following:

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

[195] According to the plaintiffs, by observing that, in order to establish commonality, "evidence that the acts alleged actually occurred is not required" and that the only factual evidence required is evidence "establishing whether these questions are common to all the class members", the S.C.C. eliminated the need for a plaintiff to lead any evidence establishing some factual basis for the common issues themselves (*Pro-Sys*, at paragraph 110). In addition, they point to another passage in *Pro-Sys* where Justice Rothstein stated that the some-basis-in fact standard articulated in *Hollick* requires some basis in fact establishing "each of the individual certification requirements" and not some basis in fact "for the claim itself" (*Pro-Sys*, at paragraph 100).

[196] The plaintiffs also rely on some decisions where, on the basis of the words used by Justice Rothstein in *Pro-Sys*, Ontario courts have adopted the one-step approach and considered that plaintiffs must only show some evidentiary basis for the class-wide commonality of the proposed common issues (see, e.g., *Hodge v. Neinstein*, 2017 ONCA 494 (CanLII), 414 D.L.R. (4th) 303, at paragraph 113; *Grossman v. Nissan Canada*, 2019 ONSC 6180 (CanLII), 311 A.C.W.S. (3d) 469, at paragraph 39; *Cirillo v. Ontario*, 2019 ONSC 3066 (CanLII), 306 A.C.W.S. (3d) 296, at paragraphs 67–69; *Kalra*

v. Mercedes Benz, 2017 ONSC 3795 (CanLII), 281 A.C.W.S. (3d) 701, at paragraphs 45–46).

[197] With respect, I disagree with the plaintiffs and I am instead of the view that the some-basis-in-fact standard requires a two-step approach to the common issues requirement.

[198] Despite recent uncertainty in the jurisprudence, it is clear that the two-step test still governs in certification decisions across Canada. The vast majority of the courts, prior to and following *Pro-Sys*, have continued to apply the two-step approach and to require a plaintiff to adduce some evidence (i.e. some basis in fact) for both the existence of the proposed common issues and for the commonality of each of the proposed common issues (see, e.g., *Greenwood v. Canada*, 2020 FC 119, 314 A.C.W.S. (3d) 866 (*Greenwood FC*), at paragraph 60; *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718 (CanLII), 300 A.C.W.S. (3d) 29 (*Fehr*), at paragraph 85; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (CanLII), 352 D.L.R. (4th) 1 (*Fulawka*), at paragraph 79; *Simpson*, at paragraph 43; *Mancinelli*, at paragraph 220; *Stenzler v. TD Asset Management Inc.*, 2020 ONSC 111 (CanLII), 316 A.C.W.S. (3d) 19, at paragraph 41; *Kuiper v. Cook (Canada) Inc.*, 2018 ONSC 6487 (CanLII), 301 A.C.W.S. (3d) 248, affd 2020 ONSC 128 (CanLII), 149 O.R. (3d) 521 (*Kuiper*), at paragraphs 26–36; *Kaplan v. Casino Rama*, 2019 ONSC 2025 (CanLII), 145 O.R. (3d) 736 (*Kaplan*), at paragraph 54; *Das*, at paragraph 623; *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 6098 (CanLII), 285 A.C.W.S. (3d) 250, at paragraphs 14–15; *Dine v. Biomet*, 2015 ONSC 7050 (CanLII), 262 A.C.W.S. (3d) 300 (*Dine*), at paragraphs 15–19; *Crosslink 2*, at paragraphs 34–35).

[199] The some-basis-in-fact standard was established by the S.C.C. in *Hollick*. In that case, the S.C.C. recognized that class representatives must “establish an evidentiary basis for certification” and “show some basis in fact for each of the certification requirements” other than the first criterion on a reasonable cause of action (*Hollick*, at paragraph 25). At the time, the S.C.C. did not express the test in terms of one or two steps. However, *Hollick* dealt with a proposed environmental class action brought forward by individuals living in proximity of a landfill and complaining about the noise and physical pollution emanating from it. When read with scrutiny and in context, it is clear that, in *Hollick*, the S.C.C. effectively applied a two-step approach to the common issues criterion, requiring the presence of a “colourable claim” (*Hollick*, at paragraph 19). Indeed, the S.C.C. concluded that the “appellant ha[d] shown a sufficient basis in fact to satisfy the commonality requirement” in that the complaint records they had submitted went on to show “that many individuals besides the appellant were concerned about noise and physical emissions from the landfill” (*Hollick*, at paragraph 26). The complaint records in *Hollick* did more than just demonstrate that there was more than one person who shared an interest in the alleged common issues raised in the case. The records also provided an evidentiary basis for the plaintiff’s assertion that there was, in fact, an “issue” with noise and physical pollution emanating from the landfill. In other words, there was no doubt that there was some basis in the evidence that the asserted common issue existed in fact, in addition to a basis for determining that the issue could be answered in common across the proposed class.

[200] In *Hollick*, the S.C.C. clearly established that more than bare pleaded allegations are required to establish some basis in fact for the common issues in a proposed class

action (*Hollick*, at paragraph 25), a principle that the S.C.C. recently reaffirmed in *Atlantic Lottery* at paragraph 160. This Court has also confirmed that, to grant certification, there has to be some basis in fact demonstrating that common issues exist beyond a bare assertion in the pleadings (*Greenwood FC*, at paragraph 60). In sum, a plaintiff is required "to adduce some evidence demonstrating that there is a 'colourable claim', or a rational connection between the class members as defined, and the proposed common issues" (*Kuiper*, at paragraph 27). It is therefore not sufficient for a plaintiff to merely rely on bare assertions in the pleadings in proving the commonality of the issues; rather, there must be a sufficient evidentiary basis demonstrating the existence of these common issues, "a factual underpinning to support the existence of claims on behalf of class members" (*Greenwood,* at paragraph 169).

[201] I see no conflict between *Pro-Sys*, *Hollick* and the long line of cases having established that there must be some evidentiary basis to show that a common issue exists beyond a bare assertion in the pleadings. When the *Pro-Sys* decision is read as a whole and properly considered in context, as it should, I have no hesitation to conclude that it does support the two-step approach to the common issues requirement.

[202] In *Pro-Sys*, the S.C.C. reaffirmed the some-basis-in-fact standard established in *Hollick*. It did so in the face of a submission by the defendant Microsoft that the some-basis-in-fact standard was synonymous with proof on a balance of probabilities. Writing for the court, Justice Rothstein rejected this submission and declined to elevate the test to a balance of probability standard. The rejection came with some helpful comments relating to the application of the some-basis-in-fact standard. Specifically, Justice Rothstein said the following at paragraphs 102–104, referring to *Hollick*:

> … Had McLachlin C.J. intended that the standard of proof to meet the certification requirements was a "balance of probabilities", that is what she would have stated. There is nothing obscure here. The *Hollick* standard has never been judicially interpreted to require evidence on a balance of probabilities. Further, Microsoft's reliance on U.S. law is novel and departs from the *Hollick* standard. The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud*, at paragraph 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (S.C.J.) [cited above], at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon*, at para. 65).
>
> Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There 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.

[203] In *Pro-Sys*, Justice Rothstein never questioned the some-basis-in-fact standard, did not intend to change the standard set out in *Hollick* and certainly did not directly address the one-step versus two-step approach. He rather emphasized that each class action depends on its facts and must be individually assessed, and declined to offer an abstract definition of the some-basis-in-fact standard because such a definition would be of limited utility. In some cases, it will be obvious that there is some basis in fact for the class action. In others, it will not. In doing so, Justice Rothstein noted that the some-basis-in-fact standard does not require the courts to weigh and resolve conflicting facts and evidence. That is a task for which the courts are ill-equipped at the certification stage.

[204] I pause to observe that the main issue in *Pro-Sys* focused on the standard upon which the expert's evidence used to establish commonality of harm should be assessed, given that the defendant Microsoft had taken the position that the some-basis-in-fact standard required the plaintiff to prove that it had met the elements of the test on a balance of probabilities. The S.C.C. rejected this, and Justice Rothstein's reference to the fact that "evidence that the acts alleged actually occurred is not required" [emphasis added] must be understood in that context (*Pro-Sys*, at paragraph 110). This reference is in relation to the balance of probabilities test advocated by Microsoft. By stating that it was not necessary to demonstrate that the alleged acts "actually occurred," Justice Rothstein in fact reaffirmed that the identification of the common issues was not a merits test, and that the evidentiary basis for establishing the existence of a common issue was not as high as proof on a balance of probabilities. The comment was not made in relation to the existence of the common issue, but in the context of the test to be applied to the assessment of the evidence and the rejection, by Justice Rothstein, of the balance of probability test suggested by Microsoft. At no point did the S.C.C. say or suggest that the minimal evidentiary requirement of some basis in fact established by *Hollick* could be thrown out and was no longer needed.

[205] As the Ontario Court of Appeal reminded in *Fehr*, requiring that a wrongful act "actually occurred" would extend the application of the some-basis-in-fact standard beyond the minimal evidentiary threshold set out in *Hollick* and transform it into a merits-based inquiry (*Fehr*, at paragraph 86; *Kuiper*, at paragraph 34). While it is entirely reasonable for a certification judge to expect the parties to produce some evidence relevant to whether there is some basis in fact that an issue exists and is common across the class, requiring evidence to show that it is actually the case would morph the test into a balance of probabilities and merits test.

[206] In other words, the *Pro-Sys* decision confirmed that the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities and that there is no need to demonstrate that the alleged acts "actually occurred" (see also *Greenwood*, at paragraph 169; *Fulawka*, at paragraph 78; *Crosslink 1*, at paragraph 66). But it did not negate that there nonetheless needs to be a sufficient evidentiary basis (i.e. some basis in fact) indicating that a common issue exists in fact, beyond a bare assertion in the pleadings (*Fulawka*, at paragraph 79; *Simpson*, at paragraph 43). Moreover, *Pro-Sys* certainly does not stand for the proposition that a plaintiff is under no obligation to establish that the alleged grounds of a cause of action need to be anchored in reality. Mere assertions are insufficient without some form of factual underpinning (*Infineon*, at paragraph 134).

[207] For all these reasons, I do not agree with the plaintiffs that *Pro-Sys* can be read or interpreted as an attempt to depart from *Hollick* as the governing authority on the some-basis-in-fact standard. In fact, Justice Rothstein did not revisit the standard and said that there was limited utility in attempting to define the some-basis-in-fact standard in the abstract. I further point out that, in the *Fischer* decision issued just two months after *Pro-Sys*, the S.C.C. did not reference *Pro-Sys* as departing from *Hollick*. In *Fischer*, Justice Cromwell referred to cases confirming that there must be some evidentiary basis that a common issue exists beyond a bare assertion in the pleadings, echoing the need to demonstrate the existence of the common issue as well as its commonality (*Fischer*, at paragraphs 39–43).

[208] In sum, in the context of the common issues criterion, I am satisfied that the some-basis-in-fact standard involves a two-step requirement that: (1) the proposed common issue exists in fact; and (2) the proposed issue can be answered in common across the entire class. True, the some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage, opine on the strengths of the plaintiff's case, or look for evidence that an alleged misconduct actually occurred. But the court has to establish whether the common issues exist in the sense that there is some minimal factual basis for the claims made and to which the common issues relate, and whether the questions are common to all the class members. This means that a plaintiff will not satisfy the some-basis-in-fact standard and that certification will be denied if the claims of the class members are not at least plausible, if there are significant gaps in the evidentiary basis for the facts on which the proposed common issues depend, or if there is no admissible evidence whatsoever for a basis in fact.

[209] I make two additional remarks.

[210] First, the plaintiffs mischaracterize and misunderstand the two-step approach when they present it as being a merits-based test. The two-step approach is not merits-based, and the courts do not venture into the merits of the case by determining whether there is some evidentiary basis (i.e. some basis in fact) for the proposed common issues.

[211] I do not dispute that, at the certification stage, the evidence presented to support certification of a common issue must not be assessed in regard to the action's merits. The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. Nor should the certification judge enter into a weighing of conflicting evidence with respect to the merits of the claim. However, applying the two-step approach does not mean that the courts engage in the weighing of evidence and enter into a consideration of the merits when dealing with the common issues criterion. It is still the some-basis-in-fact standard that applies, not the balance of probabilities standard. And it is not disputed that some basis in fact is a "relatively low evidentiary standard" (*Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545 (*Sun-Rype*), at paragraphs 57 and 61). The low evidentiary standard, however, needs some factual underpinning, and an absence of evidence or mere speculation will not be enough (*Sun-Rype*, at paragraph 70).

[212] There is a fundamental difference between weighing the merits of the claim (which the courts cannot do at certification) and determining whether some minimal evidence exists to support the existence of the claim (i.e. the two-step test). Under the

two-step approach, some evidentiary foundation is needed, but not an exhaustive record upon which the merits of the case will be argued. The standard requires some basis in fact, but not the proof of fact, or proof that the facts actually occurred. It is in that sense that the some-basis-in-fact threshold falls comfortably below the civil standard of proof on a balance of probabilities, and cannot be equated with a merits-based test.

[213] Second, the two-step approach to the common issues criterion is the only approach consistent with the underlying objectives of certification, which aims "to filter out manifestly unfounded and frivolous claims" (*Airbnb*, at paragraph 25) and to ensure that the certification process amounts to more than a mere symbolic scrutiny (*Pro-Sys,* at paragraph 103; *Airbnb*, at paragraph 31). The certification criteria add various requirements for class action proceedings, over and above what is required for individual actions. One of them is the "some basis in fact" requirement for proposed common issues, and the some-basis-in-fact standard is a key element in ensuring that certification motions act as a "meaningful screening device" (*Pro-Sys*, at paragraph 103). As Justice Belobaba said in *Dine*, "[i]f all that is needed is some evidence of class-wide commonality and no evidence that the proposed common [issue] has even a minimal basis in fact, then almost any proposed class action would have to be certified and the certification motion's role as 'a meaningful screening device' would be eviscerated" (*Dine*, at paragraph 15, fn 9).

[214] In my view, a proposed common issue that is not underpinned by some evidentiary foundation supporting a conclusion that two or more class members share an issue that exists in fact is not an issue worthy of certification. If a plaintiff is unable to marshall some evidentiary basis that a proposed common issue exists in fact, such plaintiff should not be permitted to argue a common issue relying on this question. The certification requirements, however low they may be, were not meant to authorize class actions to proceed on the basis of the commonality of a non-existent proposed common issue. A non-existent or fictitious issue has no more basis or justification because it happens to be common to a group of plaintiffs. A cause of action with no factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or millions. It would be ironic that a plaintiff's action could be certified as a class proceeding simply because there is some basis in fact on the commonality of an issue for the class members, without any basis in fact for the issue claimed to be common.

[215] More specifically, a proposed common issue alleging a wrongful act, a misconduct, a contract or a defect requires some evidentiary basis that the claimed wrongdoing, misconduct, contract or defect exists with the class members. There would certainly be no judicial economy or enhancement of access to justice in promoting the advancement of an unfounded or baseless issue, and there would be no need to encourage behaviour modification if there are no wrongdoers.

[216] In brief, the two-step approach is the only approach able to prevent the certification of claims that would be entirely artificial, detached from reality and devoid of some minimal evidence pertaining to the alleged wrongful acts or cause of action. This two-part evidentiary test is the only way that the courts can assess whether the resolution of a proposed common issue will advance the litigation as a class action.

While the some-basis-in-fact standard for demonstrating the commonality of proposed common issues is low, it must not, however, be considered as "subterranean" (*Kuiper*, at paragraph 27). Having a one-step approach would precisely bring the some-basis-in-fact standard into this subterranean territory where it is not and was never meant to be, and would reduce the common issues requirement to a meaningless exercise. Especially for proposed common issues relating to the alleged wrongful acts, misconduct or legal basis underpinning a plaintiff's claim in damages, as is the case here.

[217] Neither *Pro-Sys* nor any other class action precedent of the S.C.C. intended to lower the already low bar to certification to the point where plaintiffs would be absolved of the obligation to lead any minimal level of evidence that the wrong they allege exist in fact. This cannot be what the certification requirements were designed to address and, in my view, embracing a one-step approach to the common issues requirement would put the threshold for certification far below the mere formality and the symbolic scrutiny that the S.C.C. has repeatedly warned against.

(2) Analysis

[218] Applying the two-step approach, I find that the plaintiffs have failed to show "some basis in fact" to support their core allegations of conspiracy and implementation of a foreign directive underlying their first two proposed common issues on liability. The various categories of "evidence" that they offered fall well short of the mark and do not meet the low threshold of some basis in fact. More specifically, the plaintiffs did not provide any basis in fact to support that the defendants were parties to a coordinated restriction of DRAM supply and made an agreement in breach of section 45 of the Act. As will be detailed below, the required evidence relied on by the plaintiffs is not only deficient in certain of the "indicia" they have identified but wholly lacking in all of them.

(a) *Breach of Section 45*

(i) Plaintiffs' arguments

[219] The plaintiffs rely on the following main indicia of breaches of section 45 as evidence to support the existence of the alleged conspiracy: (i) the China Investigation; (ii) alleged coordinated supply restrictions and price increases in the Class Period, as well as the industry structure; (iii) alleged private communications and public statements made by the defendants about restrictions of DRAM supply; (iv) the defendants' admissions of involvement in a prior conspiracy concerning DRAM; (v) the Amended U.S. Complaint filed in the U.S. parallel class action; and (vi) the Singer Reports.

[220] In their Reply Memorandum, the plaintiffs further submitted that they have met their evidentiary burden to support the existence of an agreement between the defendants by referring to the following elements, which echo the various indicia of evidence they have singled out:

- The DRAM industry is conducive to collusion (Statement of Claim, at paragraphs 45–52).

- DRAM prices steadily declined before the Class Period as the defendants increased supply and competed for market share (Statement of Claim, at paragraphs 53–59). The defendants changed course at the onset of the Class Period and expressed their unlawful agreement to suppress supply and increase prices (Statement of Claim, at paragraphs 64–75).

- In a series of public statements, identified by date, person and statement, the defendants signalled their adherence to and maintained the conspiracy (Statement of Claim, at paragraphs 64–101).

- The defendants met and conspired in person, including, *inter alia*, in Singapore and Munich in 2016 (Statement of Claim, at paragraph 103).

- DRAM prices and revenues reached record levels during the Class Period, with the price of one mainstream type of DRAM increasing 130 percent, and DRAM spot prices increasing 350 percent (Statement of Claim, at paragraphs 104–110).

- China's economic regulator has investigated "possible coordinated action taken by a number of firms to gain maximum profits by pushing the price of the product as high as possible" (Statement of Claim, at paragraphs 111–114).

- The Chinese regulatory investigation led at least one defendant, Samsung, to enter a memorandum of understanding with the regulator to increase capacity, which resulted in a decrease in prices after the Class Period (Statement of Claim, at paragraphs 115–117).

- The current allegations of conspiracy are consistent with a pattern of conspiratorial conduct brought to light when the same defendants previously pled guilty to criminal anti-competitive conduct in the DRAM industry (Statement of Claim, at paragraphs 118–122).

- Economic analysis has begun to demonstrate the conspiracy, including that input costs and the technology lifecycle could not explain the rise in DRAM prices (Statement of Claim, at paragraphs 123–127).

[221] The plaintiffs contend that the fifty or so transcripts, reports and articles attached to the Tayyab Affidavit have probative value and provide ample basis in fact for the conspiracy claims. The plaintiffs submit that these documents are not relied upon for the truth of their contents, and that they are rather before the Court to determine a procedural issue (i.e. certification) and to establish some basis in fact for the commonality of the proposed common issues. They argue that the overarching rule is that all relevant evidence should be admitted (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paragraph 34). For evidence to be relevant at the certification stage, it must increase or decrease the probability of the commonality of the claims, and it does not need to establish, on any standard, the truth or falsity of a fact (*R. v. Arp*, [1998] 3 S.C.R. 339, 166 D.L.R. (4th) 296, at paragraph 38). Here, the plaintiffs argue, the documents reporting the Public Statements of the defendants and the articles on the China Investigation demonstrate their probative value by establishing the commonality of the claims raised.

(ii) China Investigation

[222] The first category of evidence relied on by the plaintiffs on the breach of section 45 is the series of articles about the China Investigation. For the following reasons, I agree with the defendants that these articles do not provide a basis in fact for the plaintiffs' claim of an alleged section 45 conspiracy. They only offer evidence about an investigation by the Chinese antitrust authorities about some type of anti-competitive behaviour in the DRAM industry in China, under Chinese law. Nothing in the evidence provided indicates that the Chinese antitrust authorities concluded that there was any anti-competitive activity, and I am not convinced that the articles provide some basis in fact allowing to infer the existence of conduct that would be in violation of Canadian law.

[223] As a preliminary issue, the plaintiffs claim that the evidence on the China Investigation can be accepted at this stage of the proceedings as it is not tendered for the truth of its contents. They say that it is provided for the limited purpose of demonstrating the existence of the China Investigation. The plaintiffs claim that this evidence is solely submitted to satisfy the requirements for certification and to establish some basis in fact for the commonality of the proposed common issues on liability, namely that the defendants engaged in the alleged anti-competitive conduct. The plaintiffs further maintain that the news articles on the China Investigation are corroborative of other evidence provided by the plaintiffs, where the defendants arguably acknowledge the existence of the investigation.

[224] The parties do not dispute that hearsay evidence can be admitted on certification motions (see, e.g., *John Doe v. R*, 2015 FC 236, 256 A.C.W.S. (3d) 782, at paragraphs 7–12; *Harrison v. XL Foods Inc.*, 2014 ABQB 720 (CanLII), 247 A.C.W.S. (3d) 511, at paragraphs 24–25). Moreover, evidence that is not tendered for the truth of its contents is not, at this stage of the proceedings, hearsay. That said, I do not need to discuss this preliminary issue any further. Even if I assume that the plaintiffs' evidence on the China Investigation can be admitted and considered at this stage, I find that it has limited probative value and does not allow me to conclude that it offers some basis in fact for the existence (or commonality) of the alleged conspiracy.

[225] In relation to the China Investigation, the plaintiffs have provided nine news articles attached as Exhibits 1 to 9 to the Tayyab Affidavit. They can be summarized as follows:

- Exhibits 1 to 3 are articles dated December 26 or 27, 2017, reporting a Chinese government official as saying that the Chinese government was "paying close attention" to a rise in the price of mobile phone storage chips and "could look into possible price fixing" and "possible coordinated action" by the firms that make them. One article reported that the Chinese government had not yet launched an official antitrust review.

- Exhibits 4 to 6 are articles dated February 2 and 5, 2018, reporting that Samsung signed a Memorandum of Understanding (MOU) with the Chinese government that "is believed to include details of further cooperation in the semiconductor industry, such as expanding investment into China and technical collaboration". The articles discuss the potential impacts of the MOU and indicate that the MOU is expected to "impact the global memory market in two ways – price moderation and production capacity expansion" and "to influence

the expansion of production capacity among the DRAM leaders". One of the articles expressly states that the MOU had "nothing to do" with the price increases "in storage chips".

- Exhibit 7 is an article from March 2018 that makes no mention of any Chinese government investigation.

- Exhibit 8 is an article dated June 4, 2018, reporting that the Chinese government had opened an investigation into alleged price-fixing in the DRAM industry.

- Exhibit 9 is an article dated November 19, 2018, reporting that Chinese regulators said they "found 'massive evidence' of anti-competitive behaviour" by the defendants, with no details on the alleged anti-competitive behaviour or the scope of the investigation. It refers to officials in Beijing saying that "a price-fixing investigation […] has made 'important progress', without offering any specific examples of wrongdoing". The article further mentions that "[t]he anti-monopoly investigation" yielded massive evidence and says that the Chinese investigation "follows a class-action lawsuit in the US, lodged in April, which alleges that the three companies conspired to inflate DRAM prices".

[226] Further to my review of the evidence, I first find that the plaintiffs' allegations and submissions once again incorrectly depict what the evidence says about the China Investigation.

[227] At paragraphs 8 and 111 to 116 of their Statement of Claim, the plaintiffs allege that the Chinese economic regulator, the National Development and Reform Commission (NDRC), launched an investigation into price-fixing by the defendants in 2017. They further argue, in their submissions, that the investigation uncovered "massive evidence of a conspiracy" and that, as a result of such investigation, Samsung (the DRAM market leader) entered into a MOU with the NDRC, whereby it agreed to increase its DRAM production capacity and supply. The nine exhibits filed by the plaintiffs in support of their allegations regarding the China Investigation do not lend credence to these general comments made by the plaintiffs. In other words, similarly to what I discussed above in section IV.A with respect to the Public Statements, the affirmations made by the plaintiffs regarding the China Investigation are not always consistent with what the underlying documents filed by the plaintiffs actually say.

[228] The first news article on the launching of an "antitrust investigation" in China is Exhibit 8 to the Tayyab Affidavit and is dated June 4, 2018. It mentions that "Beijing is investigating price-fixing allegations as DRAM prices have risen sharply", and refers to the April 2018 class action lawsuit filed in the U.S. In other words, the China Investigation followed the U.S. class action, and did not precede it. The Statement of Claim thus erroneously affirms that, at the end of 2017, the NDRC "had begun an investigation into price fixing by the defendants in DRAM …" (Statement of Claim, at paragraphs 8 and 111). There is no evidence that there was an investigation by the Chinese antitrust authorities at that time, and the Chinese economic regulator was only reported to be paying more attention to future problems that may be caused in the DRAM industry. None of the December 2017 articles (i.e. Exhibits 1 to 3 to the Tayyab

Affidavit) makes reference to any antitrust investigation having been launched in China at that point in time.

[229] The Statement of Claim also incorrectly states (at paragraphs 8 and 115) that Samsung had entered the MOU with the NDRC "to increase manufacturing capacity", thus suggesting that the MOU might be somehow related to the plaintiffs' allegation of a coordinated suppression of DRAM supply. This is not what the articles attached as Exhibits 4 to 6 to the Tayyab Affidavit actually say. The MOU was an agreement for "further cooperation in the semiconductor industry" such as expanding investments in China and further technical collaboration; it was not an agreement to increase DRAM production capacity. The articles only refer to the fact that the MOU was expected to result in possible actions by Samsung on the price growth of its DRAM products and its production capacity expansion, and that the MOU was expected to influence the expansion of production capacity among the DRAM manufacturers. But nothing in the articles indicates that the purpose of the MOU was to increase capacity. It is also clear from the news articles that the MOU had nothing to do with the observed price increases in storage chips.

[230] Furthermore, no article says that the China Investigation uncovered "massive evidence of a conspiracy" or of price-fixing behaviour. The article attached as Exhibit 9 to the Tayyab Affidavit instead mentions that the economic regulator referred to massive evidence of "anti-competitive behaviour", with no examples of wrongdoing given, and to an "anti-monopoly investigation" having yielded massive evidence. There is no statement about "massive evidence <u>of a conspiracy</u>" [emphasis added] or of price-fixing. Anti-competitive or anti-monopoly behaviour, on the one hand, and price-fixing or conspiracy, on the other hand, are two significantly different matters under Canadian competition law, and one cannot be presumed to be a synonym for the other. To conflate the two reflects a misunderstanding of Canadian competition law. Under the Act, all anti-competitive conduct are not on the same footing. Some conduct are criminal, some are not. Some open the door to a recourse under section 36, some do not. Evidence of engaging in "anti-competitive" or "anti-monopoly" behaviour in a foreign country cannot serve to establish some basis in fact for the commonality of a proposed common issue relating to a breach of a specific criminal provision like section 45, when the evidence does not allow to determine which specific anti-competitive behaviour is at stake. I would add that the conspiracy alleged by the plaintiffs in this case is an agreement to suppress DRAM supply, the alleged consequence of which was an increase in DRAM prices. It is not a price-fixing conspiracy.

[231] Finally, contrary to what the plaintiffs allege in the Statement of Claim and argue in their submissions, the investigation launched by the Chinese economic regulator in 2018 did not cause Samsung "to agree with the Chinese government that it would increase its supply of DRAM". The antitrust investigation reported in Exhibits 8 and 9 to the Tayyab Affidavit (respectively dated June 4 and November 19, 2018) did not cause the MOU. The news articles on the China Investigation instead expressly show that the MOU (reported to have been signed earlier in 2018) <u>preceded</u> the investigation undertaken by the Chinese antitrust authorities.

[232] Again, as was the case for the Public Statements discussed above in section IV.A, the plaintiffs are romancing certain facts in an attempt to draw a link between the China Investigation and their allegations of an agreement between the defendants to

suppress DRAM supply and increase DRAM prices. However, the evidence they have proffered does not support some of their allegations and submissions. To the extent that the documents on the China Investigation demonstrate that the allegations drawn from these documents are incorrect and inaccurate, they of course cannot be accepted as some evidentiary basis for the existence or commonality of the proposed common issue on a breach of section 45.

[233] At the hearing before this Court, the plaintiffs claimed that, in any event, the proof of the China Investigation on the defendants' collusive behaviour in Canada is contained in some of the 2018 financial reports issued by the defendants themselves. Further to my review of the evidence relied on by the plaintiffs on this point, I am not persuaded by the plaintiffs' submissions and I do not find that the defendants made, in their financial statements, some admissions of fact on the existence of the China Investigation which could constitute some basis in fact for the existence of an alleged breach of section 45.

[234] Exhibit 10 to the Tayyab Affidavit is a report from Samsung referring generally to "claims, disputes, and investigation conducted by regulatory bodies", including civil claims for "price-fixing related to the sale of TFT-LCD [a different product]" (at page 225). However, it does not include a reference to investigations about DRAM prices. Exhibit 13 to the Tayyab Affidavit is a report from SK Hynix referring to price-fixing class-action lawsuits filed in North America (U.S. and Canada), and to an antitrust investigation in China "initiated to investigate the violation of the antitrust law regarding on [sic] primary DRAM businesses' sales in China" (at page 359). I note that SK Hynix's financial statements contain no reference to a "price-fixing" or "supply suppression" investigation or to any investigation relating to behaviour or activities outside China. Exhibit 15 to the Tayyab Affidavit is a report from Micron referring to a "purported class-action filed" (at page 433) against DRAM suppliers in the U.S. and in Canada for alleged price-fixing of DRAM products during the period from June 1, 2016, to February 1, 2018. And it mentions that Micron has been notified in May 2018 by the Chinese antitrust authorities that they were "investigating potential collusion among DRAM suppliers in China". Again, the report contains a reference restricted to an investigation regarding China and does not mention or allude to a global investigation on DRAM supply or prices, or to Canada.

[235] That said, I have nonetheless reviewed the plaintiffs' evidence on the China Investigation in detail, and I find that the documents provided do not offer the minimal evidentiary basis required to support the existence of an alleged agreement in breach of section 45. In other words, the news articles on the China Investigation do not amount to some basis in fact that the plaintiffs' first proposed common issue on liability exists in fact as they do not provide the required minimal evidentiary basis for the existence of an unlawful conspiracy to restrict DRAM supply or to indirectly increase DRAM prices in Canada, under Canadian law.

[236] First, I observe that there are no documents coming from the Chinese antitrust agency itself. The entirety of the evidence provided on the China Investigation consists of media articles reporting the alleged work of the Chinese antitrust authorities.

[237] Second, the news articles are unclear as to the anti-competitive behaviour or conduct being investigated by the Chinese antitrust authorities, and indicate that the China Investigation has a limited territorial scope. In fact, the documents refer to an

investigation on the DRAM business in China and to the prices in China, not to a global conspiracy affecting DRAM supply or prices in other countries, including Canada. Nothing in the evidence on the China Investigation suggests or allows to infer that the anti-competitive behaviour under review in China extends beyond China.

[238] Third, there is no mention of an investigation into the suppression, restriction or limitation of DRAM supply, or on increases in DRAM prices resulting from such supply suppression, which is the alleged conspiracy advanced by the plaintiffs in their certification motion.

[239] Fourth, there is no mention of any report, conclusion or decision made by the Chinese antitrust authorities, and no evidence on whether any regulatory findings have effectively been made. The articles are silent on the results of the China Investigation initiated in 2018. Moreover, they do not refer to any of the subjects of the investigation admitting or being sanctioned for any misconduct.

[240] Fifth, there is no evidence allowing to conclude that the China Investigation relates to matters that could be in breach of section 45 of the Act under Canadian law, or evidence allowing to infer the existence of an alleged conspiracy between the defendants in breach of section 45. There is no evidence on the applicable law in China or evidence that what was investigated by the Chinese antitrust authorities under Chinese laws would amount to conduct prohibited under any of the criminal provisions of the Act in Canada. When a plaintiff intends to claim that certain anti-competitive behaviour investigated in a foreign country by a foreign agency provides an evidentiary basis supporting the existence of an alleged illegal agreement in Canada, the plaintiff must, at a minimum, adduce some evidence about the specific conduct being investigated in the foreign country as well as some evidence showing that the foreign country's laws prohibit behaviour or conduct that would be unlawful in Canada.

[241] No such evidence has been provided by the plaintiffs with respect to the China Investigation or to the conduct investigated by the Chinese antitrust authorities.

[242] I underline that the plaintiff's proposed competition class action is a very rare situation where there are no allegations and not a scintilla of evidence regarding any investigation undertaken by any competition or antitrust authorities in Canada, in the U.S., in the European Union or in any jurisdiction other than China, regarding DRAM supply or DRAM prices. And this arises in a context where the plaintiffs nonetheless claim that the alleged conspiracy between the defendants affected the global supply of DRAM.

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

also conduct and behaviour that would constitute an illegal agreement under Canadian law.

(iii) Supply restrictions, price increases and industry structure

[244] The second indicium of a breach of section 45 invoked by the plaintiffs as evidence to support the existence of the alleged conspiracy relates to the alleged coordinated supply restrictions and price increases advanced by the plaintiffs, and indirectly the structure of the DRAM industry. Here again, I agree with the defendants that the record before me contains strictly no evidence on these points.

[245] With respect to the "coordinated supply restrictions" of DRAM alluded to by the defendants, there is no evidence on either the "supply", the "restrictions" or the "coordinated" component of this statement.

[246] First, the plaintiffs have not led evidence related to the supply of DRAM: there is no evidence on the capacity or supply of DRAM by the defendants prior to or after the Class Period, no evidence of DRAM supply during the Class Period, and no evidence of what the DRAM supply might have been during the Class Period but for the defendants' alleged actions to suppress supply.

[247] Second, there is also no evidence of suppression, restriction or limitation of DRAM supply by the defendants. As detailed in the discussion above relating to the Public Statements (in section IV.A), the evidence put forward by the plaintiffs through the Public Statements rather shows increases or expected increases in the supply of DRAM during the Class Period. The Public Statements referred to by the plaintiffs reveal that the defendants increased their supply of DRAM, and that there was growth in the supply of DRAM, though this growth in supply lagged behind the growth in demand. Moreover, the defendants repeatedly expressed a clear intention to increase the supply of DRAM during the Class Period, not to limit it or to decrease it. In this case, the evidence of supply growth lagging behind demand growth cannot be considered comparable to any form of concerted output restriction contemplated by paragraph 45(1)(c) of the Act.

[248] Third, there is no evidence of any "coordination" or concerted action between the defendants, with respect to DRAM supply or to DRAM prices, nor any evidence that any increase in DRAM prices was somehow related to the state of DRAM supply.

[249] On the alleged "coordinated price increases", it is important to underline that I have not found any evidence in the documents attached to the plaintiffs' affidavits, or elsewhere in the record, pointing to any agreement, exchanges or communications between the defendants with respect to DRAM prices. There are no references to DRAM prices, let alone to any price signalling or any agreement on prices, in the dozens of paragraphs of the Statement of Claim dealing with the defendants' Public Statements or in the documents themselves. In sum, there are no material facts nor any evidence providing a basis in fact to ground the plaintiffs' allegations that the defendants agreed or conspired to directly or indirectly limit, fix or increase DRAM prices.

[250] I will only make a brief comment on the industry structure and the oligopolistic nature of the DRAM industry. In essence, as the Superior Court of Quebec concluded in *Hazan* (and the U.S. District Court also determined in the U.S. parallel class action in

Jones), I do not find that the mere fact that the DRAM industry is an oligopoly, which is not in itself anti-competitive, is enough evidence to authorize the certification of the class action in this case. The DRAM industry structure and its characteristics—such as a small number of players, demand inelasticity for a product, the commodity nature of a product or barriers to entry—do not constitute indicia or evidence of an alleged conspiracy in breach of section 45 in the absence of any factual underpinning regarding any concerted agreement between the defendants.

[251] Even the plaintiffs' expert, Dr. Singer, acknowledged that, if there is only oligopoly behaviour and an oligopoly structure but no coordination of pricing, output or capacity, and no communications of competitively sensitive information—which is precisely what we have here—, "an antitrust case could not be made out of this". In other words, the general oligopolistic market conditions prevailing in the DRAM industry are not, in the absence of evidence on the concerted conduct of the market participants, facilitating practices or "plus factors" allowing a court to conclude or infer that there was or could have been an illegal conspiracy. The oligopolistic characteristics of an industry are just as likely to be consistent with innocent behaviour as with an unlawful one.

[252] I must also stress that evidence of general price increases—even significant ones—, without any link to any form of concerted conduct or of coordinated behaviour, does not amount to some basis in fact for an illegal conspiracy under section 45 of the Act, nor does it allow to infer one. In Canada, concurrent increases in prices or even pricing which may appear to be anti-competitive is not a criminal behaviour; only a conspiracy or agreement to fix prices, allocate markets or restrict output is. A recourse in damages pursuant to section 36 of the Act requires an illegal conduct in violation of certain criminal provisions of the Act. The appearance of anti-competitive effects or a particular industry structure are not enough to ground a section 36 recourse in damages.

[253] I would add that, contrary to the plaintiffs' submissions, no Canadian court has certified a competition class action in an oligopolistic market on the basis that conscious parallelism is a defence on the merits. In the cases cited by the plaintiffs, the defence of conscious parallelism was not considered at the certification stage because there was some undisputed basis in fact supporting the existence of the conspiracy, not because conscious parallelism was a merits issue. Such basis in fact had been provided through admissions, guilty pleas or satisfactory evidence of investigations dealing with the impugned conduct, and the issue of meeting the certification requirements for the proposed common issues on liability was simply not in play.

(iv) Private communications and public statements by the defendants

[254] As a third category of evidence allegedly offering some basis in fact for the alleged agreement under section 45, the plaintiffs rely on the alleged private communications between the defendants and on the Public Statements.

[255] These elements have been referred to in detail in the analysis on the reasonable cause of action requirements in section IV.A above, where I reviewed the defendants' allegations and concluded to an absence of material facts. On both the direct private communications and the Public Statements, I also conclude that the plaintiffs have offered no evidence providing some basis in fact for the alleged conspiracy.

[256] I indicated earlier that there are no material facts to support the allegations that the defendants "met and communicated with each other, directly and indirectly, over the phone and in person". I also find that there is strictly no evidence to show some basis in fact for this allegation that the defendants ever met privately or had any direct communications between them. In fact, there is not a scintilla of evidence in the record that the defendants met or directly communicated with one another at any time, let alone to discuss DRAM supply or DRAM prices.

[257] I make the same finding with respect to trade association meetings. The plaintiffs claim that the defendants met at trade associations meetings, and they referred more specifically to certain specific meetings of the Global Semiconductor Alliance and the World Semiconductor Council. However, there is no evidence in the record relating to any such meetings, to the defendants' attendance at the meetings, or to any private discussion or agreement having occurred at such meetings. The only evidence adduced by the plaintiffs in relation to their trade association allegations consists of printouts from the Global Semiconductor Alliance, the Semiconductor Industry Association and the World Semiconductor Trade Statistics organization websites indicating that the defendants belong to those organizations.

[258] This evidence on perfectly legal memberships in perfectly legal trade associations, or even on the attendance of participants at perfectly legal trade association meetings, does not constitute any basis in fact supporting the existence of a conspiracy between the defendants.

[259] The plaintiffs have not submitted any evidence describing suspected or actual interactions between the defendants at these trade association meetings, nor any interactions suggesting the establishment of an agreement to restrain the supply of DRAM or to increase DRAM prices. The evidence is again silent on the conduct of the defendants, or on any communications or agreements between them further to the trade association meetings. Save for the defendants being members of the trade associations, there is no evidence allowing to infer that the defendants were present at the specific "key" meetings alleged to have taken place and identified in paragraph 103 of the Statement of Claim, that they communicated or discussed with one another at any such meetings, that there were communications or discussions about supply suppression of DRAM or about DRAM prices, or that the defendants had a mutual understanding or agreed on anything at those meetings. Nor is there any evidence that the supply of DRAM decreased after any of these trade association events.

[260] Trade association meetings cannot, in and of themselves, be probative of an unlawful agreement without any evidence of improper conduct by the members of such trade associations. In sum, the trade associations material does not allow me to find any evidence amounting to some basis in fact for the existence of the alleged breach of section 45.

[261] Turning to the defendants' Public Statements at earnings calls and investors conferences, they also do not contain any evidentiary foundation supporting the allegation that the defendants agreed to suppress the supply of DRAM. In fact, as discussed above in section IV.A, they show the opposite, namely the defendants' independent intention to increase their respective supply of DRAM during the Class Period, and the effective growth in DRAM supply, albeit at a rate lower than the growth in demand. As an example, throughout the Class Period, SK Hynix repeatedly and

consistently stated in public that it was adding DRAM wafer capacity and increasing supply, including by way of massive investments to expand production space at an existing facility and to build a new DRAM manufacturing facility.

[262] None of the Public Statements relied on by the plaintiffs provides an evidentiary foundation supporting an alleged agreement to suppress DRAM supply. There is no evidence on a suppression, restriction or limitation of supply as such. There is also no evidence of any intent, commitment or consensus to do so, from which an agreement or an inference of an agreement could be drawn. The Public Statements do not provide any basis in fact for the alleged conspiracy. To the contrary, they reflect an absence of evidentiary basis for the alleged conspiracy.

[263] There is also no evidentiary basis of any “facilitating practices” in terms of conduct by the defendants—such as sharing competitively sensitive information on production, capacity or prices; coordination between the defendants; or activities assisting in the monitoring of each other—that could point to circumstantial evidence of an agreement.

[264] I do not need to repeat the detailed analysis of the absence of material facts made above in section IV.A with respect to the Public Statements, the alleged “industry consensus”, or the claimed “intent” or “commitment” to restrict supply attributed to the defendants. Just as there was an absence of material facts, I do not find any evidentiary foundation supporting the possible existence of an agreement, of a meeting of the minds or of a mutual understanding between the defendants. I note that there is also an absence of evidence of overt acts by any of the defendants that could have suggested a form of two-way communications or course of conduct from which the acceptance of an offer could be reasonably inferred. There are only documents showing the state of mind and independent thinking of each separate defendant, and evidence of unilateral acts regarding each defendant’s own DRAM supply, with no express or implied intention to suppress or limit supply, no sharing of confidential supply information, and no direct or indirect invitations to the other competitors to participate in any form of concerted actions.

(v) Prior conduct

[265] The fourth category of evidence relied on by the plaintiffs relates to the prior conduct of the defendants. Some documents to that effect are attached as exhibits to the Tayyab Affidavit. Despite the unique nature of their claim based on an alleged conspiracy to suppress DRAM supply, the plaintiffs rely on the prior DRAM investigation and follow-on class actions in the *Infineon* case as constituting some basis in fact for the allegations about the defendants’ conduct between 2016 and 2018. This prior DRAM investigation was a standard price-fixing case.

[266] The plaintiffs allege that, in the *Infineon* case, each of the defendants has been involved in prior price-fixing arrangements regarding the DRAM market, where they pled guilty or cooperated with authorities and paid large fines. The plaintiffs submit that this evidence on the defendants’ past conduct is relevant at this certification stage. They maintain that, while the successful class proceeding concerning the defendants’ previous international DRAM price-fixing conspiracy does not prove present conduct, it does suggest that the current class proceeding, which alleges similar causes of action and common issues, is certifiable.

[267] I disagree, and I instead find that this prior conduct does not amount to some basis in fact for the existence of the different conduct now alleged by the plaintiffs in this certification motion.

[268] The fact that a prior class action based on an alleged conspiracy to fix DRAM prices between 1999 and 2002 was certified does not establish some basis in fact that the defendants agreed to suppress DRAM supply as alleged in this case, some 15 years later. Especially not when the prior case did not involve the same conduct (price fixing as opposed to supply suppression) and the defendants had not disputed the allegations of an unlawful agreement in that prior case. As I mentioned above in section II.F, the current case significantly differs from the *Infineon* case. In *Infineon*, the alleged conspiracy was to fix the prices of DRAM and the agreement was not in dispute at all, since the international price-fixing conspiracy had in fact been admitted by the defendants in that case (*Infineon*, at paragraph 5). It further involved allegations of direct discussions in which the alleged conspirators set prices for DRAM (*Option Consommateurs c. Infineon Technologies, a.g.*, 2008 QCCS 2781 (CanLII), 2008 CarswellQue 5729, at paragraph 57). Moreover, there was some evidence, originating directly from the U.S. and European competition agencies involved, relating to the existence of the alleged global conspiracy, the ongoing investigations by these government authorities, and the plea agreements entered into by the defendants (*Infineon*, at paragraphs 80–139). Here, the plaintiffs allege an agreement to suppress DRAM supply, based primarily on signalling in Public Statements, with no admissions or guilty pleas, nor any investigations by competition authorities in Canada, the U.S. or elsewhere with respect to the alleged supply suppression behaviour.

[269] Furthermore, the prior alleged conspiracy in *Infineon* ended some 15 years before the current conspiracy is alleged to have occurred. As the plaintiffs acknowledge in their materials, the DRAM industry is now significantly different than it was at the time of the *Infineon* case.

(vi) The Amended U.S. Complaint

[270] In their submissions to the Court, the plaintiffs also referred to the Amended U.S. Complaint attached as an exhibit to one of their affidavits, and argued that it offered some basis in fact for their proposed liability-related common issues. The plaintiffs suggest that the Amended U.S. Complaint is notably evidence that certain unnamed persons within the defendants' organizations made admissions about some alleged concerted action.

[271] I do not agree. The Amended U.S. Complaint is not evidence of the facts contained therein, and is only evidence that the U.S. plaintiffs made these allegations. As the Superior Court of Quebec observed in *Hazan*, references to U.S. pleadings alleging the same conspiracy are not appropriate evidence since those pleadings are drafted by lawyers and simply constitute opinions or legal argumentation. The common issues requirement requires the plaintiffs to show some basis in fact for their proposed common issues, not some allegations made in a foreign proceeding.

(vii) The Singer Reports

[272] Finally, at the hearing before this Court, the plaintiffs also alluded to the main report of Dr. Singer and to certain extracts relating to the market structure of the DRAM industry, as providing some evidentiary background for the alleged conspiracy.

[273] Again, I am not persuaded that the Singer Reports offer any evidence constituting some basis in fact for the existence of the alleged breach of section 45. The references to the DRAM market structure or to price fluctuations in the Singer Reports do not constitute some basis in fact that the proposed common issue of a breach of section 45 exists, as these features of an oligopolistic market structure are also consistent with perfectly legal conduct. I further observe that Dr. Singer clearly indicates in his main report that he has not been asked to opine on the existence of an agreement between the defendants or on whether a collusion exists in fact.

[274] Simply tendering an expert report is not sufficient to amount to some basis in fact of a proposed common issue. I must be satisfied, without entering into a detailed scrutiny of the evidence, that the expert's evidence on the issue at stake is sufficiently reliable that it provides some basis in fact for the existence of the common issue. While I accept that the evidence at the certification stage, including expert evidence, is scrutinized at a lower standard than it will be subject to at trial, there remains a standard that must be met. Here, it is expressly indicated by Dr. Singer that his report was not meant to and did not provide an opinion on the issue of the existence of the alleged conspiracy.

(viii) The *Crosslink* case

[275] Turning back briefly to the *Crosslink* case, I simply observe that it contains very limited discussion or analysis on the some-basis-in-fact requirement for the alleged conspiracy, as the trial judge in that case appears to have assumed that the necessary evidentiary basis for the proposed liability common issue was satisfied (*Crosslink 1*, at paragraphs 104–111).

[276] To the extent that, in *Crosslink 2*, the court appears to have adopted a one-step approach and denied the necessity of showing some basis in fact for the existence of the common liability issue, namely, the existence of a conspiracy, I do not agree with its conclusions (*Crosslink 2*, at paragraphs 51–57). I do not dispute that, at the certification stage, evidence is not required to establish whether a conspiracy actually occurred, but there is a need to provide enough evidence (i.e. some basis in fact) establishing that the conspiracy exists in fact. The allegation of a conspiracy and the proposed common issue relating to the conspiracy must be grounded in some evidence, and not only on bare assertions and speculation. As discussed above in relation to the two-step test, some basis in fact is not simply required for the commonality of the liability issue; it is also required for the existence of the alleged conspiracy.

(b) *Breach of Section 46*

[277] Moving to the second proposed common issue on liability, namely the breach of section 46, suffice it to say that, if there is no basis in fact for a breach of section 45, the same goes for the breach of section 46, which is an extension of section 45. I would add that, in addition to an absence of evidence on the alleged conspiracy under section 45, there is not a scintilla of evidence on the other main constituent elements of a foreign directive in breach of section 46: no evidence has been provided by the plaintiffs on the

implementation of a foreign directive, instruction, intimation of policy or other communication by any of the defendants, or how such directive, instruction, intimation of policy or communication was issued for the purpose of giving effect to conspiracy entered outside of Canada that would breach section 45.

(c) *Conclusion on the proposed common issues on liability*

[278] In summary, not only are the plaintiffs' allegations on the alleged conspiracy insufficient to meet the reasonable cause of action requirement, but the plaintiffs have also failed to provide some basis in fact for the proposed common issues relating to the alleged wrongful acts, namely a breach of section 45 on conspiracy or of section 46 on foreign directives. I find no evidence or basis in fact supporting any suppression, restriction or limitation in the supply of DRAM by the defendants. I find no evidence or basis in fact of any increases in DRAM prices being linked to some form of suppression, restriction or limitation of supply. I find no evidence or basis in fact of any concerted or coordinated action by the defendants regarding the supply of DRAM or the DRAM prices, nor any evidence from which such an inference could be drawn. I find no evidence or basis in fact of any two-way communications between the defendants on the supply of DRAM or on DRAM prices, or of any conduct by the defendants from which a collusive meeting of the minds or mutual understanding could be inferred. Quite the contrary, there is only evidence of a series of non-criminal, unilateral conduct by the defendants.

[279] I underline that this is not a situation where I had to resolve conflicting facts or evidence, something I could not have done at the certification stage. It is rather a situation where I find an absence of evidentiary background or basis in fact for the wrongful acts alleged by the plaintiffs.

(d) *Proposed common issues on harm and loss*

[280] In light of my finding that there is no basis in fact for the proposed common issues on a breach of section 45 or 46 of the Act, there is no need to deal with the other proposed common issues identified by the plaintiffs with respect to harm or loss, or to follow-on interest and investigation costs. If there is no evidence and basis in fact for the proposed common issues on conduct and liability, and for the existence of an alleged conspiracy, then none of the proposed common issues relating to the alleged harm or loss, or to interest or investigation costs, can be certified, as all these other proposed common issues are a consequence of the alleged conduct or liability (*Simpson*, at paragraphs 26 and 45).

[281] I am mindful of the fact that the parties have spent a fair amount of their written and oral submissions on these proposed common issues on harm or loss and on the Singer Reports, more particularly on the question of whether there is some basis in fact in the record that the alleged loss or harm can be established on a class-wide basis. This is typically the main issue in dispute in competition class actions based on an alleged breach of section 45, revolving around the existence of a sufficiently credible and plausible methodology to establish loss or harm on a class-wide basis and the test developed by the S.C.C. in *Pro-Sys* (*Pro-Sys*, at paragraph 118).

[282] In the current case, the alleged harm is increased DRAM prices caused by the alleged coordinated restrictions in the supply of DRAM. Not surprisingly, given the

parties' differing views on the existence of the alleged conspiracy, the main point of contention was the ability of Dr. Singer's methodology to distinguish between price increases resulting from illegal collusion and price increases resulting from legal conscious parallelism. According to the defendants, Dr. Singer's methodology was incapable of addressing the pleaded facts of this case (and hence was not realistic) because his proposed methodology failed to distinguish between legal oligopoly behaviour such as conscious parallelism, which may result in supra-competitive prices, and unlawful conspiracies, which also leads to supra-competitive prices. According to the plaintiffs, Dr. Singer's proposed methodology was able to control and explain all competitive forces that could affect DRAM prices, as it captures the effect of the oligopolistic interactions between the DRAM suppliers through the supply variables, the demand variables and the time trends of his model.

[283] As I mentioned above, in light of my conclusions on the proposed common issues on liability, I do not have to determine if Dr. Singer's methodology meets the requirements of the test laid out in *Pro-Sys*, as the proposed common issues relating to harm or loss are not suitable for certification in any event. I will only observe that, if Dr. Singer's methodology was effectively unable to take into account the oligopolistic structure of the DRAM industry and to isolate the potential for conscious parallelism by the market participants—which is a perfectly legal behaviour in Canada—, it would not likely be a credible, plausible or realistic methodology grounded in the facts of this case allowing the Court to establish the loss or harm caused by an illegal agreement. However, this is not a factual determination that I need to make in order to conclude that the plaintiffs' class action cannot be certified. On both the reasonable cause of action and the common issues requirement, the plaintiffs' certification motion fails on the alleged conspiracy at the source of their claims, and this is the basis on which certification is denied.

(3) Conclusion

[284] For all the reasons detailed above, I conclude that the plaintiffs do not satisfy the common issues requirement for certification. And if none of the proposed common issues can be certified, it follows that the proposed class action cannot be certified. Absent common issues, there is no justification for a class proceeding.

[285] Section 45 is the cornerstone of the Act and has frequently been described as its most significant provision. Allegations of unlawful conspiracies in violation of section 45 are serious, and a recourse alleging a breach of section 45 cannot be undertaken lightly, especially when it is seeking $1 billion in damages. A competition law class action based on an alleged conspiracy under section 45 of the Act cannot be allowed to proceed on the basis of pure speculation or wishful thinking about the existence of an agreement, and on a lack of some minimal evidence of unlawful conduct. This is what we have here.

[286] In my view, to allow the plaintiffs' proposed class action to go forward on the basis of the record before me regarding the alleged agreement would set a dangerous precedent that would open the door to file section 36 claims on the sole basis of apparent anti-competitive effects accompanied with unfounded allegations and speculation regarding the collusive conduct of the alleged conspirators. It would essentially mean that a competition law class action seeking damages under the Act for a breach of section 45 could be allowed to proceed in the complete absence of any

factual basis or minimal evidence regarding the fundamental constituent of the conspiracy offence, namely an agreement between the defendants.

[287] It is certainly tempting to see or imagine an unlawful conspiracy between suppliers whenever there are concurrent price increases—especially significant ones—in a concentrated or oligopolistic industry. Indeed, this is a comment we frequently hear in Canada whenever there appear to be simultaneous increases in retail gasoline prices. But it is the coordinated behaviour of competitors that makes certain conduct *per se* illegal under section 45 of the Act and paves the way to a claim in damages under section 36, not the actual or likely existence of anti-competitive effects such as observed price increases. The 2009 amendments to section 45 of the Act have created an assumption that three types of coordinated conduct by competitors (namely price-fixing, market allocation or output restriction) are so unambiguously harmful to competition that they ought to be automatically prohibited, without the need for evidence on their adverse anti-competitive effects. But the reverse is not true. Section 45 does not contemplate that evidence of actual or likely anti-competitive effects constitutes proof of the presence of an illegal agreement between competitors, without any material facts or evidentiary basis regarding the concerted conduct of the competitors. There needs to be direct or circumstantial evidence of the alleged conspiracy, arrangement or agreement.

[288] To grant certification of the plaintiffs' proposed class action in this case would essentially require the Court to ignore the fundamental structure of the Act and its recognition that non-criminal, unilateral conduct by competitors, even if it may have anti-competitive effects and create harm to the economy and to Canadians, does not open the door to civil recourses in damages under section 36. The Act provides that several behaviours having actual or likely anti-competitive effects may lead to civil enforcement action by the Commissioner or by private parties before the Tribunal, and to corrective measures imposed by the Tribunal. However, only a limited list of specific criminal conduct allow plaintiffs to seek damages under section 36. Under the Canadian competition law regime, it takes more than concurrent price increases, no matter how anomalous they may look, to ground a recourse in damages based on an alleged violation of section 45. It takes an express or tacit agreement. It takes a prohibited criminal conduct. This is the crucial missing link in the plaintiffs' certification motion, and this is where their case stumbles at the certification stage.

[289] The presence of an express or tacit agreement is the beating heart of the conspiracy provision, even more so with the new section 45 prohibiting hard-core cartels as *per se* infractions under the Act. Here, the plaintiffs' allegations and the evidence before me do not even allow me to detect a pulse.

[290] I make two final observations.

[291] Throughout the plaintiffs' written and oral submissions, the argument that a certification motion is a procedural process and should not be a merits-based screening was repeated like a chorus. The plaintiffs and their counsel often agitated the spectre of an inappropriate foray into the merits of the case as soon as the Court—in an effort to properly assess the factual underpinning of the plaintiffs' certification motion—was looking more closely at the allegations made in the pleadings or at the evidentiary background put forward by the plaintiffs on this motion.

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

[293] This is the analysis that I conducted in these Reasons.

[294] The repeated admonitions of the plaintiffs sometimes left the impression that the procedural aspect of the certification process was brandished as a shield to protect the plaintiffs' motion from anything more than a timid and "light" scrutiny by the Court. With respect, I do not agree that the certification process can be reduced to such a narrow scope and can be stripped down to such an empty and trivial exercise. It may well be that, when procedure constitutes the main logic to support the certification of a proposed class action, procedure becomes the main argument put forward by a plaintiff. But, in my view, the procedural dimension of class proceedings was never meant to downsize the certification process to a meaningless one, or to become a fig leaf to cover the naked shortcomings of a plaintiff's motion. When, as is the case here, there is a dearth of material facts and an absence of the minimal evidentiary basis required to support the alleged illegal conduct at the very heart of a proposed class proceeding, it is the Court's role, even at the procedural stage of certification, to filter out such untenable, unfounded and speculative claim.

[295] My second remark relates to the particularities of this proposed competition law class action based on section 45. As I indicated throughout these Reasons, the plaintiffs' motion is a fairly unique case where the very existence of the alleged conspiracy at the source of the claim for loss and damages under section 36 of the Act is disputed, and is the central battleground at the certification stage.

[296] In virtually all cases involving recourses under sections 36 and 45 of the Act, before filing their civil recourse in damages, plaintiffs typically relied on some express agreements, rules or contracts at the source of the impugned unlawful conspiracy, on criminal convictions or guilty pleas entered by the defendants in related criminal proceedings, or on a criminal investigation undertaken by the Competition Bureau or by foreign competition authorities (and clearly affecting Canada). All of these situations meant that there were not only ample material facts to nourish the plaintiffs' allegations of conspiracy and agreement made in the pleadings but also the minimal required evidentiary basis (i.e. some basis in fact) for the proposed common issues relating to the alleged wrongful conduct. Here, we instead have a case where there are no guilty pleas or convictions involving DRAM or the defendants, no investigation by the Competition Bureau into the alleged conduct of the defendants, and no investigation by

any foreign antitrust or competition authority regarding an alleged conspiracy to suppress DRAM supply.

[297] Of course, nothing in section 36 prevents a plaintiff from going forward with an action in damages based on an alleged section 45 offence, without a prior conviction, guilty plea or inquiry by the Canadian competition authorities. But when all of these are lacking, when—as is the case here—there are no criminal indictments, no plea bargains, no convictions and no regulatory inquiries by the Canadian authorities, as well as no other similar evidence in any jurisdiction with respect to the impugned conduct, it is obviously more difficult and more challenging for a plaintiff to support allegations of an unlawful conspiracy with material facts or to present the minimal evidentiary basis required for the proposed common issues on the alleged wrongful act. But it is still the plaintiff's burden to do so, and a plaintiff's choice to file a proposed competition class action early, without such support, does not exempt from having to meet the requirements for the necessary minimal evidentiary basis, and from having to present more than vague speculation and conjecture about the alleged prohibited agreement underlying a recourse under section 36.

[298] I must underscore that this is an area where a public authority (i.e. the Commissioner) is vested with extensive powers and tools to investigate criminal anti-competitive conduct and enforce the criminal provisions of the Act. The Commissioner has repeatedly affirmed that section 45 is the most important provision of the Act and that taking actions against hard-core cartels is his priority. I accept that the absence of any investigation by the Competition Bureau on an impugned conduct is not determinative of the potential existence of a section 45 conspiracy. But it is certainly telling.

C. *Paragraph 334.16(1)(d) [of the Rules]: The preferable procedure for the just and efficient resolution of the common questions of law or fact*

[299] The last criterion challenged by the defendants is the preferable procedure criterion, set out in paragraph 334.16(1)(d) and, even though I do not have to in light of my previous findings, I will make the following brief observations on this certification requirement.

[300] The plaintiffs submit that a class proceeding is the preferable procedure in this case, since it favours access to justice, judicial economy and behaviour modification. Furthermore, they maintain that they meet all the factors set out in subsection 334.16(2): common questions predominate over individual ones; there is no evidence of Class members having an interest in controlling individual actions; there are no individual proceedings; only one class proceeding has been filed in a provincial court (in *Hazan*), on the basis of a different cause of action; there is no viable alternative to resolve the claims; and the class proceeding will not create greater difficulties than any other alternative.

[301] However, in this case, I have found an absence of proposed common issues. I agree with the defendants that a class action cannot be the preferable procedure for a claim under section 36 of the Act where the alleged wrongful acts and the alleged harm or loss resulting from the wrongful conduct cannot be certified as common issues. The preferable procedure analysis in a competition class action is closely linked to the question of whether the court has a basis to certify common issues comprising the

elements of a defendant's liability (*Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 (CanLII), 305 A.C.W.S. (3d) 706 [cited above], at paragraph 84). This requires, at a minimum, the unlawful conspiracy and harm to be certifiable as common issues because these form the core elements of any plaintiff's claim under section 36 of the Act for a breach of sections 45 and 46.

[302] According to the test outlined by the S.C.C., in order to meet the preferable procedure criterion, the representative plaintiff must show: (i) that a class proceeding would be a fair, efficient and manageable method of advancing the claim and determining the common issues which arise from the claims of multiple plaintiffs, and (ii) that it would be preferable to any other reasonably available means of resolving the class members' claims (*Fischer*, at paragraph 48; *Hollick*, at paragraph 28; *Wenham*, at paragraph 77). Determining whether a class proceeding is preferable must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice" (*Fischer*, at paragraph 22; *Wenham*, at paragraphs 81, 85–98; *Airbnb*, at paragraph 143).

[303] It is axiomatic that, if there is no basis in fact for the proposed common issues, then there is no basis in fact for a class action satisfying the preferable procedure criterion (*Kaplan*, at paragraph 87; *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470 (CanLII), 253 A.C.W.S. (3d) 36, at paragraph 221). Absent common issues, a class proceeding is not the preferred procedure for the just and efficient resolution of the claims of the putative class members, and will not achieve the three principles underpinning class actions, namely judicial economy, behavioural modification and access to justice.

[304] Here, it is obvious that, given the absence of common issues, the plaintiffs do not satisfy the preferable procedure criterion either.

V. Conclusion

[305] For the above reasons, the plaintiffs' certification motion is dismissed.

[306] Pursuant to rule 334.39, no costs are typically awarded on a motion for certification. Neither party has sought costs, and there is no basis to depart from the principle established by rule 334.39 and to award costs in the present motion.

ORDER in T-809-18

THIS COURT ORDERS that:

1. The motion for certification is dismissed.

2. No costs are awarded.

ANNEX A

Subsections 334.16(1) and (2), and rule 334.18 read as follows:

Certification

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared 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 as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

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

….

Grounds that may not be relied on

334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the precise number of class members or the identity of each class member is not known; or

(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.

ANNEX B

The relevant portions of sections 36, 45 and 46 of the Act read as follows:

Recovery of damages

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

…

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

….

PART VI

Offences in Relation to Competition

Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

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

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

Evidence of conspiracy, agreement or arrangement

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

….

Definitions

(8) The following definitions apply in this section.

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

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

….

Foreign directives

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

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