

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Qualcomm Incorporated v. Barroqueiro*,
2025 BCCA 65

Date: 20250310
Docket: CA49426

Between:

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

Appellants
(Defendants)

And

David Barroqueiro, Ryan Kett and Allison Oliver

Respondents
(Plaintiffs)

Before: The Honourable Madam Justice Fisher
The Honourable Mr. Justice Grauer
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated
September 25, 2023 (*Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662,
Vancouver Docket S1710984).

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Place and Date of Hearing:

Vancouver, British Columbia
October 9, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 10, 2025

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Mr. Justice Grauer
The Honourable Justice Iyer

Summary:

Qualcomm appeals from orders certifying the respondents' class action under the Class Proceedings Act, R.S.B.C. 1996, c. 50 and dismissing Qualcomm's application for summary judgment under Rule 9-6 of the Supreme Court Civil Rules. The chambers judge certified claims against Qualcomm under s. 36 of the Competition Act, R.S.C. 1985, c. C-34, as well as in civil conspiracy, unlawful means tort, and unjust enrichment. Qualcomm contends the judge erred in law in concluding that (1) the respondents' pleadings disclosed reasonable causes of action under s. 4(1)(a) of the Class Proceedings Act, and (2) there were genuine issues for trial on the evidence before him.

Held: The appeal is allowed in part. The respondents failed to plead the central element of common unlawful object with respect to the conspiracy claims under s. 45 of the Competition Act and at common law and failed to plead material facts capable of supporting these conspiracy claims. It is therefore plain and obvious that the conspiracy claims cannot succeed. However, the judge did not err in certifying the remaining causes of action under s. 61 of the Competition Act, in unlawful means tort and in unjust enrichment. It is not plain and obvious that these claims cannot succeed. Nor did the judge err in concluding there are genuine issues for trial on the evidence with respect to these causes of action.

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Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] This is an appeal from an order certifying the within action under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 and an order dismissing an application for summary dismissal of the action pursuant to Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[2] The respondents (class plaintiffs) are those who have purchased cellular devices containing modem chips during the class period. Modem chips are semi-conductors that enable cellular devices to connect to cellular communication networks and transmit voice calls and data. Every cellular-enabled device contains a modem chip, which is interoperable with the cellular network to which the modem chip connects only if it meets certain cellular communication standards. These standards are determined in agreements reached by industry participants.

[3] The appellants (defendants below) are Qualcomm Incorporated and its wholly owned subsidiaries, Qualcomm Technologies, Inc., Qualcomm CDMA

Technologies Asia Pacific PTE Limited and Qualcomm Canada, Incorporated (Qualcomm Canada). These entities have been in the business of developing, implementing and licensing modem chips for over thirty years and have participated in the development of cellular communications standards.

[4] The respondents allege that the appellants entered into anticompetitive agreements with manufacturers and competitors and engaged in unlawful conduct in their licensing practices and the sale and distribution of their modem chips. The respondents assert breaches of the *Competition Act*, R.S.C. 1985, c. C-34, civil conspiracy, unlawful interference with economic relations (the unlawful means tort) and unjust enrichment, and contend the appellants' alleged unlawful and anticompetitive business practices have harmed Canadian consumers by inflating the price of cellular devices.

[5] The appellants submit that the alleged anticompetitive conduct is not civilly actionable in Canada and the agreements they have made are not conspiracies. They say the pleaded material facts amount to allegations that are only reviewable by the Competition Bureau and cannot ground a claim for common law damages. They challenge the certification order on the basis that the pleadings do not set out material facts to support the alleged causes of action, and they challenge the dismissal of their summary judgment application on the basis that the evidence in the record directly refutes the respondents' claims such that there is no genuine issue for trial.

Background

[6] The chambers judge, in reasons indexed as 2023 BCSC 1662, made no finding as to whether the appellants acted in concert with or independently of each other and referred to them collectively as Qualcomm, except where the context required a particular entity to be identified. I will do the same.

[7] Qualcomm licenses its patents and sells its modem chips to manufacturers of cellular devices (known as original equipment manufacturers, or "OEMs"). Many of its patents have become part of cellular communication standards used throughout the global telecommunications industry. These are known as standard essential patents, or "SEPs". The standard setting processes impose obligations on SEP holders like Qualcomm to prevent them from abusing their market power.

[8] Some of the undisputed history and general functioning of cellular communications standards are nicely summarized by the chambers judge:

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

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

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

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

[9] Standardization ensures interoperability by requiring participants to use the approved technologies that comply with the standard. Cellular communications standards have evolved over the years, and to date there are five “generations” of cellular standards, beginning with 1G to the current 5G standard. When technology participants like Qualcomm seek to have their SEPs incorporated into a proposed cellular communication standard, standards development organizations (“SDOs”) require them to commit to licence their SEPs to other industry participants on fair, reasonable and non-discriminatory terms (known as “FRAND” terms). Qualcomm’s technologies have been incorporated into 2G, 3G and 4G standards through the standard setting process described above. The 3G generation adopted a technology known as CDMA (code division multiple access) and the 4G generation adopted LTE (long term evolution) technology.

[10] Qualcomm holds over 140,000 patents and patent applications. It has two main areas of business: (1) licensing its patents, and (2) developing and supplying its modem chips to OEMs. The licensing of Qualcomm's patents is done in the United States through an entity known as Qualcomm Technology Licensing. Many of the modem chips Qualcomm sells are multi-modal, i.e., they comply with more than one cellular communication standard to be operable across cellular networks.

[11] Qualcomm holds a considerable share of the modem chip market, particularly of premium-LTE chips that comply with the 4G standard. It sells its modem chips to OEMs such as Apple and Samsung. Its competitors are other manufacturers of modem chips that include Intel, Ericsson, MediaTek and Texas Instruments, as well as OEMs who also produce chips, such as Huawei and Samsung.

[12] Qualcomm does not grant licenses at the component level to other modem chip suppliers but rather at the device level to OEMs whose products practice Qualcomm's patented technologies. In doing so, Qualcomm allows competing chip makers to use its technologies without being sued on the condition that they only sell to Qualcomm-licensed OEMs. These "non-assert" agreements require OEMs to license SEPs from Qualcomm regardless of which manufacturer supplies their modem chips.

[13] Qualcomm's role in the standard-setting process and its practice of licensing at the device level ground much of the respondents' allegations of anticompetitive conduct. They say Qualcomm entered into unlawful agreements outside the formal standard setting process, notably with Apple, to ensure its technology was adopted as a cellular communication standard. They also say Qualcomm's device level licensing policy puts rival modem chipmakers at a competitive disadvantage and allows Qualcomm to control the market supply of modem chips and impose supra-competitive, non-FRAND licensing terms. The respondents contend these business practices have resulted in higher prices to end consumers of cellular devices.

[14] There have been numerous regulatory proceedings against Qualcomm in respect of alleged anticompetitive conduct in other jurisdictions, including the United States, South Korea, Taiwan, China and the European Union. The alleged anticompetitive conduct in those proceedings involved the same licensing and

modem chip sales practices that are the basis of the respondents' action here. However, these proceedings did not allege conspiracies but rather unilateral anticompetitive conduct and abuse of market position by Qualcomm.

[15] The proceeding in the United States, filed by the U.S. Federal Trade Commission, was successfully defended by Qualcomm. In *FTC v. Qualcomm*, 969 F. 3d 974 (9th Cir. 2020), the Ninth Circuit Court held that these practices were not anticompetitive within the meaning of the *Sherman Act*, CH 647, 26 Stat. 209, 15 U.S.C., reversing a District Court decision that had ruled otherwise and had issued an injunction against Qualcomm: *FTC v. Qualcomm*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

[16] There are also consumer class actions ongoing against Qualcomm in Quebec and the United Kingdom. Again, both of these matters are based on alleged unilateral conduct under different legislation: see *Tenzer c. Qualcomm Incorporated* (30 April 2019), Court File No. 500-06-000896-171 (Que. S.C) and *Consumers' Association v. Qualcomm Incorporated*, [2022] CAT 20 (U.K. Comp. Tribunal).

The action and the decision below

[17] The Further Amended Notice of Civil Claim that was before the chambers judge (FANOCC) alleges that Qualcomm engaged in anticompetitive conduct through agreements made with other participants in the standard setting process and in its SEP licensing practices. It is alleged that Qualcomm breached its obligations to SDOs to licence its SEPs on FRAND terms, used its market power to require OEMs and others to agree to non-FRAND licensing terms, leveraged its patent portfolio to charge non-FRAND royalty rates, and collected royalties at collusive, artificially inflated prices. This conduct, it is alleged, was intended to cause economic harm to the class members by requiring them to pay artificially inflated or "supra-competitive" prices for cellular devices.

[18] The legal bases for the claims are that Qualcomm:

- a) breached Part VI of the *Competition Act* by engaging in conduct in combination with other modem chip suppliers and other participants in the standard setting process that included:

- i) by agreement, threat, promise or any like means, attempting to influence upward or discourage the reduction of prices for modem chips and cellular devices, contrary to s. 61 (as it existed prior to March 11, 2009);
 - ii) engaging in a conspiracy, combination, agreement or arrangement with others to unduly limit the supply of modem chips or to unduly prevent, limit, lessen or injure competition in the modem chip market, contrary to s. 45 (as it existed prior to March 11, 2010), and to fix, maintain, increase or control the price and to control, prevent or lessen the supply for modem chips, contrary to s. 45 (as it existed as of March 11, 2010);
 - iii) implementing a foreign directive in Canada (by Qualcomm Canada) that gave effect to a foreign conspiracy, contrary to s. 46;
- b) engaged in a civil conspiracy with participants in the standard setting process and others
- i) with the predominant purpose of harming the class plaintiffs by requiring them to pay artificially inflated prices for cellular devices and to illegally increase their profits, and
 - ii) by unlawful means, including breaches of ss. 45, 46 and 61 of the *Competition Act*, breaches of competition laws of other foreign statutes, and unlawful restraint of trade at common law and equity;
- c) unlawfully interfered with economic relations of the class plaintiffs by breaching its FRAND obligations and other legal and equitable duties to third parties (the unlawful means tort); and
- d) was unjustly enriched by benefitting from supra-competitive licensing royalties.

[19] In addressing the certification application, the chambers judge first addressed in some detail the question of whether the pleadings disclose each cause of action set out (the first requirement for certification under s. 4(1)(a) of the *Class Proceedings Act*). He was satisfied that the pleadings were sufficient, and it

was not plain and obvious that each claim disclosed no reasonable cause of action.

[20] The chambers judge described the thrust of the respondents' claim as Qualcomm abusing its "alleged dominant position in the modem chip market to charge supra-competitive prices or otherwise impose unfair terms when selling its modem chips and licensing its SEPs": at para. 67. He acknowledged Qualcomm's position that abuse of a dominant position (or other conduct such as exclusive dealing) is not civilly actionable under s. 36 of the *Competition Act*: at para. 70. However, he did not consider that the respondents' claims were bound to fail simply because other regulatory mechanisms existed, especially ones that provide no recourse to the general public for damages: at para. 162.

[21] The judge addressed the summary judgment application at the end of his reasons and dismissed it for the same reasons he gave in respect of the sufficiency of the pleadings, adding this:

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

On appeal

[22] Qualcomm's primary position on appeal is that the judge erred in dismissing the summary judgment application. It seeks an order granting summary judgment and dismissing the respondents' action pursuant to Rule 9-6 of the *Supreme Court Civil Rules*. It submits there are "two paths" to summary judgment: one based on pleadings and one based on evidence, and the chambers judge erred in law and principle (1) in concluding that the respondents had sufficiently pleaded material facts to support the causes of action advanced in the FANOC, (2) by failing to analyze whether there is a genuine issue for trial in light of Qualcomm's uncontroverted affidavit evidence, and (3) in conflating the legal standards

applicable to the cause of action requirement for certification under s. 4(1)(a) of the *Class Proceedings Act* and the application for summary judgment under Rule 9-6 of the *Supreme Court Civil Rules*.

[23] The chambers judge was of the view that a summary judgment application was not an appropriate avenue to advance an argument that the pleadings fail to disclose a cause of action; the proper avenue was an application to strike under Rule 9-5. As I discuss below, the judge was correct in that view. He also correctly described the different tests for assessing pleadings (whether it is plain and obvious that the claim discloses no reasonable cause of action) and for summary judgment (whether there is no genuine issue for trial). I do not agree with Qualcomm that he conflated the tests, but he did apply both tests in his analysis of some of the causes of action. In doing so, the judge assessed the sufficiency of the pleadings with reference not only to the facts pleaded but also to some of the evidence adduced in support of the summary judgment application. As evidence is not admissible in determining the sufficiency of pleadings, the judge erred in relying on some evidence, in effect to strengthen the allegations in the FAN OCC.

[24] To be fair, the approach of the chambers judge was in response to how the applications were argued before him. A similar approach was taken by all counsel in this appeal, which I understand stems from Qualcomm's submission that there are "two paths" to summary judgment. It is my view that this approach is not one supported by the authorities, so I will address this first.

Summary judgment

[25] In its summary judgment application, Qualcomm argued that the FAN OCC did not disclose a reasonable cause of action because it did not plead sufficient material facts supporting the causes of action alleged. It also adduced affidavit evidence that purported to address the allegations regarding its business practices. Qualcomm opposed the certification application in part on the basis that the FAN OCC did not disclose a cause of action under s. 4(1)(a) of the *Class Proceedings Act* and relied on the same arguments as the summary judgment application.

[26] Qualcomm's contention that there are "two paths" to summary judgment is based on the following passage from *Beach Estate v. Beach*, 2019 BCCA 277, a

case involving applications under Rule 9-5(1)(b) and (d) and Rule 9-6:

[48] Rule 9-5 is a challenge on the pleadings. Rule 9-6 is a challenge on a limited review of evidence. A defendant can succeed on a Rule 9-6 application by showing the case pleaded by the plaintiff is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case: *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221 at para. 46, quoting *Progressive Construction Ltd. v. Newton* (1981), 1980 CanLII 493 (BC SC), 25 B.C.L.R. 330 at 335; *International Taoist Church of Canada v. Ching Chong Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at para 14. Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada v. Lameman*, 2008 SCC 14 at paras. 10–11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.

[Emphasis added.]

[27] I do not read this passage as establishing two distinct paths to summary judgment. A defendant who applies for summary judgment bears the onus of proving that the claim is without merit. Unless the only issue is a question of law, a defendant cannot rely on mere allegations or the pleadings and must adduce evidence: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at para. 36, citing *Canada (Attorney General) v. Lameman*, 2008 SCC 14. The cases relied upon for the statement in *Beach Estate* underlined above were addressing the question of whether a plaintiff must adduce evidence in response to a defendant's summary judgment application.

[28] In *Progressive Const. Ltd. v. Newton* (1980), 117 D.L.R. (3d) 591 (B.C.S.C.), the court held that there was no invariable rule requiring a respondent to an application for summary judgment to file an affidavit of merits, as on "all such applications the issue is whether on the relevant facts and applicable law, there is a bona fide triable issue": at para. 14. The court noted that the considerations which arise on an application brought by a defendant are somewhat different from an application brought by a plaintiff:

[16] ... There the purpose of the application is to show that a case already pleaded by the plaintiff is unsound, or that there is a complete answer to it. In that situation, there would seem to be no logical justification for weighing the plaintiff's pleadings in the scales against the affidavit evidence of the defendant. If, without regard to the plaintiff's pleadings, the court is satisfied beyond a reasonable doubt that there is no claim which

deserves to be tried, the defendant should succeed. If the plaintiff submits evidence contradicting the defendant's evidence in some material respect, that will generally be enough to create a doubt. But it may not be necessary for the plaintiff to adduce evidence -- a doubt may be raised in other ways. It may, for instance, arise from the inadequacy of the applicant's affidavit which may fail to establish the means of knowledge of the deponent: *Lowe Chong v. Gilmore*, 51 B.C.R. 157 at 159, [1936] 3 W.W.R. 595 at 597. It may be that the affidavit fails to meet all of the causes of action raised by the plaintiff's pleadings as in *Commerce Capital Trust v. Caledonian* (supra). Or it may be that the applicant's material is worded in an artful and evasive manner so as not to appear trustworthy. And if any part of it is based on information and belief, that part is not admissible, the application being for a final order.

[Emphasis added.]

[29] In my view, the above passage does not establish a separate path to summary judgment. It simply means that a plaintiff may choose not to adduce evidence in answer to a defendant's application and to rely on inadequacies in the defendant's evidence; if that is the case, it is not appropriate for the court to weigh the allegations in the pleading with the defendant's evidence. It follows that a plaintiff cannot rely on mere allegations in a notice of civil claim to answer evidence adduced by a defendant: *McLean* at para. 38.

[30] Moreover, this Court has made it clear that it is not helpful to conflate Rules 9-5 and 9-6. In *Century Services Inc. v. LeRoy*, 2015 BCCA 120 (cited in *McLean* at para. 37), Justice Saunders, for the Court, discussed the differences between these rules:

[32] ... Rule 9-6 is a rule distinct from Rule 9-5; a challenge to pleadings is effected by Rule 9-5, whereas Rule 9-6 allows for the summary determination of a claim in a procedure that engages evidence but does not assume the character of a summary trial.

[33] The different character of the rules for summary judgment and striking pleadings was described well by Mr. Justice Low in *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149:

[9] Rules 9-5 and 9-6 are quite different. The former is an attack on the pleadings on the basis that the action or the defence, as pleaded, cannot succeed as a matter of law. It raises a matter of law only. The latter is an assertion that the claim or the defence is factually without merit. It raises an issue of fact only or, at most, an issue of mixed fact and law, unless under subrule (5)(c) the court determines that "the only genuine issue is an issue of law", in which case it "may determine the question [of law] and pronounce judgment accordingly."

[10] Rule 9-5 is concerned only with the sufficiency of pleadings. It provides in subrule (1) that the court may strike or amend any pleading, in whole or in part. Subrule (2) prohibits the filing of evidence on an application under subrule 1(a). An order striking a pleading could not be the basis for a *res judicata* defence in subsequent proceedings.

[11] Rule 9-6 permits an application for summary judgment, either allowing a claim in whole or in part or dismissing a claim in whole or in part. It is clear that the result sought by the application would support a future pleading of *res judicata*.

See also *Oh v. Coquitlam (City)*, 2018 BCCA 129 at para. 26.

[31] The same considerations apply to the question of whether the pleadings disclose a cause of action under s. 4(1)(a) of the *Class Proceedings Act*, as this requirement tracks the test under Rule 9-5(1) of the *Supreme Court Civil Rules* for applications to strike pleadings that fail to disclose a reasonable claim: *Watson v. Bank of America Corporation*, 2015 BCCA 362 [Watson] at para. 10. As the chambers judge recognized, the issues under consideration under s. 4(1)(a) are distinct from those in a summary judgment application under Rule 9-6. This is the case even if the only genuine issue is a question of law. Under Rule 9-6, it is not the pleadings that are challenged, but whether the law permits, and the evidence supports, the claim that is pleaded. Under Rule 9-5(1) and s. 4(1)(a), the only question is whether the pleadings themselves disclose a cause of action.

[32] In this case, it is apparent that Qualcomm's approach to its summary judgment application set the stage for the chambers judge to conflate the legal and factual issues applicable to the pleadings requirement of s. 4(1)(a) of the *Class Proceedings Act* and summary judgment under Rule 9-6. I address the judge's analysis of the pleaded causes of action in the following section.

Do the pleadings disclose a cause of action? – s. 4(1)(a) of the *Class Proceedings Act*

[33] The first requirement for certification of a class proceeding, in s. 4(1)(a) of the *Class Proceedings Act*, is that the pleadings disclose a cause of action. In assessing this, the standard is whether it is plain and obvious that the pleading discloses no reasonable cause of action and cannot succeed. As noted above, this question must be assessed on the pleadings alone and the facts pleaded are assumed to be true unless they are manifestly incapable of proof: *Watson* at

para. 10; *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at para. 42 [*Valeant*].

[34] As this Court reiterated in *Valeant*:

[43] Courts are to read pleadings generously, including the degree to which any deficiency in pleadings may be remedied by amendments. Moreover, courts should not be too quick to strike claims simply because they are novel. Such novel but arguable claims should be permitted to proceed to trial: [*Nevsun Resources Ltd. v. Araya*], 2020 SCC 5 at para. 66; [*Imperial R. v. Tobacco Canada Ltd.*, 2011 SCC 42] at para. 21.

[35] The chambers judge properly referred to these principles at paras. 102–103 of his reasons. However, as this Court has emphasized in the past, “care must be taken to avoid undermining the role of pleadings... [a] bald assertion of a conclusion is not a pleading of material fact”: *Kindylides v. Does*, 2020 BCCA 330 [*Kindylides*] at para. 34, citing MacDonald J. (in Chambers) in *Owimar v. Stewart*, 2019 BCSC 1198 [*Owimar*] at para. 19. There is a delicate balance to be maintained in evaluating the adequacy of pleadings to ensure that, on the one hand, meritorious claims are not struck for drafting deficiencies, but on the other hand, defendants are not required to respond to “bald assertions or mere conclusory statements of law”: *Kindylides* at para. 34, citing *Owimar* at para. 19.

[36] In *Canada (Attorney General) v. Frazier*, 2022 BCCA 379, at paras. 70–71 [*Frazier*], this Court discussed in some detail the importance of pleading material facts:

[69] Rule 3-1(2)(a) provides that a notice of civil claim must “set out a concise statement of the material facts giving rise to the claim”. Material facts must be pleaded in sufficient detail to support a plaintiff’s claim because the pleadings serve to provide notice and to define the issues to be tried such that the court and the opposing parties are not left to speculate as to how the facts will support the cause of action.

[70] The principles governing pleadings must be “applied functionally in the context of the case”. The following principles regarding pleading material facts emerge from the jurisprudence. Effective pleadings serve to guide the litigation process and to ensure the court can fairly decide the issues before them. Sufficient material facts are the foundation of a proper pleading and as such, the pleading “must tell the defendant who, when, where, how and what gave rise to its liability”. It is not permissible for a plaintiff to rely on the possibility that new facts may be uncovered as the case progresses.

[71] Material facts are “the elements essential to formulate a claim” and are comprised of every fact that would be necessary for the plaintiff to prove in order to support their claim. A material fact is the “ultimate fact ...

to the proof of which evidence is directed. Bare allegations that are incapable of proof and based on speculation or assumptions are not material facts. In the absence of sufficient material facts, the court will not infer facts from bald legal conclusions. Since a claim can only be evaluated on the pleaded material facts, if material facts are omitted, a claim is not properly pleaded.

[Citations omitted; emphasis added.]

[37] Qualcomm takes the position that the FANOCC is built on such “bald legal conclusions”, without sufficient material facts to ground the elements of each cause of action advanced. The respondents’ position is, unsurprisingly, the reverse. The parties also join issue on what are, at law, the elements of some of the key causes of action alleged. Both questions must be answered to determine if the pleadings disclose the causes of action advanced as required under s. 4(1)(a) of the *Class Proceedings Act*. Before turning to that, however, I will consider the standard of review with respect to the chambers judge’s conclusions on these issues.

The standard of review

[38] The parties agree that the question of whether a pleading discloses a cause of action is a pure question of law, reviewable for correctness. This is confirmed in numerous authorities, including *Pioneer Corp. v. Godfrey*, 2019 SCC 42 [*Pioneer Corp.*] at para. 57 and *Watchel v. British Columbia*, 2020 BCCA 100 at para. 28.

[39] However, the respondents submit that the correctness standard does not always apply to this question, as there are discretionary elements to some issues about the adequacy of pleadings, such as particularization, to which deference is owed. They suggest that deference is owed to the chambers judge’s assessment of whether the pleadings in this case contain sufficient material facts to support their claims, citing *Valeant*.

[40] There is a discretionary element to some aspects of assessing the adequacy of pleadings but, in my view, such discretion relates to things such as whether to permit an amendment. It does not extend to whether it is plain and obvious that the pleadings fail to plead material facts sufficient to establish a cause of action. I agree with the comments of Justice Horsman in *Situmorang v. Google, LLC*, 2024 BCCA 9, that a judge’s assessment of the sufficiency of a pleading is not a fact-finding process:

[52] ... The judge must, assuming the pleaded facts to be true, determine whether those facts arguably establish a cause of action. This is a legal question.

[41] In *Valeant*, this Court confirmed the “general rule” that the correctness standard applies to the question of whether it is plain and obvious that a party has not pleaded a reasonable cause of action. Writing for the Court, Justice Harris noted that “other issues concerning the adequacy of the pleadings may, however, involve a discretionary element to which this Court owes deference”: at para. 47. He provided, as examples, questions concerning the organization and structuring of pleadings, whether a pleading is frivolous, vexatious, or an abuse of process, or whether a pleading permits a defendant adequately to identify the factual basis to support a plaintiff’s claim. I interpret this last example to relate not to the question of whether a pleading contains material facts that establish a cause of action but rather whether it provides sufficient detail for a defendant to know the case to be met. This is exemplified in the following passage from *Gosal v. Gill*, 2019 BCCA 147 at para. 8, which Justice Harris cited at para. 48 of his reasons:

In my view deference is owed to the judge’s assessment of the adequacy of the pleadings. The issue in the case at bar is not an extricable question of law; it is not whether the facts as pleaded identify the constituent elements of a cause of action known to law. Rather, as the judge described it, the question is whether the pleadings permit the plaintiff to identify the factual matrix upon which the defendant seeks to support his allegations. Decisions of the former type (including most decisions pursuant to Rule 9-5(1)(a)) may be reviewed on a standard of correctness because if it is asserted that a rule of law is a complete answer to the question at issue, the law dictates a specific outcome and there is no discretion: *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at paras. 19-20. Decisions of the latter type (including most decisions made pursuant to Rule 9-5 (1)(d)) are discretionary.

[Emphasis added.]

[42] Moreover, given the chambers judge’s error in referring to evidence in assessing some of the pleadings, no deference is owed to his analysis of the adequacy of those pleadings.

The pleadings

[43] The essence of Qualcomm’s argument in the court below and in this appeal is that the core factual allegations in the FANOCC relate to abuse of market position which is not civilly actionable in Canada. It says the respondents have

simply recast this claim as conspiracy to rely on civil causes of action under the *Competition Act* and the pleaded torts. Qualcomm points out that the chambers judge acknowledged this as the “thrust of the plaintiffs’ claim” by describing it as Qualcomm abusing its “alleged dominant position in the modem chip market to charge supra-competitive prices or otherwise impose unfair terms when selling its chips and licensing its SEPs”: at para. 67.

[44] The respondents acknowledge that Qualcomm’s conduct may amount to abuse of dominance but submit that this does not foreclose a claim based on conspiratorial conduct. They say the FANOCC adequately sets out the nature of the alleged anti-competitive agreements. In their factum, they summarize those agreements as follows:

- (a) agreements with other chip makers and other industry members as part of the standard setting process – which had the effect of excluding alternative technologies and entrenching Qualcomm’s technologies as part of the communications standards;
- (b) agreements with other chip makers not to supply ... OEMs who have not licensed Qualcomm’s technology; and
- (c) an agreement with Apple to not use alternative 4G technology and publicly endorse Qualcomm’s preferred technology.

[45] The FANOCC is not a model pleading. It sets out the elements of each asserted cause of action but does not provide a concise statement of the material facts to support each claim. Rather, material facts are lumped together or interspersed throughout the pleading. As discussed above, however, deficiencies in drafting, for all that they may render more vexing the task for the reviewing judge, do not in themselves mean that a claim cannot succeed under the certification test in s. 4(1)(a) of the *Class Proceedings Act*. The question at this stage of the appeal is whether there are sufficient material facts, addressing the elements of each cause of action, to permit the claim to proceed.

[46] In oral argument, counsel for the respondents pointed to the following passages of the FANOCC in particular as containing the material facts on which they rely. First, the alleged agreements are described at para. 6 as “Qualcomm’s misconduct”:

- (a) agreeing on cellular communications standards with other Modem Chip suppliers that gave Qualcomm market power in the Modem Chip and SEP markets, including with among others: Ericsson, MediaTek, Intel, Samsung and Broadcom;

- (b) agreeing on cellular communication standards with other SEP Holders that gave Qualcomm market power in the Modem Chip and SEP markets, including with among others: Qualcomm, InterDigital, Samsung, Nokia, Ericsson, LG, Huawei, Blackberry, Motorola, Apple, NEC, and Panasonic;
- (c) agreeing on cellular communication standards with other participants in the standard setting process giving Qualcomm market power in the Modem Chip and SEP markets;
- (d) after acquiring market power in the Modem Chip and SEP markets, entering into non-FRAND compliant licensing agreements with OEMs;
- (e) after acquiring market power in the Modem Chip and SEP markets, withholding Modem Chips from OEMs unless they agree to simultaneously license SEPs and other patents from Qualcomm on non-FRAND terms;
- (f) entering into agreements with OEMs that require royalties to be paid to Qualcomm on Modem Chips supplied by other Modern Chip suppliers;
- (g) entering into agreements with OEMs that imposed non-litigation and non-cooperation clauses on these OEMs and others to circumvent FRAND compliant licensing terms;
- (h) entering into agreements with other Modem Chip suppliers that imposed non-FRAND compliant licensing agreements on those suppliers or refusing to provide licenses to its competitors at all; and
- (i) entering into agreements with Apple to purchase Modem Chips exclusively from Qualcomm.

[47] There is detail provided with respect to the alleged agreement with Apple regarding the adoption of LTE technology:

69. In a 2007 contractual agreement with Apple, Qualcomm conditioned partial SEP royalty relief in exchange for Apple's agreement that it would not market wireless devices that were WiMAX compatible. Given Apple's uniquely important position in the smartphone and tablet markets, Apple's agreement to renounce WiMAX helped ensure the widespread adoption of LTE for which Qualcomm had a much higher percentage of SEPs. This agreement assisted Qualcomm's acquisition of market power in the premium-LTE market by ensuring that there would be no threat to Qualcomm's market power in the form of a competing alternative standard.

...

76. In 2005, two years prior to the launch of the iPhone, Apple reached out to potential Modem Chip suppliers, including Qualcomm. Qualcomm advised Apple of its practice of requiring OEMs to purchase a license prior to providing any samples. Qualcomm also advised Apple of its requirement for Apple to cross-license its patents. Apple proposed a 5% royalty rate based on the Modem Chip price (\$1.50 per Modem Chip). Qualcomm was able to use its market power to extract a royalty rate of \$7.50, based on the value of the Cellular Device. As part of the agreement (entered into in 2007), Apple was required to publicly renounce with WiMAX, a competing cellular standard supported by Intel (see paragraph 69 above).

[48] The FANOCC also describes exclusive dealing agreements with Apple and other OEMs (LG, Samsung, Huawei, Motorola and Blackberry) that lowered royalty rates, which are alleged to have resulted from Qualcomm's acquisition of market power.

[49] Particulars of "Qualcomm's misconduct" asserted to support all the claims are set out at para. 123:

- (a) Qualcomm entered into horizontal agreements, including with other Modem Chip suppliers and other SEP Holders, and vertical agreements with participants in the standard setting process to have Qualcomm's patented technology included in cellular communication standards;
- (b) Qualcomm entered into agreements with others, including Modem Chip suppliers and OEMs, to preclude the adoption of an alternative to the LTE standard;
- (c) Qualcomm and OEMs entered into agreements that discriminate against other Modem Chip manufacturers, limiting competition;
- (d) Qualcomm and others, including OEMs, Modem Chip suppliers and other SEP Holders, entered into agreements, that unreasonably inflate Modem Chip prices and SEP licensing royalties;
- (e) Qualcomm entered into agreements with OEMs to exclusively purchase Modem Chips from Qualcomm, lessening competition;
- (f) after reaching agreements that gave it market power, Qualcomm refused to license FRAND encumbered SEPs and/or licensed SEPs on non-FRAND terms and conditions;
- (g) after reaching agreements that gave it market power, Qualcomm collected royalties at collusive, artificially inflated, and supra-competitive prices;
- (h) after reaching agreements that gave it market power, Qualcomm and others, including OEMs and Modem Chip suppliers, entered into non-FRAND licensing agreements;
- (i) Qualcomm leveraged its entire patent portfolio to charge non-FRAND royalty rates;
- (j) after reaching agreements that gave it market power, Qualcomm required OEMs to agree to non-FRAND licensing terms in order to be supplied Qualcomm Modem Chips;
- (k) Qualcomm, OEMs, and other Modem Chip suppliers entered into agreements that Qualcomm was aware, or ought to have been aware, would prevent or lessen competition;
- (l) the conduct described in paragraphs 6 [cited above], 124 to 136; and
- (m) Qualcomm refused to supply Modem Chips or enter into licensing agreements with OEMs unless non-litigation and non-regulatory co-operation terms were accepted.

[50] Paragraphs 124 to 136 set out the causes of actions under the *Competition Act*, in civil conspiracy, the unlawful means tort, and unjust enrichment.

Contraventions of the *Competition Act*

[51] Section 36(1) of the *Competition Act* creates a right of civil action for persons who have suffered loss or damage as a result of conduct that is contrary to any provision in Part VI. The respondents rely on the now-repealed s. 61 (price maintenance), the former and current versions of s. 45 (conspiracies), and s. 46 (breaching s. 45 by implementing foreign directives), each of which is (or was) contained in Part VI of the *Act*.

Section 61

[52] Until March 11, 2009, s. 61 of the *Competition Act* created a civilly actionable offence of price maintenance. In the current version of the *Competition Act*, s. 61 has been replaced with s. 76, which falls outside Part VI and is therefore not actionable under s. 36. The former s. 61 provided in part:

61 (1) No person who is engaged in the business of producing or supplying a product, ... who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

[53] The FANOCC alleges:

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

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

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

[54] In *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corporation*, 96 O.R. (3d) 252, aff'd 2010 ONCA 466, leave to appeal to SCC ref'd, 33865 (3 February 2011) [*Quizno's-Canada*], the Ontario Divisional Court held that price maintenance occurs "where there is an attempt to influence prices upwards, thereby exposing purchasers to loss": at para. 54. It described (at para. 55) three constituent elements, which were relied on by the chambers judge at para. 141 of his reasons:

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

[55] The chambers judge considered the FANOCC to allege that Qualcomm breached s. 61 by (1) engaging in the business of supplying modem chips and licenses to related technology, (2) attempting to upwardly influence the price of modem chips and royalty rates, and (3) entering into agreements with others in the standard-setting process to acquire the market power to do so: at para. 142. He found that the FANOCC provided particulars of "a number of horizontal and vertical agreements that could have ultimately resulted in enhanced prices of cellular devices", which included licensing agreements with OEMs, non-assert agreements with competitor chip makers and the 2007 agreement with Apple regarding the adoption of LTE technology: at para. 145.

[56] Qualcomm submits the judge erred in not dismissing the s. 61 claim because the FANOCC does not clearly specify which of the many commercial agreements described violate s. 61 and no conduct is pleaded that would constitute a deliberate effort to increase the prices that others charge their customers. Qualcomm relies on *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib. 10 [*Visa*], a decision of the Competition Tribunal, which held that the "influencing upward" condition in the current s. 76

... must mean something other than the consequences that flow from a company's exercise of market power which results in adverse effects on competition in the form of an increase in prices in the downstream market.

[57] The respondents contend that a deliberate effort to increase prices is not required. They rely on *Quizno's-Canada*, which held that a specific intent to restrict

or maintain prices is not required under s. 61(1), rather “it suffices that the supplier intentionally engaged in proscribed behaviour which had the effect or would have the effect of maintaining prices”: at para. 53.

[58] It is not necessary to resolve the question of intent under s. 61 in the context of determining the sufficiency of the pleadings. Regardless of the intent required, I see no error in the judge’s conclusion that it was not plain and obvious that the claim under s. 61 disclosed no reasonable cause of action. The FANOCC, as noted above, does plead that Qualcomm intended that the all-in price of cellular devices would be increased, and intended to extract supra-competitive profits from that increase in price. Furthermore, while there is some basis for Qualcomm’s concern that the FANOCC does not specifically identify which of many agreements the respondents rely on to ground their claim under s. 61, this is, in my view, the consequence of poorly drafted pleadings. In respect of this claim, the error does not rise to the level of failing to plead material facts capable of satisfying all the elements.

[59] I would therefore not accede to this ground of appeal.

Section 45

[60] Qualcomm’s complaint is that the pleadings do not allege agreements that are capable of constituting conspiracies under either the former and current s. 45 of the *Competition Act* because there is no allegation of a common purpose with other parties to unduly limit competition or otherwise do one of the prohibited things set out in these provisions. Qualcomm submits that a common purpose to do some unlawful thing is the essence of conspiracy; without so much as a pleading of common purpose, let alone substantiating material facts, the respondents’ allegations of conspiracy—both under the *Competition Act* and at common law—are baseless.

[61] With respect to the specific agreements that the FANOCC alleges to be conspiracies, Qualcomm submits its participation in the standard-setting process itself is not an actionable conspiracy, given that standardization of cellular technologies is a lawful activity that fosters innovation and is inherently pro-competitive. It says the FANOCC alleges nothing more than Qualcomm’s bare participation in this process and fails to link Qualcomm’s actions to any of the

prohibited purposes identified in s. 45. It says the allegations regarding Apple are not a s. 45 conspiracy, as they amount only to exclusive dealing (a non-criminal reviewable trade practice), and do not plead material facts to support the allegation that Qualcomm and Apple made the agreement for the purpose of doing anything prohibited by s. 45.

[62] Qualcomm submits that the allegations with respect to the other types of agreements amount to, at most, a unilateral imposition of unfavourable terms by Qualcomm on those who wish to use its technology. It points out that the alleged co-conspirators are parties who would have been harmed by the conspiracy—competitor chip makers and its OEM customers—and thus it is inherently implausible that these parties would have a common objective to injure their own business interests. In short, Qualcomm says that even if these agreements had upward effects on the prices of licenses or modem chips, this does not make them conspiratorial agreements with a common objective to injure competition.

[63] The respondents say the FANOC provides sufficient material facts as to the nature of the alleged anti-competitive agreements, the circumstances giving rise to those agreements, and the participants in those agreements. They say these material facts are sufficient to support the elements of the s. 45 offences, including the subjective and objective fault elements. They recognize that Qualcomm may have engaged in impermissible abuse of dominance that is not actionable but submit that a claim in conspiracy is not foreclosed.

[64] The chambers judge addressed the causes of action under the former and current s. 45 together and concluded that the claims of the respondents can form a cause of action based on a breach of both versions. In doing so, he rolled together the pleadings issue and the summary judgment application, as demonstrated in the bolded passages below:

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

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

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

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

[Underline emphasis in original; bold emphasis added.]

[65] As noted above, the judge's approach mirrored the way the case was argued before him. While he erred in failing to separate the applications in his analysis under s. 4(1)(a) of the *Class Proceedings Act*, it is clear that he was well aware of the different tests applicable to applications to strike pleadings and for summary judgment. In assessing the pleadings under s. 4(1)(a), the judge understood that the court is to assume that the facts stated in the claim "as they stand or as they may be amended" can be proven and the test is whether it is plain and obvious that the claim discloses no reasonable cause of action: at para. 102. He understood that summary judgment "engages but does not assume the character of a summary trial" and such an application is an assertion that the claim "is factually without merit": at para. 252. He also found the pleadings analysis to be more properly considered on an application to strike under Rule 9-5: at para. 257.

[66] That said, the judge erred in his analysis of the pleadings by considering evidence. It is therefore necessary to assess the sufficiency of the pleadings themselves.

The former s. 45

[67] Prior to March 11, 2010, s. 45(1) of the *Competition Act* created an offence for engaging in conspiracies in restraint of trade:

45 (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

[68] To establish that a conspiracy, combination, agreement or arrangement was in contravention of s. 45(1), ss. 45(2) and (2.2) provided:

(2) ... it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

...

(2.2) ... it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

[69] The respondents rely on s. 45(a), (c) and (d), alleging in the FANOC (at para. 125) that Qualcomm engaged in a conspiracy, combination and agreement with others, including OEMs, SEP holders and other Modem Chip suppliers to:

- unduly limit the production, manufacture, or supply of Modem Chips;
- prevent, limit or lessen, unduly, competition in the production, manufacture, purchase, sale, or supply in the Modem Chip market; and/or
- otherwise restrain or injure competition in the Modem Chip market unduly.

[70] Section 45(3) provided several defences to a charge under s. 45(1), including “the defining of product standards” (s. 45(3)(b)). However, under s. 45(4), that defence did not apply if the conspiracy lessened or was likely to lessen competition unduly in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution, or if the conspiracy restricted or was likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

[71] Finally, under s. 45(8), the offence in s. 45(1) did not apply to a conspiracy, combination, agreement or arrangement among affiliate companies.

[72] In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 [*Nova Scotia*], the Supreme Court of Canada considered the offence under s. 32(1)(c) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (which had become the former s. 45(1)(c) of the *Competition Act* at the time of that appeal). At issue was whether s. 45(1)(c) infringed s. 7 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, because of vagueness arising from the use of the word “unduly” or the *mens rea* required by the offence. Justice Gonthier, for the Court, concluded that the section did not infringe s. 7. His analysis included some historical review of competition legislation in Canada, which is helpful to ground an understanding of where the former s. 45 was situated at the time it was in force.

[73] First, the Court noted that the *Competition Act* was central to Canadian public policy in the economic sector and s. 45 was itself “one of the pillars” of the *Act*. The following statement of the purpose of the *Act*, from *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] 1 S.C.R. 641, was considered apt:

... The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.

[74] Second, the Court made several observations particular to conspiracies in restraint of trade contrary to s. 45(1)(c). It held that (1) s. 45(1)(c) remained “at the core of the criminal part of the *Act*” and was “the epitome of competition law”: at 649; (2) competition is presumed by the *Competition Act* to be in the public interest and the only issue is whether an agreement impairs competition to the extent that it will attract liability: at 650; and (3) s. 45(1)(c) lies on a continuum between a *per se* rule (which attaches consequences to precisely-defined acts irrespective of the circumstances) and a “rule of reason” (which is more general and invites in-depth inquiry into the circumstances), as it allows for discussion of the anti-competitive effects of an agreement but does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement: at 650. (These two paradigms of adjudication—the *per se* rule and the rule of reason—were

developed in American antitrust law and are applied under the *Sherman Act: Nova Scotia* at 650.)

[75] The respondents rely heavily on *Nova Scotia*'s statement of the elements that must be proven under s. 45. However, the Court's analysis focused on the use of the word "unduly" in the language of the former s. 45 and the *mens rea* requirement in the context of s. 7 of the *Charter*. There is no suggestion that the FANOCC fails to plead that the effects of the alleged conspiracies on competition were "undue" within the meaning of the former s. 45.

[76] Nor is there any dispute about the *mens rea* requirement. In *Nova Scotia*, the Court, relying on ss. 45(1)(c), (2) and (2.2), described (at 660) both a subjective and objective fault element:

To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.

In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly. ... Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the *actus reus* that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

[Emphasis added.]

[77] In *Watson*, Justice Saunders, for the Court, expressly defined both the *actus reus* and the *mens rea* of the offence under the former s. 45 of the *Competition Act*, relying on *Nova Scotia* for the *mens rea* element:

[73] For the purposes of this case, the *actus reus* elements of former s. 45 are:

- i) the defendant conspired, combined, agreed, or arranged with another person; and
- ii) the agreement was to enhance unreasonably the price of a product, to lessen unduly the supply of a product, or to otherwise restrain or injure competition unduly.

[74] The *mens rea* element of former s. 45 as defined in [*Nova Scotia*] requires:

- i) the defendant had a subjective intention to agree and was aware of the agreement's terms; and
- ii) the defendant had the required objective intention, that is, a reasonable business person would or should be aware that the likely effect of the agreement would be to lessen competition unduly.

[78] These decisions demonstrate that the elements of this offence are predicated on the existence of an agreement between at least two parties to do something that is prohibited by s. 45(1)—the *actus reus* of the offence. All of the words “conspires, combines, agrees or arranges” as used in s. 45(1) connote a meeting of the minds or a mutual understanding: *Watson* at para. 77. In *Shah v. LG Chem, Ltd.*, 2018 ONCA 819, the Ontario Court of Appeal similarly described the essence of a conspiracy under this provision as “an agreement—a meeting of the minds—to do one of the things enumerated in that provision”: at para. 49. Both of these decisions were cited by the Supreme Court of Canada in *Pioneer Corp.* at para. 75.

[79] As I understand the respondents' argument, they contend, following *Nova Scotia*, that the offence under s. 45 requires a pleading of only an intention to enter into an agreement with knowledge of the terms and knowledge that the likely effect of the agreement would lessen competition. But it is not enough to plead only the *mens rea* of the offence. This ignores the *actus reus*, the agreement to do one of the prohibited acts—in other words, a common unlawful purpose. This is precisely Qualcomm's contention, that none of the agreements identified in the FANOCOC can constitute conspiracies.

[80] The criminal offence of conspiracy was described by Justice Dickson (as he then was) in *Papalia v. The Queen*, [1979] 2 S.C.R. 256 [*Papalia*]:

The word “conspire” derives from two Latin words, “con” and “spirare”, meaning “to breathe together”. To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence ... The *actus reus* is the fact of agreement... The agreement reached by the co-conspirators may contemplate a number of acts or offences... The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. In *R. v. Meyrick and Ribuffi*, at p. 102 the question asked was whether “the acts of the accused were done in

pursuance of a criminal purpose held in common between them” and in 11 Halsbury (4th ed.), at p. 44 it is said:

It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose.

There must be evidence beyond a reasonable doubt that the alleged conspirators acted in concert in pursuit of a common goal.

[Emphasis added.]

[81] This has been undisputed in the caselaw for decades. Since *Papalia*, there has been “consensus as to the essential elements of the offence of conspiracy”, including “an agreement between co-conspirators to bring about, as a common objective, an unlawful or criminal design”: *Sappier v. R.*, 2017 NBCA 34 at para. 15, citing *Papalia* and *United States of America v. Dynar*, [1997] 2 S.C.R. 462 at paras. 86–88 [*Dynar*].

[82] As I read *Nova Scotia*, the Court simply clarifies the way in which the Crown must prove the mental element of the offence under s. 45. Nothing in that decision changes the *nature of the agreement* which must be proven. As Dickson J. held in *Papalia*, “[o]n a charge of conspiracy the agreement itself is the gist of the offence”: at 276. The essence of the *actus reus* of conspiracy is an agreement between the co-conspirators to effect some common purpose or design: *Dynar* at paras. 86–87.

[83] This common unlawful purpose is what distinguishes the conspiracy provisions of the *Competition Act* from the abuse of dominance provisions. I agree with the chambers judge and the respondents that, simply because a set of facts could support a finding of abuse of dominance, it does not follow that those same facts cannot support a finding of conspiracy. This does not, however, obviate the need for careful analysis of the pleadings. Merely pleading facts suggestive of unilateral abuse of dominance along with various commercial agreements is not sufficient to establish that a conspiracy has taken place. Agreeing, without more, is not conspiracy: simply because a company has a contract with Qualcomm that may have some negative impact on competition does not mean that the company has *conspired* with Qualcomm to damage competition. More is required. The question, then, is whether there is anything in the pleadings that can supply that missing element.

[84] The chambers judge referred to the principles applicable to the offence under the former s. 45(1), stemming from *Nova Scotia*. He recognized that s. 45 prohibited conspiracies that unduly limited competition and required both subjective and objective fault elements. He also recognized that the structure of the market and the behaviour of the parties formed part of the inquiry into determining if an agreement has unduly lessened competition. He concluded (at para. 116) that a plaintiff must establish three things:

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

[85] He also recognized that s. 45(3) provided a defence in respect of conspiracies, agreements or arrangements that relate to the defining of product standards, except where the circumstances in s. 45(4) applied.

[86] The judge considered the pleadings to rely on the following agreements alleged to unduly prevent or limit competition under the former s. 45 (at para. 119):

- a) As part of the standard-setting process, Qualcomm entered into horizontal and vertical agreements with industry participants, including rival modem chip suppliers (such as Ericsson, MediaTek, Intel, Samsung, LG, Broadcom, and VIA Telecom), other SEP holders, OEMs and cellular service providers to have its patented technology included in cellular communication standards, to the exclusion of alternative technology. Qualcomm entered into these agreements with the intention of using the acquired market power to charge supra-competitive modem chip prices and SEP royalties. These agreements allowed Qualcomm to acquire and maintain market power. Qualcomm then leveraged this market power to engage in a course of anti-competitive conduct and impose supra-competitive modem chip prices and SEP royalties.
- b) Qualcomm entered into agreements with others, including modem chip suppliers and OEMs, to prevent alternatives to the LTE standard from being widely adopted. For example, Qualcomm entered into an agreement with Apple, whereby Apple was required to renounce the WiMAX standard. This helped to ensure the widespread adoption of LTE technology.

- c) Qualcomm, its competitors and OEMs entered into the following agreements that unduly lessened competition:
 - (i) Qualcomm and other modem chip makers entered into agreements, whereby the modem chip makers agreed to sell modem chips only to OEMs who had a license agreement in place with Qualcomm. This enabled Qualcomm to enforce its “no license, no chip” policy. This policy resulted in OEMs paying supra-competitive royalty rates to Qualcomm, as there was no alternative means of accessing the technology that was essential to the standard.
 - (ii) As part of the agreements referenced above, modem chip makers were required to comply with onerous reporting obligations, including by providing sensitive business information about their customers and volume of sales. This was an oversight mechanism to detect cheating.
 - (iii) Qualcomm and OEMs entered into agreements that required OEMs to pay a royalty to Qualcomm when they purchased modem chips from other suppliers. This operated as an industry-wide “surcharge” and removed the competitive restraint on Qualcomm’s all-in prices.
- d) Qualcomm entered into *de facto* exclusivity agreements with OEMs, whereby Qualcomm provided discounts or rebates on the purchase price of modem chips only if the OEM purchased all or nearly all modem chips from Qualcomm (typically 85-100%). The result was that Qualcomm charged higher royalty rates for modem chips purchased from a competitor. This created a strong incentive for OEMs to purchase from Qualcomm and had the effect of lessening competition.
- e) After acquiring market power through the agreements referenced in (a), Qualcomm:
 - (i) refused to license its SEPs to competitors, contrary to FRAND;
 - (ii) withheld modem chips from OEMs unless they agreed to simultaneously license SEPs from Qualcomm on non-FRAND terms;
 - (iii) entered into non-FRAND licensing agreements with OEMs; and
 - (iv) entered into licensing agreements with OEMs with non-litigation and non-regulatory co-operation terms to circumvent FRAND-compliant licensing terms.

[Emphasis added.]

[87] In my view, the judge failed to acknowledge that the *actus reus* of a conspiracy requires an agreement among the parties *to do something prohibited by s. 45(1)*. He noted the pleading that “Qualcomm was aware, or ought to have been aware, that its conduct would unduly prevent or lessen competition and cause supra-competitive prices to be paid by the Class”: at para. 120. This

pleading addresses only the *mens rea* element for Qualcomm, following *Nova Scotia*.

[88] Nevertheless, the respondents submit that a claim in conspiracy is not foreclosed. They rely on *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*], where they say similar arguments were made and rejected.

[89] I agree with the respondents that the pleadings in this case are consistent with the pleadings in *Microsoft* (so far as one can discern from the various judgments that discuss the pleadings). However, that is not a complete answer to Qualcomm's submissions. When *Microsoft* came on appeal, the issue was not the adequacy of the pleadings with respect to the element of common object. Nothing in the Court's decision in *Microsoft* precludes the conclusion that a pleading of common object is necessary to succeed on a claim under s. 45.

[90] In *Microsoft*, the plaintiffs claimed that Microsoft engaged in anti-competitive conduct that allowed it to overcharge for its Intel-compatible PC operating systems and applications software. The plaintiffs were retail consumers of computers installed with these Microsoft products and were thus indirect purchasers. The action had been certified as a class proceeding by Justice Myers: 2010 BCSC 285. Prior to that, Tysoe J. (as he then was) had ruled on applications related to the pleadings.

[91] As originally drafted, the pleadings alleged abuse of market dominance by Microsoft, contrary to Part VIII of the *Competition Act*. Justice Tysoe struck those claims on the ground that Part VIII matters fell exclusively within the jurisdiction of the Competition Tribunal: 2006 BCSC 1047 [Tysoe J. #1]. The plaintiffs sought and obtained leave to amend: 2006 BCSC 1738 [Tysoe J. #2].

[92] The amended claim retained some of the abuse of dominance language, but key paragraphs were redrafted to bring the alleged market misconduct within the scope of the former s. 45. The plaintiffs alleged that Microsoft combined with the manufacturers in a scheme to exclude competition and keep the prices higher than they should be. The pleading alleged that Microsoft "combined or agreed with others, including IAPs [internet access providers], ISVs [independent software vendors], OEMs, and Intel to prevent or lessen, unduly, competition and to

otherwise restrain or injure competition unduly” and that “Microsoft and Microsoft Canada dictated the terms of these combinations and agreements, and were aware or ought to have been aware that the effect of the agreement would be to prevent or lessen competition unduly”: see para. 29 of Tysoe J. #2. The pleadings described conduct similar to that asserted in this case; for example:

19. ... Microsoft embarked upon a campaign to prevent or lessen competition substantially and to thereby increase the price of its products in the market for Intel-compatible PC operating systems. Microsoft Canada and others actively participated in or facilitated that campaign. As a part of the campaign, Microsoft and Microsoft Canada combined or agreed with others, including IAPs, ISVs OEMs, and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. As a consequence, Microsoft has unlawfully maintained and abused its dominant position in the North American market for Intel-compatible PC operating systems and has charged supra-competitive prices.

[Underline emphasis in original.]

[93] Justice Tysoe held that he did not need to decide whether coerced association can result in a combination for the purposes of s. 45(1) and concluded that the amended pleading was consistent with the wording of s. 45(1). He did not consider it appropriate to interpret the words or determine whether the plaintiffs would be able to prove the allegation. He did not accede to an objection that the allegation was irrational because the other parties would not conspire with the defendants to drive up the prices of their products with no financial benefit to themselves, as he considered it inappropriate to speculate about the motives of the other parties. Justice Tysoe did, however, find that the pleadings did not sufficiently particularize the identity of the other parties and required the plaintiff to delete broad inclusions of unidentified parties.

[94] On appeal to this Court, the certification order was set aside and the action dismissed on the basis that indirect purchaser actions were not available as a matter of law in Canada: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186. Justice Donald, in dissent, concluded otherwise, and also found the pleadings sufficient to meet the requirement under s. 4(1)(a) of the *Class Proceedings Act*. On appeal to the Supreme Court of Canada, Justice Rothstein, for the Court, agreed with Donald J.A. that indirect purchaser actions were available. He also agreed with Tysoe J. that the pleadings disclosed a cause of action.

[95] Like Qualcomm submits here, Microsoft submitted that despite the amendments, the real claim remained a complaint against abuse of market dominance, which was within the administrative scheme of the *Competition Act*. Justice Donald rejected this exclusivity argument:

[22] I reject the contention that the amendment did not really change anything. What were Part VIII allegations are now recast as conspiracies under Part VI and actionable under s. 36 of Part IV. The jurisdiction of the court has been properly invoked and it is not ousted by the administrative scheme.

[96] Justice Rothstein agreed that s. 36 of the *Competition Act* expressly confers jurisdiction on the court to entertain such claims and held it was not plain and obvious that such a claim would be unsuccessful: at paras. 70–71. His analysis was based on the question of jurisdiction and other arguments not relevant here, rather than the sufficiency of the pleadings in relation to s. 45.

[97] In short, I do not read *Microsoft* as standing for the proposition that a common unlawful purpose does not need to be pleaded to advance a claim of conspiracy, either under s. 45 of the *Competition Act* or at common law. As discussed above, there must be material facts in the pleadings to support the bare assertion that an agreement between Qualcomm and another party was a conspiracy. Qualcomm submits that there is nothing in the pleadings that can fill that gap. I agree.

[98] The FANOCOC sets out the cause of action under the former s. 45 and asserts a conspiracy, agreement or arrangement with others to do one of the things prohibited under subsections (a), (b) and (d):

125. Contrary to s. 45 of the *Competition Act*, from at least as early as January 1, 2007 until at least March 11, 2010, Qualcomm engaged in a conspiracy, combination, and agreement with others, including OEMs, SEP Holders, and other Modern Chip suppliers, to:

(a) unduly limit the production, manufacture, or supply of Modem Chips;

(b) prevent, limit or lessen, unduly, competition in the production, manufacture, purchase, sale, or supply in the Modern Chip market; and/or,

(c) otherwise restrain or injure competition in the Modern Chip market unduly.

126. Particulars of Qualcomm's conduct includes, but is not necessarily limited to, the conduct described at paragraph 123 above.

[99] The respondents particularize this claim by alleging that Qualcomm made agreements with other participants in the standard setting process to adopt LTE technology, which gave Qualcomm market power. They identify other participants as SEP holders that include InterDigital, Samsung, Nokia, Ericsson, LG, Huawei, Blackberry, Motorola, Apple, NEC and Panasonic, and modem chip suppliers that include Ericsson, MediaTek, Samsung and Broadcom (FANOCC paras. 6(a)–(c), 123(a)–(b)).

[100] They go on to allege that Qualcomm used the market power it acquired through the standard setting process to effectively coerce OEMs to enter into licensing agreements that did not comply with Qualcomm’s FRAND commitments and imposed supra-competitive royalties (FANOCC paras. 6(d)–(e), 60–63, 123(d)–(j), (m)). They plead in para. 123(j) that Qualcomm “required OEMs to agree to non-FRAND licensing terms in order to be supplied Qualcomm Modem Chips”. The FANOCC does not identify the OEMs who entered into licensing agreements with Qualcomm, nor does it refer to any specific agreement.

[101] As noted above, there is no pleading of the *actus reus* of a common object between Qualcomm and others. The FANOCC does plead intention on the part of Qualcomm to variously injure the plaintiff class, injure competition, and extract anticompetitive profits—for example, at paras. 6–7, 50, 91, 138, and 140. However, there is no assertion of a common object on the part of any of the various named and unnamed alleged co-conspirators.

[102] The mere assertion of a legal conclusion—that Qualcomm conspired with other parties—does not transform a pleaded commercial agreement into a pleaded conspiracy. As stated plainly in *Frazier*, “the court will not infer facts from bald legal conclusions”: at para. 71. The agreements pleaded in the FANOCC could, theoretically, be conspiracies. But for all the reasons set out above, an agreement is only a conspiracy if the parties to it share a common, unlawful purpose. The pleadings provide no basis upon which that conclusion could be reached without speculation about the unknown objects of Qualcomm’s alleged co-conspirators.

[103] I am cognizant of the need to read pleadings generously and accommodate for deficiencies in drafting. I am not convinced, however, that the shortcomings here can be categorized as mere deficiencies. I agree with Qualcomm that the

respondents have attempted to repackage allegations of unilateral misconduct—abuse of dominance—as civilly actionable conspiracies. This is evident when examining the claims made against Qualcomm in other jurisdictions. While the respondents are entitled to cast their pleadings to allege conspiracy, they must at the very least support the essential elements of a conspiracy by material facts. In my view, they have failed to do so.

[104] Without a pleading going to the element of common unlawful object and without material facts to support this, it is plain and obvious that the claim under the former s. 45, as pleaded, discloses no reasonable cause of action and cannot succeed.

The current s. 45

[105] The current s. 45, in force since March 11, 2010, incorporates significant changes from the previous version. The current offence is a *per se* offence, meaning there is no “undue” or seriousness requirement; where an agreement is to restrain competition in one of three enumerated ways, the offence is made out. In addition, the conspiracy, agreement, or arrangement must be with a competitor—horizontal conspiracy, rather than vertical. The text of the current s. 45 provides:

- 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.

[106] The defence of ancillary restraints is found in s. 45(4):

- (4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if
- (a) that person establishes, on a balance of probabilities, that
 - (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
 - (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

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

[107] Consistent with the former provision, the offence in s. 45(1) does not apply where the conspiracy, agreement or arrangement is among affiliate companies: s. 45(6)(a).

[108] In *Williams v. Audible Inc.*, 2022 BCSC 834 [*Williams*], Horsman J. (as she then was) reviewed the legislative history of s. 45. She observed that the former s. 45 (as interpreted in *Nova Scotia*) was simultaneously under- and over-inclusive:

[98] ... Agreements between competitors which were not hard-core cartels, which may, in fact, bring pro-competitive benefits, risked being caught up in the criminal prohibition. At the same time, the two-step market structure-behaviour tests described in [*Nova Scotia*] made it difficult to prosecute agreements that did constitute hard-core cartel behaviour...

[109] As I understand it, the concern about the potential over-inclusivity under the former s. 45 was a concern about the breadth of the conduct prohibited, because a common object to achieve some *pro*-competitive result could have been criminalized.

[110] Justice Horsman referred to a 2002 report of a House of Commons standing committee entitled *A Plan to Modernize Canada's Competition Regime*, which proposed a two-track approach to an amendment of s. 45—the first to retain criminal conspiracies for agreements strictly devised to restrict competition through price fixing, market allocation or output restrictions, and the second to provide for civil review of other types of agreements between competitors. She also referred to a 2008 report of the Competition Policy Review Panel, which recommended that s. 45 be repealed and replaced “with a *per se* criminal offence to address hardcore cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects”: at paras. 98–99. In view of this legislative history, Horsman J. interpreted s. 45 as a provision intended to criminalize

[101] ... a narrow range of conduct – agreements between competitors to fix prices, allocate markets, or restrict output, that constitute naked restraints that can only have negative effects – and permit civil review by the Competition Tribunal of other agreements between competitors.

[111] She compared s. 45 to s. 90.1 of the *Competition Act*, which was added to the *Act* at the same time s. 45 was repealed and replaced:

[102] Section 90.1 ... provides that the Tribunal may issue orders to address an agreement or arrangement between competitors that “prevents or lessens, or is likely to prevent or lessen, competition substantially in a market”. By contrast, the conduct prohibited by s. 45 is *per se* unlawful because it is conduct that is unambiguously harmful to competition and, therefore, deserving of prosecution without a detailed inquiry into its anti-competitive effects.

[112] I would endorse Horsman J.’s interpretation of s. 45. See also *Jensen v. Samsung Electronics Co.*, 2021 FC 1185, aff’d 2023 FCA 89, leave to appeal to SCC ref’d, 40807 (11 January 2024); *Difederico v. Amazon.com, Inc.*, 2023 FC 1156 [*Difederico*].

[113] The chambers judge recognized that s. 45 created a *per se* offence that was narrowed to remove the “unduly lessen” requirement and to apply only to conspiracies between competitors (horizontal conspiracies). He also recognized that it provides an ancillary restraints defence that might apply in the context of the standard-setting process: at paras. 121–122. He did not explicitly state what he took to be the elements of the offence under the current s. 45. As I read his analysis, he understood the elements under the current s. 45 to track the elements under the former s. 45, except to the extent that they are modified by the new *per se* nature of the offence, and the new requirement of horizontality. This is similar to the approach taken by this Court in *Watson*.

[114] In *Watson*, Justice Saunders defined the elements of s. 45 in reference to the elements of the former s. 45, making changes as needed to reflect the new statutory language. Similarly, in *Shah*, the Ontario Court of Appeal noted that the *actus reus* changed slightly when s. 45 was amended but “remained focused on whether the alleged conspirator was part of an agreement and whether that agreement was to do something that is prohibited by virtue of s. 45”, and considered the *mens rea* requirement to be the same as that established in *Nova Scotia*: that “the defendant intend to agree, with *knowledge* of the terms of that agreement”, and “*objectively* intend to achieve the prohibited end” (emphasis in original): at para. 50.

[115] From these authorities, I would describe the *actus reus* elements of the current s. 45 to be (i) the defendant conspired, combined, agreed, or arranged

with a competitor in respect of a product; and (ii) the agreement was to do one of the acts set out in s. 45(1)(a), (b) or (c)—to fix prices, allocate markets, or restrict output of the product. The *mens rea* elements include the subjective intent to agree to do one of these prohibited acts and the objective intent to achieve that end.

[116] As with the former s. 45, the *actus reus* remains responsive to the underlying core requirement of conspiracy-based offences or torts, namely that the conspirators share a common object. This is clear from the statutory language: the parties must agree *to* fix prices, allocate markets, or control supply, etc. Thus, at a bare minimum, a proper pleading under the current s. 45 must provide that the parties to the alleged conspiracies had a common purpose of achieving one of these prohibited ends. This is what makes the activities prohibited under s. 45 “*per se* unlawful” and “unambiguously harmful to competition”: *Williams* at para. 102. Furthermore, material facts must be pleaded that support this common object and provide at least some basis upon which to conclude that it is not plain and obvious the claim cannot succeed. In *Difederico*, Crampton C.J. described a proper pleading of the *actus reus* or requisite “act of agreement” under s. 45 as providing material facts

[40] ... with respect to either (i) two way communications concerning one or more of the matters described in paragraphs 45(1)(a)-(c), or (ii) a communication from one party followed by a course of conduct from which a meeting of the minds or a concerted purpose can be inferred...

[117] The chambers judge considered the pleadings to rely on agreements Qualcomm entered into with competitor modem chip suppliers (a) to preclude the adoption of alternative LTE standards, and (b) whereby the modem chip suppliers were only permitted to sell modem chips to OEMs who had a license agreement with Qualcomm: at para. 124.

[118] The FANOCC sets out the cause of action under s. 45, alleging in para. 128 that Qualcomm “conspired, agreed or arranged with Modem Chip suppliers and SEP holders” to:

- (a) fix, maintain, increase or control the price for the supply of Modem Chips; and/or
- (b) fix, maintain, control, prevent, lessen or eliminate the production or supply of Modem Chips.

[119] Beyond this conclusory statement of the statutory language of the offence, the FANOCOC purports to provide particulars of this allegation at para. 129:

- (a) Qualcomm entered into horizontal agreements, including with Modem Chip suppliers and SEP Holders, to have Qualcomm's patented technology included in cellular communication standards;
- (b) Qualcomm entered into horizontal agreements with others, including Modem Chip suppliers and SEP Holders, to unreasonably inflate SEP Royalties and Modem Chip prices;
- (c) Qualcomm and Modem Chip suppliers, entered into non-FRAND licensing agreements;
- (d) collecting royalties at collusive, artificially inflated, and supra-competitive prices; and/or
- (e) other conduct described herein.

[120] The essence of the claim under s. 45 as I understand it is that Qualcomm refused to issue licenses for their SEPs to competitor modem chip suppliers (contrary to FRAND commitments) and instead imposed non-assert agreements with their competitors that limited who they could sell to—i.e., OEMs with a Qualcomm license. This practice, it is alleged, restricted the supply of modem chips and also required competitors to comply with onerous reporting conditions: paras. 6(h), 52–53.

[121] There was some discussion in oral argument about the novel nature of these claims, involving as they do, by the respondents' own admission, so-called "coerced co-conspirators". It is unnecessary to answer here the question of whether conspiracies may be made out against parties whose cooperation is coerced. While each party's motive to enter into a conspiratorial agreement need not be the same, the pleadings must allege a common object among the conspirators beyond repeating only the bare statutory language of the offence, and this allegation must be supported by material facts.

[122] The claims under the current s. 45 are even more plainly unsupportable on the material facts pleaded. The current s. 45 aims to target "hardcore cartel" behaviour which is *per se* unlawful and "unambiguously harmful". The agreements pleaded as material facts on which the allegations under the current s. 45 rest are not express agreements to fix prices, allocate markets, or restrict supply. The pleadings suggest that the *effect* of some of these agreements would be to "inflate" prices, but do not say that this end was the common purpose of the

contracting parties. The potential anticompetitive effects of agreements such as these are why they may constitute abuse of dominance. The essential element of *conspiracy*, however, is absent from the pleadings.

[123] For substantially the same reasons set out above in respect of the claims under the former s. 45, it is plain and obvious that the FANOCOC discloses no reasonable cause of action under the current s. 45.

Section 46

[124] Section 46 of the *Competition Act* provides:

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.

[125] In short, s. 46 makes it an offence for a corporation carrying on business in Canada to implement a directive from a controlling company that gives effect in Canada to a foreign conspiracy or agreement which would, if entered into in Canada, contravene s. 45. The Canadian defendant need not have any knowledge of the conspiracy to be liable.

[126] In the FANOCOC, it is alleged that Qualcomm Canada breached s. 46 of the *Competition Act* by carrying on business in Canada and implementing directives, instructions, policies or communications from Qualcomm Incorporated to give effect to breaches of s. 45 of the *Competition Act*:

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

[127] The chambers judge held that the claim under s. 46 was “merely a subset of the larger s. 45 claim, and a vehicle through which recourse can be sought specifically against the Canadian subsidiary”: at para. 137. In this, I agree. The claims under s. 46 succeed or fail with the claims under s. 45.

[128] Since the chambers judge had found that the pleadings disclosed a reasonable cause of action under s. 45, he concluded it was not plain and obvious that the claim under s. 46 disclosed no reasonable cause of action. In light of my conclusions above, I take the opposite view. Having failed to plead a reasonable cause of action under s. 45, it is plain and obvious that the claim under s. 46 cannot succeed.

Civil conspiracy

[129] In addition to the claims under ss. 45 and 46 of the *Competition Act*, the pleadings make claims against Qualcomm under the common law tort of civil conspiracy. Qualcomm submits that the chambers judge erred in law in his analysis of this pleading for the same reasons he erred in his analysis of s. 45—because the respondents failed to plead material facts identifying a conspiratorial agreement.

The tort of conspiracy

[130] The tort of conspiracy differs from the crime of conspiracy in that the gist of the tort is not the agreement but the carrying out of an agreement that causes damage to the plaintiff. In *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 [*Cement LaFarge*] at 471–472, Justice Estey held that the law of tort recognizes an action against two or more defendants acting in combination as the tort of conspiracy if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue.

In both situations, however, there must be actual damage suffered by the plaintiff.

[131] The first type of conspiracy is known as predominant purpose conspiracy and the second as unlawful means conspiracy: see *Microsoft* at paras. 74, 80.

[132] These two sub-categories of tortious conspiracy are, in effect, alternate pathways to the same result. A common object or purpose on the part of the alleged co-conspirators is an essential element of the tort of civil conspiracy, whether pursued by way of predominant purpose conspiracy, unlawful means conspiracy, or both. In light of my conclusions on the claims under s. 45 of the *Competition Act*, it should not be surprising, then, that I do not agree with the chambers judge's assessment of the pleadings with respect to these claims in civil conspiracy. However, it is important to discuss the elements of each pleaded tort to explain why it is plain and obvious that the claims with respect to each cannot succeed.

[133] Predominant purpose conspiracy is made out where two or more parties agree to do some act (lawful or unlawful) with the predominant purpose of injuring the plaintiff, and the parties' conduct in carrying out that agreement causes damage to the plaintiff. Where lawful means are used, the end itself, being injury to the plaintiff, renders the lawful act unlawful: *Microsoft* at para. 74. Although a conspiracy between or among affiliate companies is not actionable under s. 45 of the *Competition Act*, there are authorities that have left open a cause of action in predominant purpose conspiracy between affiliated companies: *Microsoft* at para. 79.

[134] Unlawful means conspiracy does not require a predominant purpose but does require that unlawful conduct be directed toward the plaintiff knowing that injury to the plaintiff is likely to result, and injury to the plaintiff in fact occurs: *Microsoft* at para. 80. The wrongfulness of the conspiratorial conduct is supplied by the unlawfulness of the means chosen to bring the common purpose to fruition. The unlawful conduct element of the tort can, as pleaded here, be satisfied by a breach of a statute: see *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 [*Bram*] at para. 67.

The pleadings

[135] Both types of civil conspiracy are pleaded in the FANOC:

132. Qualcomm Incorporated, Qualcomm Canada Inc., Qualcomm Technologies, Inc., Qualcomm Canada Inc., Qualcomm CDMA Technologies Asia Pacific Pte. Ltd, OEMs, participants in the standard setting process, and others have engaged in a civil conspiracy—both an unlawful means conspiracy and predominant purpose conspiracy.

133. During and prior to the Class Period, at times and places some of which are unknown to the Plaintiffs and the Class, Qualcomm, participants in the standard setting process, and others wrongfully and unlawfully conspired and agreed with one another, as described above.

134. Qualcomm Incorporated, Qualcomm Technologies, Inc., Qualcomm CDMA Technologies Asia Pacific Pte. Ltd., Qualcomm Canada Inc., participants in the standard setting process and other unnamed co-conspirators were motivated to conspire. Their predominant purpose and concern was to harm the Plaintiffs and Class by requiring them to pay artificially inflated prices for Cellular Devices and to illegally increase their profits on the sale thereof.

135. The Defendants' conduct, participants in the standard setting process, and the conduct of other unnamed co-conspirators' conduct particularized herein were prohibited, unlawful, and illegal acts, including:

- (a) an unlawful restraint of trade at common law and equity;
- (b) an offence related to competition contrary to s. 61 of the *Competition Act* as it existed prior to March 11, 2009, s. 45 of the *Competition Act* as it existed prior to March 11, 2010, and contrary to s. 45 of the *Competition Act*;
- (c) an offence contrary to s. 1 of the *Sherman Act*, CH 647, 26 Stat. 209, 15 U.S.C, and the applicable U.S. state competition laws;
- (d) an offence contrary to the *OMA* and *UK Monopolies Act*;
- (e) a breach of Qualcomm's FRAND contractual undertakings;
- (f) an offence contrary to Article 101 of the *Treaty on the Functioning of the European Union*, OJ No. C 326/47; and,
- (g) illegal acts contrary to the competition laws of South Korea, Japan, China, and Taiwan among others.

136. The acts described above were unlawful acts directed towards purchasers of Modem Chips and Cellular Devices, including the Plaintiffs and Class, which unlawful acts Qualcomm Incorporated, Qualcomm Technologies, Inc., Qualcomm CDMA Technologies Asia Pacific Pte. Ltd., Qualcomm Canada Inc. knew in the circumstances would cause injury to the Plaintiffs and Class. These unlawful acts did cause injury to the Plaintiffs and Class.

137. Qualcomm's conduct in combination with others constitutes a tortious conspiracy to injure the Plaintiffs and other Class Members and renders the Defendants liable to pay the resulting damages.

[Emphasis added.]

[136] The allegations at paras. 132 and 133 are bare pleadings of conspiracy, particularized only by reference to Qualcomm, “participants in the standard setting process and others” conspiring “as described above”. As reviewed in my analysis of s. 45, there are no material facts pleaded that support this bare allegation of conspiracy. Moreover, para. 134 alleges only that the Qualcomm entities and other un-named co-conspirators “were motivated to conspire” with the predominant purpose to harm the plaintiffs, and para. 136 alleges only that the Qualcomm entities knew the unlawful acts would cause injury to the plaintiffs, with no pleading of knowledge on the part of any other party. Paragraph 137 pleads only a bald statement that Qualcomm’s conduct “in combination with others” constitutes a conspiracy. Again, no material facts are pleaded to support a conspiracy among Qualcomm entities and others.

[137] As I explain below, it is my view that the chambers judge articulated the correct legal principles but failed to apply those principles in his assessment of the pleading in civil conspiracy.

Predominant purpose conspiracy

[138] The chambers judge drew on *Microsoft, Watson and Golden Capital Securities Limited v. Rempel*, 2004 BCCA 565 [*Golden Capital*] in correctly articulating the elements of predominant purpose conspiracy:

[164] A predominant purpose conspiracy is made out where: (a) two or more persons combine or conspire to carry out a common design or a means of achieving a common objective; (b) the predominant purpose is to cause injury to the plaintiff (using either lawful or unlawful means); and (c) the plaintiff does in fact suffer loss caused by the conduct ...

[139] He recognized that a plaintiff must establish the existence of an agreement; that “mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to co-operate, is not enough to constitute one a party to a conspiracy”; and instead, there must be “intentional participation in the transaction with a view to the furtherance of the common design and purpose”: at para. 167, citing *Saskatchewan Farm and Land Company v. Smith et. al.*, [1923] 1 W.W.R. 1179 (S.K.K.B.) at para. 1. He noted, however, that this form of the tort “does not require an agreement in a formal contractual sense”, citing para. 47 of *Golden Capital*: at para. 167.

[140] The judge recognized the possibility (arising from *Microsoft*) that a cause of action in predominant purpose conspiracy may occur between affiliated entities. He rejected Qualcomm's argument that more specificity was required to support the allegations of individual Qualcomm entities conspiring with each other. He found the claim was sufficiently pleaded, reasoning as follows:

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

[141] The respondents seek to sustain the pleading in predominant purpose conspiracy on the basis that it clearly alleges that Qualcomm's conduct was directed at consumers. In my view, this submission focuses on only one element of the tort and fails to recognize that the predominant purpose must be in combination with others. The judge fell into the same error in this brief analysis by focusing only on the element of predominant purpose to injure the plaintiff and ignoring the critical element of an agreement in the sense of having combined with others to carry out a common design. This point was emphasized in *Golden Capital*, where Justice Lowry articulated the difference between an agreement "in a contractual sense" and an agreement constituting a conspiracy:

[47] Thus, to prove a case in conspiracy, it is first necessary to plainly establish, directly or by inference, that there was an agreement between the defendant and one or more others. That does not mean an agreement in the contractual sense. A defendant must be shown to have agreed in the sense of having combined or conspired with one or more others to carry out a common design or a means of achieving a common objective, which is then implemented with resulting injury to the plaintiff.

[Emphasis added.]

[142] All of the agreements pleaded in the FANOCC are agreements in the contractual sense, not in the sense of a conspiracy or combination, and no material facts are pleaded to support the element of common design or object among parties other than Qualcomm.

[143] As for the pleading of predominant purpose conspiracy among only Qualcomm entities, the legal question is unsettled, and this cause of action remains available. However, pleading a civil conspiracy among affiliated entities requires, at a minimum, some material facts relating to the nature of the conspiratorial agreement and how the entities operate among themselves, at least insofar as the plaintiffs have knowledge of the opposing parties' corporate structures. It is not sufficient to simply allege conspiracy among affiliated entities and leave it to the court to infer a factual basis for the allegation. There is no pleading of material facts to support the allegation that the Qualcomm entities conspired amongst themselves.

Unlawful means conspiracy

[144] The chambers judge also correctly articulated the elements of unlawful means conspiracy to require (a) the unlawful conduct be directed toward the plaintiff, (b) the defendant know that injury to the plaintiff is likely to result, and (c) injury to the plaintiff does in fact occur: at para. 171. He recognized that the unlawful means component can be satisfied by breaches of statute, and the intent requires a clear expectation that injury to the plaintiff will occur: at paras. 172–173.

[145] In finding this claim to be sufficiently pleaded, the judge referred to the pleadings reproduced above, as well as evidence adduced by the respondents in support of their claim that overcharges were passed on to end consumers of cellular devices and Qualcomm knew that such overcharges were typically passed on to end consumers: at paras. 174–175.

[146] The respondents submit that the unlawful means conspiracy is sustainable because it properly pleads breaches of ss. 45 and 46 of the *Competition Act*, other forms of restraint of trade and breach of contract (being Qualcomm's breach of its FRAND obligations). They also refer to evidence they say shows that Qualcomm in fact breached its FRAND obligations.

[147] I cannot accept the respondents' submission, because it again fails to recognize that the unlawful means must also involve a combination—that is, concerted unlawful action between more than one person. Nowhere in the pleading are there any material facts that support the bare assertion that any of the other parties—be it other Qualcomm entities, OEMs or other chip suppliers—

were parties to any of the unlawful means pleaded. A clear example is the assertion that Qualcomm's unilateral breach of its FRAND obligations can ground the unlawful means conspiracy. The unlawful means must be committed in combination. In the absence of this, the unlawful means tort rather than the unlawful means conspiracy is the cause of action that most accurately captures the essence of the respondents' complaints about Qualcomm's conduct—as I address below.

[148] In my view, the chambers judge did not apply the correct analysis of the elements of this tort to his review of the pleadings. He referred only to the bare allegations that the Qualcomm entities and others engaged in unlawful conduct together, directed towards purchasers of cellular devices, despite his acknowledgement that the allegation of intent to cause injury to the plaintiffs was asserted only against Qualcomm.

[149] As discussed above, while pleadings are to be read generously, the Court cannot and should not draw factual inferences from bare assertions of legal conclusions to bolster or fill in the gaps of faulty pleadings. None of the agreements set out in the pleadings describe a common purpose on the part of the parties to the alleged conspiracy to injure the plaintiff class by lawful or unlawful means. Nor do they provide any material facts capable of grounding the claim that the parties to these agreements had a common unlawful object.

[150] Therefore, I find it plain and obvious that the FANOCC does not disclose a reasonable claim of civil conspiracy.

Unlawful means tort

[151] The unlawful means tort is available in three-party situations where the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff: *Bram* at para. 5. In *Bram*, Justice Cromwell defined this tort as narrow in scope for reasons including the following:

[30] Potential liability for the unlawful means tort often arises when there are contingent economic interests at stake, such as legitimate business expectations. Such interests, however, are at the margins of the traditional concerns of tort law. The first point, therefore, is that tort law has traditionally accorded less protection to purely economic interests than to physical integrity and property rights...

[31] Second, the common law has traditionally been reluctant to develop rules about fair competition ... The common law in general, and tort law in particular, have been astute to assure “some elbow room [many would say much elbow room] for the aggressive pursuit of self-interest”: C. Sappideen and P. Vines, eds., *Fleming’s The Law of Torts (10th ed. 2011)*, at para. 30.120. As Bowen L.J. put it in *Mogul Steamship Company v. McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598 (C.A.), at p. 614, aff’d [1892] A.C. 25 (H.L.), there can be no liability for a person who has “done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade”...

[33] A third point also favours a limited role for this tort. The common law in the Anglo-Canadian tradition has generally promoted legal certainty for commercial affairs. That certainty is easily put in jeopardy by adopting vague legal standards based on “commercial morality” or by imposing liability for malicious conduct alone ...

[152] The rationale for the tort accepted by Cromwell J. is one focused on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct. This “liability stretching” rationale limits the potential scope of liability by both the intention requirement and the more restrictive definition of the conduct which will support liability: at para. 37. The tort is not meant to sanction all intentional infliction of economic harm but only conduct that is “a flagrant abuse of the competitive process”: at para. 39. It extends civil liability without creating new actionable wrongs:

[43] ... It thereby closes a perceived liability gap where the wrongdoer’s acts in relation to a third party, which are in breach of established legal obligations to that third party, intentionally target the injured plaintiff...

[153] Unlike the tort of unlawful means conspiracy, the unlawful means required to satisfy the tort of unlawful means cannot *merely* be the breach of a statute. Conduct is unlawful “if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it”: at paras. 5, 26. The tort functions to “expand the range of persons who can sue for harm intentionally caused by existing actionable wrongs to a third party”: at para. 45. A breach of a criminal or regulatory statute is therefore not *per se* actionable unless the act gives rise to civil liability by the third party (such as the crime of assault being actionable in the tort of trespass to the person) or a breach of statute is otherwise civilly actionable: at paras. 45, 62: see also *Low v. Pfizer Canada Inc.*, 2015 BCCA 506, leave to appeal to SCC ref’d, 36848 (9 June 2016) at paras. 83, 87 [*Low*].

[154] The unlawful means tort requires intentional targeting of the plaintiff by the defendant. This requirement may be satisfied where the defendant intends to cause economic harm to the plaintiff either as an end in itself or “because it is a necessary means of achieving an end that serves some ulterior motive”: *Bram* at para. 95. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant’s conduct, even where the defendant is aware that harm to the plaintiff is “extremely likely” to result, as this is an accepted part of market competition: *Bram* at para. 95.

[155] Thus, the core elements of the unlawful means tort are the intentional infliction of economic injury on the plaintiff by the defendant’s use of unlawful means against a third party: *Bram* at paras. 23, 28. The chambers judge, who relied on both *Bram* and *Low*, correctly described the elements of this tort as “(a) an unlawful act committed against a third party; (b) that is intended to cause economic harm to the plaintiff; and (c) results in economic harm to the plaintiff”: at para. 177. He also correctly described the intention requirement as set out above.

The pleadings

[156] The respondents plead that Qualcomm’s “unfair, unreasonable, discriminatory, bad faith, and anti-competitive acts, as particularized herein, were unlawful and prohibited conduct against third parties that were intended to cause economic harm to the Plaintiffs and the Class”. They go on to allege that Qualcomm’s conduct supports third party actions for damages under Canadian law, under the laws of jurisdictions where the acts took place and under the law of contract—including breach of Qualcomm’s “FRAND licensing undertakings” and “breach of the duty of good faith in contractual relations”. The pleading includes allegations of Qualcomm’s intention as well as resulting harm to the plaintiffs:

140. Qualcomm intended that its conduct would cause harm to the Plaintiffs and Class by causing them to pay higher prices for Cellular Devices. Alternatively, Qualcomm intended to harm the Plaintiffs and Class as a necessary means of enriching itself. Qualcomm intended and knew that the harm suffered by the Plaintiffs and Class would follow as a natural consequence of its conduct particularized herein.

141. The Plaintiffs and Class suffered harm as a result of Qualcomm’s conduct in the form of artificially inflated prices for the Cellular Devices they purchased.

Analysis

[157] The chambers judge observed that the requisite unlawful means here included Qualcomm's alleged breaches of its contractual FRAND obligations and breaches of the duty of good faith in contract (as well as civil conspiracy and breaches of the competition laws). These alleged breaches, set out in some detail in the pleadings, would be civilly actionable by the parties to Qualcomm's FRAND commitments, and as such, are actionable in tort by the respondents if they can establish that Qualcomm intended to cause harm, and did cause harm, to the plaintiff class.

[158] Qualcomm concedes, for the purposes of the appeal, that the pleadings alleging Qualcomm's breaches of FRAND are capable of satisfying the unlawful means element of the tort. However, it contends that the respondents have failed to plead the requisite level of intention on the part of Qualcomm to target the plaintiff class. Qualcomm submits that a mere intention to increase its own profits is insufficient; the respondents must plead, and provide material facts to support, that Qualcomm's conduct was specifically targeted at the class. It argues that nothing in the pleadings provides a sufficient basis for the claim that Qualcomm's conduct was akin to "targeted malice" directed at the plaintiff class.

[159] The respondents contend that this is an incorrect statement of the law. They rely on the proposition from *Bram*, cited above, that it is sufficient to establish liability that the defendant intends harm to the plaintiff as an end in itself *or* as a necessary means to achieving some ulterior end. They argue that the pleadings provide a sufficient basis upon which to ground the claim that Qualcomm intended harm to the plaintiff class as a necessary means to its own enrichment.

[160] I agree with the respondents. It is an issue for trial whether the plaintiff class can satisfy the court that this intention goes beyond what *Bram* says cannot suffice, namely that harm to the plaintiff is a mere incidental consequence of the defendant's conduct. As I have identified above, the FANOCOC pleads unilateral intention on the part of Qualcomm to injure the plaintiff class and pleads actual damage to the class through the extraction by Qualcomm of supra-competitive profits. In my view, this provides a sufficient basis in the pleadings to advance the claim that Qualcomm used unlawful means with the intention of harming the plaintiff class.

[161] It is not necessary to decide whether the intentional targeting of the plaintiff can be characterized as “targeted malice” as this Court described it in *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 33. Suffice it to say, the intention element for this tort requires a defendant to cause economic harm to the plaintiff as an end in itself or to do so as a necessary means of achieving an end that serves some ulterior motive—clearly serious conduct.

[162] As I understand the pleadings, Qualcomm’s conduct that underlies the respondents’ primary complaints constitutes its refusal to license its SEPs to competitors, its practice of entering into non-assert agreements with competitors, and its “no license, no chip” policy. This is the conduct the respondents allege is unlawful because it is in breach of Qualcomm’s FRAND obligations, and which has harmed competition and harmed the class. It is also the conduct which has formed the primary basis for litigation against Qualcomm in multiple foreign jurisdictions. As indicated above, my view is that the unlawful means tort is a cause of action that allows the respondents to test the essence of their claim.

[163] I therefore see no error in the chambers judge’s conclusion that it is not plain and obvious that the pleadings cannot support the claim under the unlawful means tort. I would not accede to this ground of appeal.

Unjust enrichment

[164] The elements of a claim in unjust enrichment are well established and were correctly identified by the chambers judge. The plaintiff must demonstrate that (a) the defendant has been enriched, (b) the plaintiff suffered a corresponding deprivation, and (c) there is no juristic reason for the enrichment and corresponding deprivation: *Kerr v. Baranow*, 2011 SCC 10 [*Kerr*].

[165] A two-stage analysis to establish the “no juristic reason” element was outlined in *Moore v. Sweet*, 2018 SCC 52 at paras. 57–58. First, the plaintiff must show that the defendant’s retention of the benefit cannot be justified on the basis of any established category of juristic reason, such as a contract, legal disposition, donative intent or a common law, equitable or statutory obligation. If successful, the plaintiff establishes a *prima facie* case. Second, the defendant may rebut the *prima facie* case by establishing some residual reason why the enrichment should

be retained, having regard to the reasonable expectations of the parties and to considerations of public policy: see also *Kerr* at para. 44.

The pleadings

[166] The respondents plead unjust enrichment as a further, or alternative cause of action. The FANOCC sets out all three elements:

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

144. There is no juristic reason for Qualcomm's enrichment, since the artificially inflated royalties and Modem Chip prices received by Qualcomm stems from its prohibited and unlawful acts ...

[167] The prohibited and unlawful acts include breaches of Part VI of the *Competition Act* as well as foreign competition statutes, and unlawful restraint of trade at common law and equity.

Analysis

[168] The chambers judge found the alleged enrichment (inflated royalties and modem chip prices received) and corresponding deprivation (inflated prices of cellular devices) was adequately particularized in the FANOCC. Relying on *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 and *Microsoft*, he considered that "unjust enrichment may be available absent a direct relationship between the defendant and the plaintiff", and more particularly, that overcharges passed through to consumers may provide a sufficient benefit/detriment nexus for this claim: at para. 191. As for juristic reasons, he considered the question of whether the underlying contracts are illegal should not be resolved at this stage of proceedings: at para. 192. In expressing his conclusion, the judge referred to the tests for both summary judgment and sufficient pleadings:

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

[169] Qualcomm submits the unjust enrichment claim does not allege any separate or additional wrongs in support of equitable relief but rather is "entirely

parasitic of the other statutory and common law claims”. It maintains there is a juristic reason for the benefits it receives in the form of its contracts with OEMs that provide for payment of royalties and the sale of modem chips. It says the FANOCC does not allege that these contracts are illegal and does not plead any material facts to support this claim.

[170] The respondents submit that Qualcomm was unjustly enriched because its overcharges were passed down to end consumers of cellular devices. This, they say supports a direct nexus between Qualcomm’s benefit (inflated royalties and modem chip prices received) and the detriment to the class (paying inflated prices). They say they are not required to allege that Qualcomm’s contracts with its OEM customers are illegal.

[171] Despite the judge’s conflation of the tests for summary judgment and pleadings, I find no error in his substantive assessment of this pleading. All the elements of unjust enrichment are set out with sufficient particularity. It is a question for trial whether there is a juristic reason for Qualcomm’s enrichment, if the mechanism of the enrichment and the corresponding detriment to the class is proven to be unlawful or tortious conduct on the part of Qualcomm. The pleadings alleging no juristic reason include breaches of Part VI of the *Competition Act* (which now encompass only s. 61) and unlawful restraint of trade at common law and equity (which I read as encompassing the unlawful means tort).

[172] In my view, it is not plain and obvious that the pleadings disclose no reasonable cause of action in unjust enrichment.

Conclusion on Pleadings

[173] I conclude that the FANOCC does not disclose a reasonable cause of action in the conspiracy offences under the former and current versions of s. 45 of the *Competition Act*, s. 46 of the *Act*, and in the tort of civil conspiracy.

[174] I also conclude that the FANOCC discloses reasonable causes of action under s. 61 of the *Competition Act*, in unlawful means tort, and in unjust enrichment.

Summary judgment — Rule 9-6

[175] Given my conclusion that the conspiracy claims under the *Competition Act* and common law are not properly pleaded, it is necessary to consider the evidentiary record relevant only to the non-conspiracy-based claims.

[176] Qualcomm submits that the chambers judge erred in failing to fully consider whether the uncontradicted evidence it adduced demonstrated that there is no genuine issue for trial. It says the judge “sporadically but inconsistently” referred to evidence in his analysis and conclusions under s. 4(1)(a) and compounded those errors by relying on that analysis in dismissing the summary judgment application.

[177] As discussed above, the chambers judge was correct in his view that Qualcomm’s concerns with the sufficiency of the pleadings were more properly considered as part of the s. 4(1)(a) analysis. He was clearly aware that the question on summary judgment in this case relied on the evidence before him and he cited the applicable legal principles:

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

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

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

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

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

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

application fails to meet all of the causes of action raised by the plaintiff's pleadings, the application must be dismissed: *Beach* at para. 48.

[178] Whether there is a genuine issue for trial in this case is a question of mixed fact and law, as the answer depends on whether the evidence adduced by Qualcomm meets the causes of action raised in the FANOC and whether the respondents' evidence contradicts Qualcomm's evidence in a material way: *Beach Estate* at para. 48. Such questions are reviewable on the standard of palpable and overriding error unless the judge misapplied the test for summary judgment: *Charbonneau Estate v. Charbonneau*, 2021 BCCA 206 at para. 22.

[179] In this case, the chambers judge applied the correct test on summary judgment. Although his assessment of the evidence was interspersed throughout his analysis under s. 4(1)(a), I would not characterize this as a failure to analyze whether the evidence in the record demonstrated that there is no genuine issue for trial. His analysis of the summary judgment application was brief, but it captured the essence of the legal and evidentiary issues in dispute:

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

[180] Despite the brevity of his analysis, it is my view that the judge did not err in dismissing the summary judgment application. In light of the complex issues in play, the relatively brief affidavits adduced by Qualcomm cannot be said to provide a complete answer to the plaintiffs' case. There is a body of evidence in the record adduced by the respondents, much of it expert opinion, which disputes key aspects of Qualcomm's evidence, particularly in relation to the effects of its licensing practices and whether they are in breach of its FRAND obligations.

[181] Qualcomm's evidence consisted of affidavits from five representatives and a report from an expert in American civil procedure. Each affidavit addressed aspects of Qualcomm's business and licensing practices as well as its role and

contribution to the development of cellular standards. The expert report opined on the effect of the appellate decision in *FTC v. Qualcomm* which, as discussed above, reversed an order granting partial summary judgment and an injunction against Qualcomm.

[182] The respondents' evidence consisted of a large body of documents related to regulatory investigations and proceedings in foreign jurisdictions and six reports from four experts on questions of the commonality of damages arising from Qualcomm's licensing practices, class-wide methods for determining appropriate FRAND market rates for Qualcomm's SEPs, whether Qualcomm's licensing practises accord with FRAND and industry practice, and the impact of the appellate decision in *FTC v. Qualcomm*.

[183] The admissibility of the respondents' evidence is not in issue in this appeal. Suffice it to say that the judge was well aware of hearsay concerns regarding the documentary evidence and referred only to what he considered to be admissible evidence, such as documents that originated with Qualcomm and transcripts of testimony from Qualcomm employees.

[184] The chambers judge referred to all this evidence. Although he did not identify which evidence conflicted on which core issues, the record supports his conclusion that there are enough fundamental disputes in the evidence to render summary judgment inappropriate. There are disputes in relation to Qualcomm's conduct in attaining market power, whether its refusal to license competing modem chip makers is a breach of its FRAND obligations, and whether its licensing practises and royalty rates affect the price of modem chips and cellular devices. This evidence comes from expert opinion as well as documents originating with Qualcomm that include statements made by Qualcomm employees about the fairness of its licensing practice and admittedly lucrative royalty rates and the nature of the non-assert agreements it negotiates with competitor chip makers.

[185] I would therefore not accede to this ground of appeal.

Conclusion

[186] For all of these reasons, I would allow the appeal of the certification order only to the extent that the claims under ss. 45 and 46 of the *Competition Act* and

the claim in the tort of civil conspiracy do not meet the requirement of s. 4(1)(a) of the *Class Proceedings Act* and should not have been certified.

[187] I would dismiss the appeal of the certification order with respect to the claims under s. 61 of the *Competition Act* and the claims in unlawful means tort and unjust enrichment. I would also dismiss the appeal of the order dismissing Qualcomm's application for summary judgment.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Iyer"