Federal Court  Cour fédérale

Date: 20230828

Docket: T-445-20

Citation: **2023 FC 1156**

Toronto, Ontario, August 28, 2023

PRESENT: Chief Justice Paul Crampton

PROPOSED CLASS PROCEEDING

BETWEEN:

STEPHANIE DIFEDERICO AND
JAMESON EDMOND CASEY

Plaintiffs

and

AMAZON.COM, INC., AMAZON.COM.CA, INC.,
AMAZON.COM SERVICES LLC,
AMAZON SERVICES INTERNATIONAL, INC., AND
AMAZON SERVICES CONTRACTS, INC.

Defendants

ORDER AND REASONS

Introduction

[1] The plaintiffs in the underlying action claim $12 billion in damages on behalf of three classes of consumers (collectively **"Class Members"**). In support of their claim, they allege breaches of sections 45 and 46 of the *Competition Act*, RSC, 1985, c C-34 (the **"Act"**). Those alleged breaches are based on two "agreements" that the defendants are said to have entered into with third parties (the **"Allegedly Anti-competitive Agreements"**).

[2] The first such agreement is a provision in the standard Business Solutions Agreement (the **"BSA"**) that the defendants (together, **"Amazon"**) entered into with third parties who sold products on Amazon's online retail platform (**"Third Party Sellers"**) for part of the period of time in dispute. The plaintiffs describe that provision as a most-favoured nation (**"MFN"**) agreement. The second Allegedly Anti-competitive Agreement is the Amazon Marketplace Fair Pricing Policy (the **"Fair Pricing Policy"**) that Amazon first published on its website for Third Party Sellers in November 2017.

[3] In the present Motion, the plaintiffs seek various types of relief, including an order certifying their action as a class proceeding under Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 (the **"Rules"**).

[4] For the reasons that follow, I have concluded that the plaintiffs have not established the first requirement for certification, namely, that the pleadings disclose a reasonable cause of action: Rule 334.16(1)(a). This is so for two reasons.

[5] First, the plaintiffs have not pled sufficient material facts with respect to all of the constituent elements of sections 45 and 46, for either of the Allegedly Anti-competitive Agreements.

[6] Second, it is plain and obvious that neither of the Allegedly Anti-competitive Agreements is an agreement contemplated by sections 45 and 46 of the Act. Sections 45 and 46 target conspiracies, agreements and arrangements, also known as "hard-core" or "naked" cartel agreements, that are generally recognized to have unambiguously harmful effects on competition and consumers. For this reason, those sections establish indictable criminal offences and provide for the harshest penalties in the Act.[1] On their face, the Alleged Anti-competitive Agreements do not contemplate conduct that could reasonably be said to be likely to have unambiguously harmful effects on competition and consumers.

[7] Having regard to the foregoing, and for the reasons further explained below, this Motion will be dismissed.

I. Background

[8] The MFN "agreement" is a clause (the "**MFN Clause**") in a provision (**"S-4"**) that was included in the BSA from June 1, 2010 through March 2019.

[1] Pursuant to amendments made to the Act in 2022 - which entered into force on June 23, 2023 - persons convicted under section 45 are subject to a penalty of up to 14 years imprisonment and/or a fine in the discretion of the court. (The amendments removed the previous $25 million limit on fine amounts.) Persons convicted under section 46 continue to be liable to a fine in the discretion of the court.

[9] S-4 was one of the "Selling on Amazon Service Terms" that were explicitly part of the BSA. The MFN Clause in S-4 essentially required Third Party Sellers to ensure that the prices of products they sold on Amazon's platform were at least as favourable as the selling prices of those products on any other e-commerce website (the "**MFN Price**"). The plaintiffs characterize this as an MFN provision because it resembles a most-favoured nation clause.

[10] The Fair Pricing Policy articulates Amazon's commitment to provide its customers with the largest selection of products, at the lowest price, and with the fastest delivery. In support of that commitment, Amazon states that it regularly monitors the prices of items on its platform and that it may take certain actions, including suspending or terminating selling privileges, when it identifies "pricing practices that harm customer trust." Such practices are said to include "[s]etting a price on a product or service that is significantly higher than recent prices offered on or off Amazon."

[11] Among other things, the plaintiffs allege that S-4 and the Fair Pricing Policy permit Amazon to shelter its online business from price competition. More specifically, they assert that those "agreements" allow Amazon to ensure that the prices of products sold by Third Party Sellers on its platform and on competing e-commerce websites never drop below a particular level, namely, the sellers' marginal cost plus Amazon's fees. The plaintiffs maintain that this permits Amazon to (i) set anti-competitive fees, and (ii) create a floor price under which the products in question cannot be offered for sale on any e-commerce website. The plaintiffs state that this has inflated the prices of products sold on Amazon's platform as well as on other e-commerce websites used by Third Party Sellers. They estimate this inflationary impact on prices

paid by Canadian consumers to be "upwards of $12 billion." The products in question (referred to herein as **"Amazon Products**"), include products sold on Amazon's platform by the Third Party Sellers, as well as by Amazon itself.

[12] This proceeding is one of three of which the Court is aware that have been initiated in Canada against Amazon in relation to the Alleged Anti-competitive Agreements. The other two were filed before the Ontario Superior Court of Justice (*Sweet v Amazon.com, Inc*, File No. CV-20-00640850-00CP (the **"Ontario Proceeding"**) and the Quebec Superior Court (*Wells v Amazon.com, Inc*, File No. 500-06-001055-207 (the **"Quebec Proceeding"**), respectively). During the hearing of this Motion, counsel advised that the Ontario Proceeding had been stayed and that a decision on an application for authorization in the Quebec Proceeding was under reserve.

II. The Parties

A. *The Representative Plaintiffs and the Classes They Represent*

[13] The plaintiffs assert that three classes of consumers have suffered damages as a result of the Allegedly Anti-competitive Agreements. The representative plaintiff Stephanie Difederico seeks to represent a class of consumers characterized as the **"Amazon E-Commerce Class,"** which is defined as follows:

> All persons or entities in Canada who, from 1 June 2010 to the date this action is certified (the "**Class Period"**), purchased Amazon Products on Amazon.ca or Amazon.com. Excluded from the Amazon E-Commerce Class are the defendants and their parent companies, subsidiaries, and affiliates.
>
> [Formatting added on defined term.]

[14] The representative plaintiff Jameson Edmond Casey seeks to represent two additional classes of consumers, namely, the **"Other E-Commerce Class"** and the **"Umbrella Class."**

[15] The Other E-Commerce Class is defined as follows:

> All persons or entities in Canada ("Canadian Consumers") who, from 1 June 2010 to the date this action is certified (the "Class Period"), purchased Amazon Products on any website other than Amazon.ca or Amazon.com. Excluded from the Other E-Commerce Class are the defendants and their parent companies, subsidiaries, and affiliates.

[16] The Umbrella Class is characterized in the following terms:

> All persons or entities in Canada ("Canadian Consumers") who, from 1 June 2010 to the date this action is certified (the "Class Period"), purchased products from any website other than Amazon.ca or Amazon.com which products are not Amazon Products. Excluded from the Umbrella Class are the defendants and their parent companies, subsidiaries, and affiliates.

[17] In the fall of last year, Justice Furlanetto of this Court issued a stay of Ms. Difederico's claims relating to her purchases on the Amazon.ca store, in favour of arbitration: *Difederico v Amazon*, 2022 FC 1256, aff'd 2023 FCA 165.[2] The implications of that decision for the purposes of this Motion were disputed during the hearing of this Motion. Given the conclusion that I have reached with respect to the failure of the plaintiffs to plead a reasonable cause of action, it is unnecessary for me to address this issue.

[2] The Court recently received a letter from the plaintiffs' counsel advising that they had received instructions to apply to the Supreme Court of Canada ("SCC") for leave to appeal this decision.

B. *Amazon*

[18] The plaintiffs allege that Amazon is the world's largest online retailer, accounting for almost 50 percent of e-commerce retail purchases in Canada. The plaintiffs further assert that, during the Class Period, Amazon's sales as the seller of record accounted for between 40 and 66 percent of the sales on its platform. The remaining sales were made by Third Party Sellers, who paid certain fees to Amazon to be able to market and sell their products on its platform. The plaintiffs assert that Amazon and Third Party Sellers are competitors because Amazon sells products as the seller of record that Third Party Sellers themselves also sell, either on Amazon's platform, on their own e-commerce websites or on other e-commerce platforms.

[19] The plaintiffs add that Amazon and Third Party Sellers are also potential competitors in respect of other products. These products include products that are included within the same broad product categories (for example "Home and Garden"), in which Amazon and the Third Party Sellers already participate. The plaintiffs assert that Amazon regularly monitors the selling data of Third Party Sellers on its platform and then launches products in competition with the products sold by those sellers.

III. Issues

[20] Pursuant to Rule 334.16(1), the Court shall certify a class proceeding if the five conditions set out in paragraphs 334.16(1)(a) – (e) are satisfied. The full text of Rule 334.16(1) is reproduced in Annex 1 to these reasons. The following five issues reflect the requisite and conjunctive pre-conditions for certification:

A. Do the pleadings disclose a reasonable cause of action?

B. Is there an identifiable class of two or more persons?

C. Do the claims of the Class Members raise common issues of law or fact?

D. Is a class proceeding the preferable procedure for the just and efficient resolution of the common questions of law or fact?

E. Do the representative plaintiffs meet the requirements of Rule 334.16(1)(e)?

IV. Relevant Legislation

[21] The sole cause of action in this proceeding is for recovery of damages under paragraph 36(1)(a) of the Act, as a result of conduct contrary to sections 45 and 46 of that legislation. Subsection 36(1) provides as follows:

Recovery of damages	**Recouvrement de dommages-intérêts**
36 (1) Any person who has suffered loss or damage as a result of	**36 (1)** Toute personne qui a subi une perte ou des dommages par suite:
(a) conduct that is contrary to any provision of Part VI, or	**a)** soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	**b)** soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte

been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[22] In brief, subsection 36(1) permits the recovery of loss or damages suffered as a result of (a) conduct that is contrary to any of the provisions in Part VI of the Act (which establishes various criminal offences), or (b) the failure of any person to comply with an order of the Competition Tribunal or another court under the Act. It also permits recovery of costs associated with investigating the matter and then bringing proceedings.

[23] Subsection 45(1) creates an indictable offense for anyone who conspires, agrees or arranges with a competitor to do certain specific things. The provision states as follows:

Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement:
(a) to fix, maintain, increase or control the price	**a)** soit pour fixer, maintenir, augmenter ou

for the supply of the product;	contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	**b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

[24] The various parts of section 45 that are relevant for the present purposes are reproduced in Annex 2 to these reasons.

[25] Section 46 essentially creates an indictable offence for a corporation carrying on business in Canada to implement a communication from a person outside Canada made for the purpose of giving effect to a foreign conspiracy, combination or agreement that, if entered into in Canada, *would have been in contravention of section 45*. The person outside Canada must be in a position to direct or influence the policies of the corporation within Canada. An offence is committed whether or not any director or officer of the corporation in Canada has knowledge of the impugned conspiracy, agreement or arrangement. The full text of subsection 46(1) is reproduced in Annex 2.

V. Assessment

A. *Do the pleadings disclose a reasonable cause of action?*

(1) General principles

[26] The principle objectives of a class proceeding are "to facilitate access to justice, to modify harmful behaviour and to conserve judicial resources": *L'Oratoire Saint-Joseph du Mont-Royal v J.J.*, 2019 SCC 35 at para 6 [***Oratoire***]. These objectives must be kept in mind when determining whether a proposed class proceeding meets the requirements for certification: *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 at para 54 [***Jensen FC***]; aff'd 2023 FCA 89 [***Jensen FCA***], leave to appeal to SCC requested.

[27] The test for assessing whether the pleadings disclose a reasonable cause of action is the same as the test applicable on a motion to strike, namely, whether "it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action": *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 14 [***Atlantic Lottery***]; *Jensen FCA*, at para 15. In brief, "if a claim has no reasonable prospect of success it should not be allowed to proceed to trial": *Atlantic Lottery*, at para 14.

[28] A claim will fail to disclose a reasonable cause of action if it contains a "radical defect," is "doomed to fail" or is "so clearly improper as to be bereft of any possibility of success": *Atlantic Lottery*, at paras 89-90; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [***Wenham***], citing *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47. [*Wenham* leave to appeal to SCC refused, 39518 (10 June 2021).]

[29] In applying this test, the Court's task "is not to resolve conflicting facts and evidence and assess the strength of the case": *Wenham*, at para 28. The Court's focus is on the pleadings, not on the evidence: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 23 [***Imperial***

Tobacco]; *Jensen FCA*, at para 52. Those pleadings must be read generously, holistically, and practically, with a view to "err[ing] on the side of permitting a novel but arguable claim to proceed": *Imperial Tobacco*, at para 21; *Wenham*, at para 34; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 18 [***Mancuso***], leave to appeal to SCC refused, 36889 (23 June 2016).

[30] Nevertheless, the court has an important screening role to play: *Desjardins Financial Services Firm Inc v Asselin*, 2020 SCC 30 at para 74; *Jensen FCA*, at para 49; *Mohr v National Hockey League*, 2022 FCA 145 at paras 49 and 53 [***Mohr FCA***], leave to appeal to SCC refused, 40426 (20 April 2023). That role includes assessing whether the pleadings (i) are "sufficient to put the defendant on notice of the essence of the plaintiff's claim" (*Atlantic Lottery*, at para 89), (ii) have adequately addressed "the constituent elements of each cause of action", and (iii) provide enough facts or particulars to ensure that the trial proceedings will be "both manageable and fair": *Mancuso*, at paras 18-19. See also *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 104 [***Pro-Sys***].

[31] Moreover, the presumption of truth that applies to pleaded facts:

> "…does not extend to matters which are manifestly incapable of being proven, to matters inconsistent with common sense, vague generalization[s], opinion[s], conjecture[s], bare allegations, bald conclusory legal statements or speculation that is unsupported by material facts."
>
> *Jensen FCA*, at para 52(b), endorsing *Jensen FC*, at paras 81-82. See also *Oratoire*, at paras 59-60.

[32] In assessing the sufficiency of the pleadings, documents referred to therein, whether through direct quotes, summaries or paraphrases of documents, will be considered to be

incorporated by reference and part of the pleadings "if they are central enough to the claim to form an essential element or integral part of the claim itself or its factual matrix": *Jensen FCA*, at para 52(c), endorsing *Jensen FC*, at paras 85 and 87. In this regard:

> If the documents referred to in the pleadings do not actually say what the plaintiff alleges they say, or if the plaintiff has ascribed a meaning to those paraphrases and quotes that is not consistent, on a plain reading, with the documents from which they originate, the court cannot consider these allegations as material facts. The certification judge's task is not to look at these documents in detail to determine whether or not the plaintiff has correctly interpreted them, but can determine whether the references made by the plaintiff accurately reflect what has been expressly stated in the documents: Reasons at paras. 86-87.
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> *Jensen FCA*, at para 52(d). See also paragraph 59, where the Federal Court of Appeal endorsed this Court's more detailed assessment of this issue, at *Jensen FC* paras 144-146.

[33] Where a cause of action is advanced under section 36 of the Act, the Court will assess the sufficiency of the pleadings with respect to (i) the alleged "loss or damage suffered", (ii) whether that loss or damage was "as a result of conduct contrary to part VI of the Act", and (iii) the cost of any investigation alleged to have been incurred in connection with the matter and the proceedings taken under that provision: see paragraphs 21-22 above: *Jensen FCA*, at para 19; *Jensen FC*, at paras 93 and 123.

(2) Elements of section 45 of the *Act*

[34] Part VI of the Act establishes various criminal offences. In the present proceeding, the alleged "conduct contrary to … the Act" is conduct described in sections 45 and 46 of the Act. Accordingly, it is incumbent upon the Plaintiffs to plead sufficient material facts with respect to each of the constituent elements of those offences: *Jensen FC*, at paras 73, 75 and 94, aff'd *Jensen FCA*, at para 19; Rules 174 and 181.

[35] There are three constituent elements of section 45. These are: (i) a "conspiracy, agreement or arrangement", (ii) with a "competitor", (iii) to do one of the things set forth in paragraphs 45(1)(a) – (c), respectively: see paragraph 23 above.

[36] It bears underscoring that if an impugned conspiracy, agreement or arrangement does not contravene section 45, it cannot contravene section 46. This is because an important element of the latter provision is the existence of a conspiracy, agreement or arrangement entered into outside Canada that, *if entered into in Canada, would have been in contravention of section 45*. It follows that if a Statement of Claim does not disclose a reasonable cause of action under section 45, it will not disclose a reasonable cause of action under section 46.

[37] The words "conspiracy, agreement or arrangement" all "contemplate a mutual arriving at an understanding or agreement" between the alleged parties thereto: *R v Armco Canada Ltd et al.*, 1976 CarswellOnt 771 at para 21, [1977] 13 OR (2d) 32, (ONCA) [***Armco OCA***], leave to appeal to SCC refused, [1977] 13 OR (2d) 32 (5 April 1976), see also: *R v Gage (No 2)*, 1908 CarswellMan 20 at para 88, 13 CCC 428 (MBCA).[3] Stated differently, those words contemplate a "meeting of the minds" with respect to one or more of the matters described in paragraphs 45(1)(a) – (c): *Jensen FCA*, at paras 59 and 65-66; *Watson v Bank of America Corporation*, 2015 BCCA 362 at para 77 [***Watson***]. Another way of putting this is that there must be a conspiracy, agreement or arrangement to put into effect a common design with respect to one of those matters: *The Queen v O'Brien*, [1954] SCR 666 at 668-669 and 675 [***O'Brien***]; see also *R v*

[3] At the time *Armco OCA* was decided, the relevant words in the predecessor to what is now s. 45 of the Act were "conspires, combines, agrees or arranges."

Aluminum Co of Can, 1976 CarswellQue 94 at paras 28-29, 29 CPR (2d) 183, (QCSC) **[*Aluminum*]**.

[38] Until that "act of agreement" occurs, a mere intention or design on the part of one or more of the parties to the alleged agreement to enter into that agreement will not suffice: *O'Brien*; *Aluminum*; *R v Armco Canada Ltd*, [1974] OJ No 2200 at para 148, 6 OR (2d) 52, (ONHCJ) [***R v Armco***], aff'd *Armco OCA*; *R v Abitibi Power & Paper Co*, [1960] QJ No.7 at para 22, 131 CCC 201 (QCQB) [***Abitibi***].

[39] It is not necessary for a plaintiff to establish that there were any acts in furtherance of the agreement: *Container Materials Ltd v The King*, [1942] SCR 147 at 159 [***Container Materials***]; *Abitibi*, at para 22. An offence is committed once parties enter into an agreement proscribed by section 45, even if the agreement is not put into effect: *O'Brien*, at 669. Indeed, an offence is also committed even if "the agreement could not have been successfully carried into execution": *Howard Smith Paper Mills Ltd et al v The Queen*, [1957] SCR 403 at 412 [***Howard Smith***]. In brief, "[t]he crime is in the conspiracy," not in the acts that it contemplates: *Howard Smith*, at 413, quoting *R v Elliott*, [1905] 9 OLR, 648 at 651, 9 CCC 505 (ONHCJ), aff'd 9 CCC 505 (ONCA). Stated differently, the agreement itself is the "gist" of the offence: *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, [1980] 2 SCR 644 at 674 [***Atlantic Sugar***], quoting *Paradis v The King*, [1934] SCR 165 at 168; see also *Abitibi*, at para 24. However, acts in furtherance may give rise to an inference that the alleged agreement was entered into and can provide evidence of the object(s) of the agreement: *Container Materials*;

Jensen FC, at para 103; *Regina v Northern Electric Co Ltd et al*, [1955] OR 431 at 453, 456 and 469, 111 CCC 241,(Ont SC); see also subsection 45(3).

[40] It follows from the foregoing that to properly plead the requisite "act of agreement", or *actus reus*, a plaintiff should provide material facts 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: *Jensen FC*, at para 98.

[41] Under the current wording of section 45, it is not necessary to plead any anti-competitive effects to meet the requirements of that provision: see the discussion at paragraphs 95-96 below. As a result of the 2010 amendments to s. 45, such effects are now relevant only to damages. They are no longer relevant to liability, unless they provide evidence of an impugned agreement.[4]

[42] In brief, section 45 is concerned with the objects or purposes of the impugned agreement, rather than with its effects: *Container Materials*; *Mohr FCA*, at para 38; *Abitibi*, at paras 119 and 126; *R v Armco*, at paras 148 and 164. See also *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 655 [***PANS***].[5]

[4] In this regard, care must be taken when relying on jurisprudence concerning versions of s.45 that predate the 2010 amendments.

[5] To the extent that the Court proceeded to reference "any behaviour that tends to reduce competition or limit entry," those comments must be understood in the context of the prior wording of section 45, which included an "effects" element that is no longer present in that provision.

[43] To properly plead the requisite *mens rea*, it is incumbent upon a plaintiff to provide sufficient material facts with respect to (i) a subjective intention to enter into the agreement and knowledge of its terms, and (ii) an objective intention to do one or more of the things described in paragraphs 45(1)(a)-(c): *PANS*, at 659-660; *Watson*, at paras 72-76; *Shah v LG Chem Ltd*, 2018 ONCA 819 at para 50 **[*Shah*]**, leave to appeal to SCC refused, 38440 (17 October 2019). However, at the certification stage, it *may* suffice for a plaintiff to allege that the impugned agreement was entered into knowingly and voluntarily, so long as the pleadings also provide sufficient material facts from which the requisite objective intention may be inferred: *Watson*, at paras 100-102.

[44] The term "competitor" is defined in subsection 45(8) to include "a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement," regarding one or more of the matters described in paragraphs 45(1) (a) to (c). Given that each of the latter paragraphs use the term "the product", it is readily apparent that the referenced product in question is the product referred to in the "chapeau" or opening words of subsection 45(1). That is the product in respect of which the parties to the alleged agreement compete: *Mohr National Hockey League*, 2021 FC 488 at paras 35 and 42 [***Mohr FC***]. Consequently, plaintiffs who allege an agreement contrary to section 45 must plead sufficient material facts with respect to competition between the parties to the impugned agreement, in relation to that product.

(3) Analysis of the MFN Clause in S-4

(a) *Introduction*

[45] As noted at paragraphs 8 and 9 above, the first of the two Allegedly Anti-Competitive Agreements is S-4 in the BSA, which includes the MFN Clause.

[46] The BSA sets out the terms on which Third Party Sellers obtain services from Amazon, including the service of selling on Amazon, in order to offer their products on Amazon's platform. [6] It also covers services provided by Amazon, including optional storage, fulfillment services for third-party sellers' products, and advertising.

[47] Third Party Sellers agree to be bound by the BSA by virtue of registering for, or using, the services made available by Amazon on its platform.

[48] There were three versions of S-4 in effect between approximately June 1, 2020 and March 8, 2019.

[49] The initial version was in effect between approximately April 15, 2010 and July 13, 2010. The part of that provision that is in dispute stated as follows:

> **S-4 Parity with Your Sales Channels.**
>
> a. Subject to this Section S-4, you are free to determine the products you list for sale on the Amazon Site **and the prices at which you sell [those] products [on various sales channels]**. However, we are asking sellers who choose to sell products on the Amazon Site **not to charge customers higher prices on the Amazon Site than they charge customers elsewhere**. Accordingly[, effective [_____]], **you must maintain parity** between the terms on which you offer or sell each of Your Products on or through the Amazon Site and the terms on which

[6] For greater certainty, such products are defined at paragraph **[11]** above as Amazon Products.

> you or your affiliates offer or sell each of those products on or through any Non-Physical Sales Channel, **as follows**:
>
> b. Price Terms. You **will ensure that: (a) the Total Price of each of Your Products on the Amazon Site does not exceed the lowest Total Price for that product offered or sold by you or your affiliates on or through any Non-Physical Sales Channel; and (b) for any of Your Products that are not [fulfilled by us], the Item Price component of the Total Price for that product on the Amazon Site does not exceed the Item Price component of the lowest Total Price for that product offered or sold by you or your affiliates on or through any Non-Physical Sales Channel.**
>
> …[Emphasis added.]

[50] The second version of S-4 was in effect between approximately July 13, 2010 and April 30, 2014. The part of that provision that is in dispute stated as follows:

> S-4 Parity with Your Sales Channels.
>
> Subject to this Section S-4, you are free to determine which of Your Products you wish to list for sale on the Amazon Site. **You will maintain parity** between the products you offer through Your Sales Channels and the products you list on the Amazon Site **by ensuring that** at the Selling on Amazon Launch Date and thereafter: (a) the Purchase Price and every other term of offer and/or sale of Your Product (including associated shipping and handling charges, Shipment Information, any "low price" guarantee, rebate or discount, any free or discounted products or other benefit available as a result of purchasing one or more other products, and terms of applicable return and refund policies) **is at least as favorable to Amazon users as the most favorable terms upon which a product is offered and/or sold via Your Sales Channels** (excluding consideration of Excluded Offers);
>
> …[Emphasis added.]

[51] The third version of S-4 was in effect between approximately April 30, 2014 and March 8, 2019. The part of that provision that is in dispute stated as follows:

> S-4 Parity with Your Sales Channels.

> Subject to this Section S-4, you are free to determine which of Your Products you wish to offer on a particular Amazon Site. **You will maintain parity** between the products you offer through Your Sales Channels and the products you list on any Amazon Site **by ensuring that** : (a) the Purchase Price and every other term of offer or sale of Your Product (including associated shipping and handling charges, Shipment Information, any "low price" guarantee, rebate or discount, any free or discounted products or other benefit available as a result of purchasing one or more other products, and terms of applicable cancellation, return and refund policies) **is at least as favorable to Amazon Site users as the most favorable terms upon which a product is offered or sold via Your Sales Channels** (excluding consideration of Excluded Offers);
>
> …[Emphasis added.]

[52] The second and third versions of S-4 included similar language to address the situation where shipping and handling charges associated with the sale and delivery of the Third Party Seller's product were included in the listed purchase price.

[53] In assessing whether the plaintiffs' Statement of Claim discloses a reasonable cause of action with respect to section 45 (and by implication 46) of the Act and the three versions of S-4 described above, it is necessary to assess each of the three principal elements of s. 45. These are the requirements that there be: (i) a "conspiracy, agreement or arrangement", (ii) with a "competitor", (iii) to do one of the things set forth in paragraphs 45(1)(a) – (c), respectively: see paragraphs 34-36 above. These will be discussed immediately below.

(b) *The "agreement"*

[54] At paragraph 46 of the Statement of Claim, the plaintiffs allege that when a Third Party Seller registers with Amazon, it agrees to the terms of the BSA. This is confirmed by the following language that appears at the beginning of the BSA:

> BY REGISTERING FOR OR USING THE SERVICE(S), YOU (ON BEHALF OF YOURSELF OR THE BUSINESS YOU REPRESENT) AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT, INCLUDING THE SERVICE TERMS AND PROGRAM POLICIES THAT APPLY IN THE COUNTRY FOR WHICH YOU REGISTER…

[55] At paragraph 49 of the Statement of Claim, the plaintiffs add that this agreement between Amazon and each Third Party Seller who sells on Amazon's platform is express and in writing.

[56] I agree. Having regard to the foregoing, I find that the plaintiffs have pled sufficient material facts to support their allegation that Amazon entered into an "agreement" with each Third Party Seller selling on its platform. That is to say, the plaintiffs have pled sufficient material facts with respect to the "express act of agreeing", the intention to enter into the BSA and the requisite meeting of the minds to agree to the terms of the BSA, including S-4 and the MFN Clause. Amazon does not suggest otherwise. Indeed, during oral submissions, it acknowledged that the BSA constitutes an agreement between it and Third Party Sellers who register to use its services. However, Amazon maintains that S-4 is not a type of agreement contemplated by section 45, and that the plaintiffs have failed to adequately plead the *mens rea* of Amazon and the Third Party Sellers. Those submissions will be addressed further below.

[57] Beyond the individual agreements alleged to have been entered into between Amazon and each Third Party Seller, the plaintiffs allege an agreement among Third Party Sellers. This agreement is claimed to have been reached "by their jointly agreeing with each other through their common agreement with Amazon to limit price competition for Amazon Products on Amazon websites in accordance with the MFN": Statement of Claim, paragraph 50.

[58] The Defendants respond that this alleged agreement among Third Party Sellers is not supported by any material facts and is contradicted by the text of the BSA. More specifically, they state that the Statement of Claim does not describe any "meeting of the minds" among Third Party Sellers, whether by two-way communications or by other facts from which some type of communication between Third Party Sellers could be inferred.

[59] I agree. The plaintiffs' allegation of a collective agreement *among Third Party Sellers* is bald, and is not supported by any material facts or particulars whatsoever. It is far from sufficient for the purposes of this Motion: *Jensen FCA*, at para 65.

[60] Moreover, on its face, the "agreement" contemplated by each BSA is a single agreement between Amazon and each individual Third Party Seller. This is clear from the following sentence that appears immediately following the passage quoted at paragraph 54 above:

> As used in this Agreement, "we," "us," and "Amazon" means the Amazon Contracting Party or any of its affiliates, and "you" means **the applicant** (if registering as an individual), or the business employing **the applicant** (if registering as a business).
>
> [Emphasis added.]

[61] In support of their allegation of an agreement among Third Party Sellers, the plaintiffs rely on *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC & Ors*, [2020] UKSC 24 at para 93 [***Sainsbury's***], where the agreement in question was characterized as "a collective agreement between undertakings." Those undertakings were banks that had entered into agreements to provide Visa or Mastercard services to merchants: *Sainsbury's*, at para 52. However, that case is distinguishable. This is because the banks agreed upon specific "multilateral interchange fees" (**"MIFs"**) to be paid by merchants, unless the merchant entered

into a bilateral agreement with its bank. In contrast to the evidence of bilateral agreements between Amazon and Third Party Sellers in the present proceeding, the evidence in *Sainsbury's* was that no such bilateral agreements had been entered into: *Sainsbury's*, at paras 43-44. Moreover, it appears that there was no dispute that the agreement with respect to MIFs was an agreement between the banks: *Sainsbury's*, at para 42. I will simply add in passing that the explicit focus of that case was on *the effects* of the impugned MIF agreements, rather than upon *the object* of those agreements: *Sainsbury's*, at paras 42, 88, 90 and 99. As discussed at paragraphs 41-42 above, the prohibitions contained in subsection 45(1) of the Act focus solely on *the object* of the proscribed conspiracies, agreements or arrangements. Once the illegal object is established, anti-competitive effects are presumed: *Mohr FCA*, at paras 2 and 38.

[62] In summary, for the reasons set forth above, I find that the plaintiffs have pled sufficient material facts to support their allegation that Amazon entered into an "agreement" with each Third Party Seller selling on its platform. However, they have not pled sufficient material facts to support their allegation that the Third Party Sellers entered into a separate, collective, agreement among themselves.

(c) *Among "competitors"*

[63] The plaintiffs allege that Amazon and Third Party Sellers are direct competitors with respect to the supply or production and supply of Amazon Products, both on the Amazon platform and beyond that platform. In this regard, the plaintiffs allege that Amazon supplies various products, as the seller of record, that Third Party Sellers also supply, either on Amazon's platform, or on their own e-commerce websites, or on other e-commerce platforms. These

products allegedly include “more than 80 private-label brands across its product categories”: Statement of Claim, paragraph 32. The plaintiffs add that, from 2010 to the present, Amazon’s sales as the seller of record have accounted for between approximately 40 and 66 percent of the sales on the Amazon platform. They further claim that Amazon and Third Party sellers directly or potentially compete in the sale of Amazon Products in each of the 23 product categories displayed on Amazon.ca and in each of the 25 categories displayed on Amazon.com.

[64] In support of these allegations, the plaintiffs state that Jeff Bezos (at the relevant time CEO of Amazon),[7] agreed that Amazon competes with third-party sellers on and off Amazon’s platforms. The Plaintiffs claim that Mr. Bezos acknowledged this in his testimony before the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law on July 29, 2020.

[65] Amazon acknowledges that it may be a competitor of some Third Party Sellers when it sells products as a seller of record. However, it maintains that S-4 and the Fair Pricing Policy are not horizontal agreements between competitors. Instead, Amazon states that the agreements it enters into with Third Party Sellers are vertical agreements, because they are made in Amazon’s capacity as an online store operator. In support of this position, Amazon states that, as the operator of its stores, it unilaterally sets the terms of the BSA, including S-4. Amazon adds that S-4 governs the marketplace services that Amazon provides to Third Party Sellers, and that those services are not products or services “in respect of which [Amazon and Third Party Sellers]

[7] Since July 2021, Mr. Bezos has been Executive Chairperson of Amazon.

compete", as required by section 45 of the Act: *Mohr FC*, at para 35. Amazon further states that S-4 does not require Amazon to do anything in its role as a seller.

[66] During their oral submissions, the plaintiffs maintained that a platform operator that is in both a vertical and a horizontal relationship with third parties who sell on its platform is not exempt from the purview of section 45 simply because it establishes the terms of the agreements that it enters into with those third parties.

[67] I agree. The potential applicability of section 45 to any particular agreement between a platform operator and third parties who sell on the platform must be determined on the basis of the relevant facts in each case. For greater certainty, and subject to the defence set forth in subsection 45(4),[8] a platform operator cannot immunize what would otherwise be a horizontal agreement proscribed by section 45, by burying that agreement in a broader agreement that is largely vertical in nature.

[68] For the purposes of the present Motion, the pleaded facts summarized at paragraphs 63 and 64 above "must be read generously, holistically, and practically, with a view to 'err[ing] on the side of permitting a novel but arguable claim to proceed'": see paragraph 29 above. In my view, those pleaded facts are sufficient to permit the plaintiffs to prevail on this Motion with respect to requirement in section 45 that the impugned agreements be among competitors "with respect to a product." Contrary to Amazon's contention, S-4 is not limited to governing the marketplace services that Amazon provides to Third Party Sellers. It also requires Third Party

[8] See Annex 2 below. During the hearing, Amazon confirmed that it is not asserting this defence in this proceeding: Transcript (day 2), at 110.

Sellers to ensure that the prices of products listed on its platform are at least as favourable to Amazon Site users as the MFN Price.[9]

[69] Amazon's position that S-4 is a purely vertical agreement would be a matter to be determined if and when this proceeding were to advance to the merits stage. For the present purposes, it bears underscoring that Amazon acknowledges that it may be a competitor to some Third Party Sellers when it sells products as a seller of record.

[70] I will pause to observe that, in 2013, the Bundeskartellamt (Germany's antitrust regulator) concluded that the agreements entered into between Amazon and its third party sellers were not purely vertical in nature, particularly insofar as Amazon's price parity obligation for retailers was concerned: *Amazon Removes Price Parity Obligation for Retailers on its Marketplace Platform*, Case Report, Bundeskartellamt, 26 November 2013.

[71] The plaintiffs further allege that Amazon and Third Party Sellers are also *potential* competitors "to produce and supply or supply" Amazon Products. In this regard, the plaintiffs assert that it is likely that Amazon or Third Party Sellers will sell the same branded or substitute products in the future, either on Amazon's platform, on the sellers' own websites, or on other e-commerce websites. In support of this assertion, they state the following in their Statement of Claim:

> 43 …Amazon regularly monitors the selling data of third-party sellers on its platform to determine for which Amazon Products it would be profitable for Amazon to produce and supply or supply in competition with the products those sellers sell. During the

[9] For convenience, the MFN Price is defined above as the most favorable terms upon which the same product is offered or sold outside Amazon's platform.

> Class Period, Amazon chose to compete with third-party sellers with Amazon Products for which Amazon had formerly not been the seller of record.

[72] In my view, the pleaded facts quoted immediately above are not sufficient for the purposes of the present Motion. This is because they are not "sufficient to put the defendant on notice of the essence of" the plaintiffs' claim as it relates to potential competition, and they do not provide enough facts or particulars to ensure that the trial of this issue would be "both manageable and fair": see jurisprudence cited at paragraph 30 above. I reach the same conclusion with respect to the plaintiffs' allegation that Third Party Sellers who use Amazon's platform are potential competitors *of each other* "to produce and supply or supply" Amazon Products.

[73] Pursuant to subsection 45(8) of the Act, the term "competitor" in section 45 "includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c)." The plaintiffs have not plead any facts whatsoever to provide any reasonable basis to believe that Amazon would *likely* compete with any specific Third Party Seller with respect to any *particular* product. The same is true with respect to the plaintiffs' allegation that Third Party Sellers are potential competitors of each other. Consequently, the plaintiffs have not provided sufficient notice to Amazon with respect to the specific products in relation to which it would have to defend the allegation of potential competition. The plaintiffs are not entitled to rely on the possibility that new facts may turn up as the case progresses: *Imperial Tobacco*, at para 22.

[74] Finally, the plaintiffs further allege that the Third Party Sellers are also actual competitors of each other. At paragraph 44 of their Statement of Claim, they briefly explain as follows:

> 44. The third-party sellers who use Amazon's platform are competitors for the production and supply or supply of Amazon Products because within these product categories, these sellers are competing with each other to sell those products to consumers, whether on or off Amazon's platform.

[75] Given my conclusion that the plaintiffs have not pled sufficient material facts to support their allegation that the Third Party Sellers entered into a separate agreement among themselves, it is unnecessary to address the above allegation that the Third Party Sellers are actual competitors of each other, within the meaning of section 45: see paragraphs 58-62 above.

[76] In summary, I conclude that the plaintiffs have pled sufficient material facts to support their allegation that Amazon is an actual competitor of at least some Third Party Sellers, within the meaning of subsection 45(1) of the Act. However, the plaintiffs have not plead sufficient material facts to support their allegation that Amazon and the Third Party Sellers are potential competitors. The same is true with respect to their allegation that the Third Party Sellers are potential competitors of each other. It is unnecessary to address the plaintiffs' separate allegation that the Third Party Sellers are actual competitors of each other.

(d) *The object and subject matter of S-4*

[77] At paragraphs 5 and 9 of their Statement of Claim, the plaintiffs broadly allege that Amazon and the Third Party Sellers entered into anticompetitive agreements contemplated by each of paragraphs 45(1)(a), (b) and (c). In this regard, the plaintiffs' allegations in paragraph 9 initially closely track the language of those provisions, without more. It would appear that the broad allegations apply to both S-4 and the Fair Pricing Policy. The plaintiffs then elaborate, as discussed at paragraphs 116- 161 below.

[78] For the reasons set forth below, I find that the plaintiffs' allegations with respect to S-4 of the BSA do not disclose a reasonable cause of action under sections 45 or 46 of the Act. In brief, even reading those allegations generously, holistically and practically, they do not have a reasonable prospect of success.

(i) Subsection 45(1) and the scheme of the Act

[79] It is trite law that "the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 117, quoting *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [***Rizzo***]; and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, both quoting E. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

[80] For convenience, subsection 45(1) is reproduced below:

Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement:
(a) to fix, maintain, increase or control the price for the supply of the product;	**a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or	**b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour

markets for the production or supply of the product; or	la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

[81] The presence of the word "or" at the end of paragraph 45(1)(b) makes it clear that paragraphs 45(1)(a) – (c) are disjunctive. That is to say, they create three separate offences.

[82] Interpreting subsection 45(1) by reference to the scheme and purposes of the Act strongly suggests that its scope is confined to agreements that are unambiguously harmful to competition. Those agreements are also known as "hard-core cartels."

[83] With respect to the scheme of the Act, it is important to note that the Act adopts a bifurcated approach to horizontal agreements between competitors. In addition to the criminal prohibition in section 45, the Act contains a civil provision in section 90.1, which provides as follows:

Agreements or Arrangements that Prevent or Lessen Competition Substantially	**Accords ou arrangements empêchant ou diminuant sensiblement la concurrence**
Order	**Ordonnance**
90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely	**90.1 (1)** Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue

to prevent or lessen, competition substantially in a market, the Tribunal may make an order	sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :
(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or	**a)** interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;
(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.	**b)** enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

[84] Parliament inserted section 90.1 into the Act in 2010, at the same time it amended subsection 45(1) to its current form. This strongly suggests that Parliament intended some types of agreements between competitors to be within the purview of section 45, and others to be contemplated by section 90.1. To avoid the possibility of such agreements being pursued under both of those provisions, Parliament amended section 45.1 and introduced subsection 90.1(10). Together, section 45.1 and subsection 90.1(10) prevent proceedings being brought under both provisions on the basis of essentially the same facts. The full texts of both provisions are included in Annex 2 to these reasons.

[85] Additional important indications of the scope of sections 45 and 90.1, respectively, are provided by their position in the overall architecture of the Act, as well as by the potential

penalties for contravening section 45, and the potential remedy that may be imposed under section 90.1.

[86] Section 45 is situated in Part VI of the Act, which deals with criminal offences in relation to competition. By contrast, section 90.1 is in Part VIII of the Act, which addresses matters reviewable by the Competition Tribunal.

[87] Pursuant to subsection 45(2), persons who commit an offence under subsection 45(1) are guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the Court, or to both. At the time of the 2010 amendments to the Act, these sanctions were increased from five years and a fine not exceeding $10 million to 14 years and a fine not exceeding $25 million. The sanctions were again increased in 2019, with the limit on the maximum fine amount being removed: see the current and previous versions of subsection 45(1), at Annexes 2, 3 and 4 below.

[88] The significant increases in the potential penalties for contravening subsection 45(1) that were made in 2010, together with the removal of the limit on potential fines altogether in 2022, suggests that this provision was intended to apply to agreements that require high degrees of deterrence and denunciation. It is reasonable to infer that such agreements are those that are generally unambiguously harmful to competition and that merit the full force of the criminal law. Another way of describing such agreements are those that represent "the very antithesis of the Competition Act's objective": *Pioneer Corp. v Godfrey*, 2019 SCC 42 at para 65 [***Godfrey***], quoting *Shah*, at para 38.

[89] To the extent that other types of agreements among competitors can have pro-competitive or other benign effects, interpreting section 45 in a way that includes them within its purview would undermine the stated purpose of the Act, as set forth in section 1.1. That purpose is "to maintain and encourage competition in Canada", in order to achieve the various benefits listed in that provision. Interpreting section 45 in a manner that would be incompatible with this purpose should be avoided: *Rizzo*, at para 27. Insofar as such an incompatibility would result from the substantial chilling effect that section 45 would likely have on pro-competitive or other benign types of agreements, section 45 should be interpreted in a manner as to avoid such potential consequences.

[90] Interpreting section 45 in the manner described above would avoid this incompatibility. In other words, interpreting section 45 such that it applies solely to unambiguously harmful types of agreements between competitors that involve the matters described in paragraphs 45(1)(a) – (c), would be consistent with the scheme and purpose of the Act. This would produce the harmonious outcome that other types of agreements between competitors, including those that may directly or indirectly involve one or more of those matters, would be understood as being within the purview of section 90.1.

[91] In summary, the scheme and purposes of the Act support interpreting section 45 in a manner as to apply solely to unambiguously harmful types of agreements between competitors that involve the matters described in paragraphs 45(1)(a) – (c). The scheme and purpose of the Act also supports the view that other types of agreements between competitors that may or may

not have anti-competitive effects, depending on the particular facts and circumstances, were intended to be reviewed under section 90.1.

(ii) The jurisprudence

[92] The foregoing interpretation of section 45 is supported by the jurisprudence.

[93] To begin with, in *PANS*, at 649, the SCC observed that the predecessor of subsection 45(1) is "at the core of the criminal part of the Act" and "definitely rests on a substratum of values."[10]

[94] Consistent with these observations, this Court has observed that "price fixing agreements, like other forms of hard-core cartel agreements, are analogous to fraud and theft": *R v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117 at para 54 [***Maxzone***]. This Court has also characterized the penalties available under sections 45 and 46 of the Act as being such as to clearly communicate society's "abhorrence" of the crimes they proscribe: *Maxzone*, at para 51.

[95] In *Jensen FC*, this Court interpreted section 45 as applying to "three categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of sanction without a detailed inquiry into their actual competitive effects": *Jensen FC*, at para 96; see also para 287. Later in its decision, the Court described section 45 as "prohibiting hard-core cartels": *Jensen FC*, at para 289. Elsewhere, the Court observed that the existing scheme of the Act establishes a "criminal enforcement regime for the most egregious

[10] The predecessor section at issue was subsection 32(1)(c) of the *Combines Investigation Act*, which became section 45(1)(c) in 1986, soon after that Act was renamed the *Competition Act*.

forms of cartel agreements between competitors, while at the same time removing the threat of criminal sanctions for legitimate collaborations to avoid discouraging competitors from engaging in potentially beneficial alliances" [emphasis added]: *Jensen FC*, at para 95. Elsewhere in its decision, the Court also distinguished the conduct proscribed by the criminal prohibitions in the Act from "other types of conduct [that] are considered only potentially anti-competitive": *Jensen FC*, at para 90. The Court further noted that those types of conduct "are not treated as crimes and are instead subject to civil review and potential forward-looking prohibition once the impugned conduct has been established to have had, have or be likely to have anti-competitive effects": *Jensen FC*, at para 90.

[96] The view that section 45 is limited to a narrow range of conduct that "constitute naked restraints that can only have negative effects" was also adopted in *Mohr FC*, at para 57[11] and by the Supreme Court of British Columbia in *Williams v Audible Inc*, 2022 BCSC 834 at para 101 [***Williams***]. The Court in the latter case also adopted the view that "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": *Williams*, at para 102.

[97] In addition to the foregoing, the Court in *Shah* observed that "Section 45 limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct": Shah, at para 51. This statement was quoted with approval in *Godfrey*, at para 75.

[11] An error identified by Federal Court of Appeal in connection with this Court's discussion of the legislative history regarding s. 45 concerned a subsequent *obiter dictum* "observation" that this Court made at paragraph 60 of its decision.

However, the statement must be viewed in the light of the following, preceding, passage in *Shah*, at para 50:

> The *mens rea* contained in s. 45 has both subjective and objective components. The subjective component requires that the defendant *intend* to agree, with *knowledge* of the terms of that agreement. The objective component requires that the defendant ***objectively intend*** to achieve the prohibited end, in this case, increasing the price of LIBs and lessening, unduly, competition.
>
> [Emphasis added. Citations omitted.]

[98] It must also be kept in mind that *Godfrey* concerned the *mens rea* elements of s. 45 as it was prior to the 2010 amendments. In *PANS*, above, the SCC characterized the subjective and objective fault elements in the following terms:

> 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.
>
> *PANS*, at 659-660.

[99] Given that subsection 45(1) was amended to remove the requirement to demonstrate a conspiracy, agreement or arrangement to prevent or lessen competition "unduly," the SCC's teachings in *PANS* must be modified to reflect the current wording of paragraphs 45(1)(a) – (c). Pursuant to that wording, the subjective fault element would remain the same, namely, an

intention to enter into the agreement and knowledge of its terms. Accused persons remain free to adduce evidence that they did not intend to carry out the agreement. The objective fault element would be an objective intention to do one of the things proscribed in paragraphs 45(1)(a) – (c): *Watson*, at para 76; *Shah*, at paras 50-51. That objective intention is to be assessed in terms of whether a reasonable business person who is familiar with the business in question would or should know that the impugned agreement had as its object or purpose one of the prohibited types of conduct prescribed in paragraphs 45(1)(a), (b) or (c).

[100] In summary, the jurisprudence discussed above supports the conclusions of the interpretative analysis provided at paragraphs 84-91 of these reasons. That is to say, the jurisprudence supports the view that Parliament intended section 45 to apply only to conspiracies, agreements and arrangements that have unambiguously harmful effects on competition. Such agreements are also known as "hard-core" or "naked" cartel agreements. This unambiguously harmful conduct must be objectively intended, in the sense that a reasonable business person who is familiar with the business in question would or should know that the impugned agreement had as its object or purpose one of the prohibited types of conduct prescribed in paragraphs 45(1)(a), (b) or (c). Other types of conduct that are only potentially anti-competitive were intended to be assessed under section 90.1 of the Act, in order to remove the threat of criminal sanctions for potentially legitimate collaborations.

(iii) The legislative history of s. 45

[101] Legislative history can also be helpful in informing the purpose and scope of a statutory provision: *Atlantic Lottery*, at paras 41 and 44-6; *Imperial Tobacco*, at paras 127-128. However,

care must be taken to distinguish between, on the one hand, committee proceedings or other history that shed light on the evolution and legislative history of section 45, and on the other hand evidence provided by academics and public servants which may be aspirational, disputable or of arguable relevance: *Mohr FCA*, at para 63. For greater certainty, statements by those "directly responsible" for an amendment is relevant evidence of legislative purpose: *Atlantic Lottery*, at para 46; *Godfrey*, at para 68.

[102] In 1986, the maximum fine set forth in what is now section 45 of the Act was increased from $1 million to $10 million. In explaining the government's initial proposal to increase the fine to $5 million the Minister responsible for the amendments explained, shortly before the amendments were introduced for First Reading, that this change would "send a clear signal to the courts that Parliament considers conspiracy to be a very serious criminal offence and that offenders should be dealt with by a firm hand": Consumer and Corporate Affairs Canada, *Competition Law Amendments, A Guide* (Ottawa: December 1985) at 27.[12] Ultimately, the level of the fine was increased to $10 million following an amendment at the Legislative Committee stage.

[103] In 2002, the House of Commons Standing Committee on Industry, Science and Technology issued a report containing a number of recommendations to amend the Act. Recommendation 12 of that report stated as follows:

> 12. That the Government of Canada amend the *Competition Act* to create a two-track approach for agreements between competitors. The first track would retain the conspiracy provision (section 45) for agreements that are strictly devised to restrict competition

[12] The first page of this publication indicates that it was issued by the Minister of Consumer and Corporate Affairs, the Honourable Michel Côté. He was the Minister responsible for the 1986 amendments.

> directly through raising prices or indirectly through output restrictions or market sharing, such as customer or territorial assignments, as well as both group customer or supplier boycotts. The second track would deal with any other type of agreement between competitors in which restrictions on competition are ancillary to the agreement's main or broader purpose.
>
> House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, (adopted April 9, 2002, tabled April 23, 2002,), at xvi.

[104] Later in 2002, the Government of Canada broadly endorsed the foregoing recommendation when it stated the following:

> The Government supports the need to amend section 45 and indeed believes that such amendments are essential for effective enforcement of the provision.
>
> The Government further endorses the basic principle of a two-track approach for conspiracies under which hard core cartel behaviour, such as agreements to fix prices, allocate markets or restrict supplies, would be criminal offences without a competition test or an efficiency defence. Other types of agreements between competitors would be subject to a civil review…
>
> Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology, "*A Plan to Modernize Canada's Competition Regime*", (October 1, 2002), at 3.

[105] In 2008, a panel appointed by the federal government issued a report on this country's competition policy that included various recommendations to amend the Act. With respect to the criminal provisions of the Act, the panel observed:

> The Panel is of the view that the criminal law, with its attendant sanctions including fines and imprisonment, should be reserved for <u>conduct that is unambiguously harmful</u> to competition and where clear standards can be applied that are understandable to the business community.
>
> […]

> At the same time, criminal law is too blunt an instrument to deal with agreements between competitors that do not fall into the "hardcore" cartel category, such as restrictions on advertising or strategic alliances, but that may harm competition nonetheless. A more sophisticated economic approach to address the latter has been advocated by the Bureau and other experts to deal with this category of agreements between competitors.
>
> Government of Canada, *Compete to Win: Final Report – June 2008*, at 58-59 [*Compete to Win*] [Emphasis added.]

[106] Having regard to the foregoing, the panel recommended that the government "repeal the existing conspiracy provisions and replace them with a per se criminal offence to address hard-core cartels and a civil provision to deal with other types of agreements between competitors that have anti-competitive effects": *Compete to Win*, Recommendation 14(d), at 127 [footnote omitted].

[107] The following year, Bill C-10, a budget implementation bill that included amendments to section 45 and several other provisions of the Act, was introduced in Parliament. The wording of the proposed amendments to section 45 and a new civil provision in section 90.1 addressing non-hard-core cartel agreements among competitors was enacted without any changes and entered into force in March 2010.

[108] The legislative history discussed above helps to inform the Court's interpretation of section 45. As with the scheme and purposes of the Act, as well as the jurisprudence, it strongly suggests that the application of section 45, as currently worded, was intended to be limited to conspiracies, agreements and arrangements that are unambiguously harmful to competition. Such agreements are also known as "hard-core" or "naked" cartel agreements. Other agreements

between competitors were intended to be reviewed under the non-criminal provision in section 90.1 of the Act, in part to provide clearer standards to the business community.

[109] I will pause to note that, at the time of the 2010 amendments to the Act, Parliament also included a defence in subsection 45(4), which stated as follows:

Defence	**Défense**
(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:	**(4)** Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :
(a) that person establishes, on a balance of probabilities, that:	**a)** il établit, selon la prépondérance des probabilités :
(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and	**(i)** que le complot, l'accord ou l'arrangement, selon le cas, est accessoire à un accord ou à un arrangement plus large ou distinct qui inclut les mêmes parties,
(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and	**(ii)** qu'il est directement lié à l'objectif de l'accord ou de l'arrangement plus large ou distinct et est raisonnablement nécessaire à la réalisation de cet objectif;
(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.	**b)** l'accord ou l'arrangement plus large ou distinct, considéré individuellement, ne contrevient pas au même paragraphe.

[110] Given the presence of the words “that would otherwise contravene [subsection 45(1)],” this provision does not assist to discern the scope of subsection 45(1).

(iv) Conclusion regarding the interpretation and scope of section 45

[111] Based on my analysis of the scheme and purposes of the Act, as well as the jurisprudence and the legislative history discussed above, I conclude that Parliament intended to confine the application of section 45 to unambiguously harmful types of agreements between competitors that involve the matters described in paragraphs 45(1)(a) – (c).

[112] This unambiguously harmful conduct must be objectively intended, in the sense that a reasonable business person who is familiar with the business in question would or should know that the impugned agreement had as its object or purpose one of the prohibited types of conduct prescribed in paragraphs 45(1)(a), (b) or (c).

[113] I also conclude that other types of conduct that are only potentially anti-competitive were intended to be reviewed under section 90.1 of the Act, in order to remove the threat of criminal sanctions for potentially legitimate collaborations.

(v) Application of the interpretation of section 45 to the plaintiffs’ allegations regarding S-4

[114] As noted at paragraph 77 above, the plaintiffs’ claims regarding S-4 begin with the broad allegation that Amazon and the Third Party Sellers entered into anticompetitive agreements contemplated by each of paragraphs 45(1)(a), (b) and (c). In this regard, the plaintiffs’

allegations closely track the language of those provisions, without more. The plaintiffs then proceed to "particularize" their allegations as described below.

Paragraph 45(1)(a)

[115] As previously noted, paragraph 45(1)(a) of the Act makes it an offence to conspire, agree or arrange, with a competitor, "to fix, maintain, increase or control the price for the supply of the product" in respect of which the alleged conspirators are competitors.

[116] Beyond the broad allegations mentioned immediately above, the plaintiffs more specifically allege that, by agreeing to the MFN Clause in S-4 of the BSA, Amazon and Third Party Sellers agreed, expressly and in writing, *to limit* price competition. These alleged "co-conspirators" are claimed to have done so by setting a floor price for Amazon Products sold by Third Party Sellers *on non-Amazon websites*, based on the price at which Third Party Sellers sold Amazon Products on the Amazon platform. In this regard, the plaintiffs note that, pursuant to S-4, the Third Party Sellers agreed to:

> … maintain parity between the products you [the third-party seller] offer through Your Sales Channels and the products you list on any Amazon Site **by ensuring that** . . . the purchase price and every other term of sale . . . is at least as favorable to Amazon Site users as the most favorable terms via Your Sales Channels (excluding consideration of Excluded Offers).
>
> [Emphasis added.]

[117] The plaintiffs maintain that Amazon and the Third Party Sellers mutually understood that by this agreement the Third Party Sellers would set prices for Amazon Products on *non-Amazon websites* at prices that did not reflect competition between them but instead were collusively imposed prices derived from the prices they set for their products on Amazon's websites. The

plaintiffs add that Amazon and Third Party Sellers shared the common goal or common object that Third Party Sellers that sell on both Amazon and other websites (**"Multi-Homing Sellers"**) would not charge a higher retail price for Amazon Products *on Amazon's websites*, relative to the prices they charge for those products on other e-commerce websites. The Plaintiffs assert that this agreement is a "price restraint" on its face because Multi-Homing Sellers are not free to charge prices of their own choosing, but must instead set them to satisfy the price constraint established by the MFN Clause in S-4. Moreover, the plaintiffs claim that, by agreeing to S-4, Third Party Sellers agreed not to compete on other e-commerce websites in a manner that would cause Amazon to reduce its platform fees to a competitive level.

[118] It is plain and obvious that the foregoing allegations do not plead a reasonable cause of action in respect of paragraph 45(1)(a).

[119] Paragraph 45(1)(a) can be contravened in one of four ways, namely, by agreeing to "fix,", "maintain", "increase" or "control" the price for the product in respect of which the parties to the impugned agreement compete. I will begin by assessing whether the pleadings disclose a reasonable cause of action in relation to the "fixing", "maintaining" or "increasing" of the price of any Amazon Product. I will then do the same with respect to the "controlling" of the prices of Amazon Products.

[120] With respect to an agreement to "fix", "maintain" or "increase" the price for the supply of Amazon Products, the plaintiffs simply make bald allegations that track the language of the Act: See paragraphs 77 and 114 above. They do not provide any meaningful material facts or

particulars. This is not sufficient to state a reasonable cause of action: *Jensen FCA*, at paras 38, 63-64 and 70.

[121] Turning to the more particularized pleadings discussed at paragraphs 116 and 117 above, the plaintiffs do not allege any agreement to "fix", "maintain" or "increase" the price of any Amazon Product. Instead, they allege an agreement to *limit* price competition by setting a floor price (through the MFN Clause) that did not reflect competition between Amazon and Third Parties. That alleged floor price is claimed to have been a "collusively imposed" price derived from the prices that Third Party Sellers establish for their products on Amazon's websites. The plaintiffs assert that the MFN Clause is a *"price restraint"* on its face, because Multi-Homing Sellers were not free to charge prices of their own choosing, but instead were required to set them to satisfy the terms of the MFN Clause.

[122] Prior to the 2010 amendments to subsection 45(1), the word "limit" was included paragraphs 45(1)(a) and (b), and the word "restrain" appeared in paragraph 45(1)(d).[13] Had Parliament intended to capture agreements to "limit" or "restrain" prices in the manner alleged by the plaintiffs, it could easily have left those words in the amended version of subsection 45(1). It may be inferred from the removal of those words that Parliament did not intend for such agreements to be within the purview of the amended provision, unless such agreements also constitute agreements to "fix", "maintain", "increase" or "control" prices.

[13] Readers are referred to the text of that provision in Annex 4 below.

[123] The plaintiffs do not plead any particular price or range of prices that Amazon and Third Party Sellers agreed to "fix", "maintain" or "increase". They also do not plead any amount or range of any "increase" in the price of any Amazon Product.

[124] Given that the plaintiffs specifically reference the MFN Clause in S-4 throughout their Statement of Claim, and indeed quote from it at paragraph 48 of their Statement of Claim, it is permissible for this Court to consider S-4 in its entirety in considering whether it states what the plaintiffs allege it states: see paragraph 32 above.

[125] On a plain reading of the three versions of S-4 reproduced at paragraphs 49-51 above, there is nothing explicit or implicit therein that contemplated any "fixing", "maintaining" or "increasing" of the price of any Amazon Product. At all times, and subject to the MFN Clause that was explicitly intended to be *favourable* to Amazon's customers, Amazon and Third Party Sellers remained entirely free to set their own prices for Amazon Products on Amazon's Platform as they individually saw fit. Indeed, S-4 does not address whatsoever the prices that Amazon could charge, whether on its platform or elsewhere. For greater certainty, the MFN Clause did not in any way "fix", "maintain" or "increase" prices on Amazon's website in any commonly understood manner. As explicitly stated in the Fair Pricing Policy, "Sellers are responsible for setting their own prices on Amazon marketplaces."

[126] Insofar as sales of Amazon Products by Third Party Sellers *off Amazon's platform* are concerned, there is nothing in S-4 that "fixed", "maintain" or "increased" the prices of those sellers at any particular level. Indeed, S-4 is silent regarding prices off Amazon's platform, other

than to effectively state that whatever those prices are, they cannot be higher on Amazon's platform. In other words, the focus of S-4 is entirely on the prices at which Third Party Sellers sell *on Amazon's platform*. Outside that platform, Third Party Sellers remained free to set their own individual prices at all times. However, once they did so, they could not charge a less favourable price for those products *on Amazon's platform*. That is to say, they could not charge a price above the MFN Price. This was explicit in the initial version of S-4, and there is nothing to suggest otherwise in the second and third versions of S-4.

[127] Although the MFN Clause *may* have had have the indirect *effect* of increasing some prices of Amazon Products sold by Third Party Sellers *off* Amazon's platform, section 45 is not concerned with effects. It prescribes *agreements* to do the things described in paragraphs 45(1)(a), (b) and (c). An agreement that does not have as its object one of the things described in those paragraphs does not fall within the purview of section 45 simply because it may have an adverse impact on prices. Insofar as S-4 is concerned, its object cannot reasonably be said to have concerned the "fixing", "maintaining" or "increasing" of prices *off Amazon's platform*, because it was entirely focused *on Amazon's platform*.

[128] It bears emphasizing that Amazon and each individual Third Party Seller always remained free to set their own prices, both on Amazon's platform and outside that platform, subject solely to the MFN Clause.

[129] I pause to observe that, for the present purposes, any differences in the wording of the three versions of S-4 are of no consequence.

[130] Having regard to the foregoing, it is plain and obvious from a straightforward reading of S-4 that neither the MFN Clause, nor S-4 as a whole, "fixed", "maintained" or "increased" the price of any Amazon Product, within the meaning of paragraph 45(1)(a).

[131] I acknowledge that the second sentence in the second and third versions of S-4 included an obligation on Third Party Sellers to "maintain parity" between the products they offered *off Amazon* and the products they listed *on Amazon's platform*. The third sentence in the first version of S-4 included the same language. However, each of these three versions of S-4 proceeded to define that this simply meant that Third Party Sellers had to ensure that they complied with the MFN Clause, as described at paragraphs 125 and 126 above. They were otherwise entirely free to set the prices of their Amazon products in their absolute and unfettered discretion.

[132] I will now turn to the word "control" in paragraph 45(1)(a) of the Act.

[133] Reading the particularized pleadings discussed at paragraphs 116-117 above in the manner that is required on this Motion,[14] I acknowledge that they *may* arguably provide sufficient material facts to claim *a form of* "control" in relation to the prices charged by Third Party Sellers on Amazon's platform. This is because they describe the S-4 agreement and how it operates, on its face, to exercise *a form of* control over the prices of Amazon Products sold by Third Party Sellers *on Amazon's platform*. That form of control consists in an agreement by Third Party Sellers to ensure that the total price charged for any Amazon Product that they sell

[14] See paragraph [**29**] above.

on Amazon's platform is at least as favourable to users of that platform as the MFN Price.[15] This is a form of control because, as stated at paragraph 52 of the plaintiffs' Statement of Claim, Multi-Homing Sellers "agree[d] not to charge a higher retail price for Amazon Products on Amazon's e-commerce websites than on other e-commerce websites." In other words, the MFN Clause in S-4 established a constraining parameter on the prices at which Third Party Sellers could offer and sell Amazon Products *on Amazon's platform*. Although the plaintiffs do not use the term "control" when providing their particulars with respect to paragraph 45(1)(a) and S-4, at paragraphs 47 to 53 and 55 of the Statement of Claim, they do use that term elsewhere in the Statement of Claim, for example, at paragraphs 5, 91 and 98. To the extent that there may be any deficiency in their pleadings in this regard, that deficiency could readily be addressed by granting the plaintiffs leave to amend their pleading.

[134] Notwithstanding the foregoing, the *form of* "control" discussed above is not a form of "control" that was contemplated by paragraph 45(1)(a) when it was enacted by Parliament in 2010. In other words, that type of "control" of prices is not a type of *actus reus* prescribed by paragraph 45(1)(a). As discussed at paragraphs 82-113 above, an analysis of the scheme and purpose of the Act, the relevant jurisprudence and the legislative history of sections 45 and 90.1 demonstrates that section 45 was intended to apply solely to unambiguously harmful types of agreements between competitors that involve the matters described in paragraphs 45(1)(a), (b) and (c). As Parliament was aware, those agreements are also known as "hard-core" or "naked" cartel agreements.

[15] For convenience, the MFN Price is defined above as the most favorable terms upon which the same product is offered or sold outside that platform.

[135] S-4 is no such agreement. It is not unambiguously harmful. On their face, the second and third versions of S-4 solely concerned pricing *on Amazon's platform* and required pricing that was "at least as favourable" to users of that platform as the MFN Price: see paragraphs 50 and 51 above. The corresponding language in the initial version of S-4 required pricing *on Amazon's platform* that did "not exceed the lowest Total Price for that product offered or sold by you or your affiliates on or through any Non-Physical Sales Channel": See paragraph 49 above. The second and third versions of S-4 also required that customers *be compensated* when a Third Party Seller became aware of pricing that did not comply with the MFN Clause. In this regard, those versions of S-4 stated as follows:

> If you become aware of any non-compliance with [the MFN Clause], you will promptly compensate adversely affected customers by making appropriate refunds to them in accordance with Section S-2.2.

[136] It bears emphasizing that, insofar as the plaintiffs' claims concern either the prices of Amazon Products sold *outside Amazon's platform* or Amazon's platform fees, S-4 did not constitute an explicit or implicit agreement regarding such prices or fees. On a plain reading, it was limited to the prices charged by Third Party Sellers *on Amazon's platform*. Stated differently, the only prices in respect of which S-4 imposed any form of "control" were the prices of products sold on Amazon's platform. S-4 did not impose any control in relation to the prices of any products sold outside of that platform, for example on Third Party Sellers' own websites, or on platforms operated by other parties. Third Party Sellers remained free at all times to set the prices of Amazon Products sold outside Amazon's platform, in their complete and unfettered discretion.

[137] For greater certainty, and contrary to the plaintiffs' allegations, S-4 also did not constitute an agreement by Third Party Sellers to refrain from competing on non-Amazon e-commerce platforms in a manner that would cause Amazon to reduce its platform fees to a competitive level. On a plain reading of S-4, there was nothing whatsoever that was directed towards or that contemplated any constraint on the ability of Third Party Sellers to set the prices of Amazon Products sold outside Amazon' platform, as they saw fit. Likewise, there was nothing in S-4 that was directed towards platform fees.

[138] I acknowledge that one potential *effect* of S-4 *might* have been that it indirectly resulted in setting a floor price for Amazon Products sold by some Third Party Sellers on some non-Amazon websites, based on the price at which those sellers sold those products on Amazon's platform, as alleged by the plaintiffs. I also acknowledge that a potential second, indirect, *effect* of this might have been to attenuate the competitive pressures on Amazon's platform fees, as alleged by the plaintiffs. However, section 45 is concerned with the object or subject matter of agreements. It is not concerned with their effects: see paragraphs 41-42 above.

[139] On a plain reading of the three versions of S-4 reproduced at paragraphs 49-51 above, their subject matter or object solely concerned the prices of products sold on Amazon's platform. In other words, the *actus reus* of Amazon and Third Party Sellers concerned an agreement about prices *on Amazon's platform*.

[140] Given that such *actus reus* was explicitly directed towards *favouring* customers who purchased Amazon Products on Amazon's platform, it is plain and obvious that it is not a type of

actus reus that constitutes an agreement to "control" prices, within the meaning of paragraph 45(1)(a). To reiterate, on its face, that agreement was not unambiguously harmful to competition or customers of Amazon Products: see paragraph 135 above.

[141] Moreover, it is plain and obvious that the plaintiffs do not have a reasonable prospect of success in satisfying the objective *mens rea* element associated with paragraph 45(1)(a), whether in relation to an agreement to "control" prices or otherwise. That element is an objective intention to "fix", "maintain", "increase" or "control" prices, as contemplated by paragraph 45(1)(a): see paragraph 43 above.

[142] The plaintiffs' particularized claims in this regard are set forth at paragraphs 51 and 52 of their Statement of Claim, which provide as follows:

> 51. Amazon and the third-party sellers mutually understood that by this agreement the third party-sellers would set prices for Amazon Products on non-Amazon websites at prices that did not reflect competition between them but instead were collusively imposed prices derived from the prices they set for their products on Amazon's websites.
>
> 52. By this agreement Amazon and the third-party sellers agreed to act in furtherance of a common goal or to pursue a common object. That goal or object was that third-party sellers that sell on both Amazon and other websites, ("multi-homing" sellers) agree not to charge a higher retail price for Amazon Products on Amazon's e-commerce websites than on other e-commerce websites.

[143] These claims are bald assertions, unsupported by any material facts. That alone is fatal to the plaintiffs' claim: see paragraph 30 above. For greater certainty, neither the pleadings quoted immediately above nor any other pleadings in the Statement of Claim provide sufficient material

facts from which the requisite objective intention associated with paragraph 45(1)(a) may be reasonably inferred.

[144] The plaintiffs' claims are also contradicted by a plain reading of S-4. As discussed above, the subject matter or object of S-4 concerns prices of products sold *on Amazon's platform*. S-4 does not concern the prices of Amazon Products sold on *non-Amazon websites*, other than to state that, whatever those prices may be, the corresponding prices on Amazon's platform cannot be higher than the lowest of those prices.

[145] A reasonable business person who is familiar with online retailing, including on Amazon, would not likely conclude from a plain reading S-4 that it had as its object or purpose the "control" of prices on *Amazon* or *non-Amazon websites*, or the "fixing", "maintaining" or "increasing" of the prices of Amazon Products sold on such websites, within the meaning of paragraph 45(1)(a): see paragraphs 42-43 above. The plaintiffs do not have a reasonable prospect of success of demonstrating otherwise. Stated differently, the reasonable business person described above would not likely know, and could not be expected to know, that Amazon and Third Party Sellers objectively intended to "fix", "maintain", "increase" or "control" prices in the sense contemplated by paragraph 45(1)(a), and as alleged by the plaintiffs. Such a reasonable person would not likely consider that S-4 was the type of unambiguously harmful, hard-core cartel agreement, contemplated by paragraph 45(1)(a).

[146] Having regard to all of the foregoing, I conclude that it is plain and obvious that the plaintiffs' claims disclose no reasonable cause of action with respect to paragraph 45(1)(a).

Paragraphs 45(1)(b) and (c)

[147] Paragraph 45(1)(b) makes it an offence to conspire, agree or arrange with a competitor "to allocate sales, territories, customers or markets for the production or supply of" the product in respect of which the co-conspirators compete.

[148] Paragraph 45(1)(c) makes it an offence to conspire, agree or arrange with a competitor "to fix, maintain, control, prevent, lessen or eliminate the production or supply of" the product in respect of which the co-conspirators compete.

[149] As with paragraph 45(1)(a), the Statement of Claim makes broad allegations that simply track the language of paragraphs 45(1)(b) and (c). The only elaboration provided by the plaintiffs is at paragraph 54, where they state as follows:

> 54. The agreement also (i) allocates sales, territories, customers or markets for the production or supply of the Amazon Products and (ii) fixes, maintains, controls, prevents, lessens, or eliminates the production or supply of the Amazon Products **because third-party sellers cannot sell on Amazon's platform unless they make this agreement.** This ensures that if these third-party sellers do not wish to participate in the anticompetitive arrangement, then they cannot compete to sell their Amazon Products on Amazon's websites, thereby removing their Amazon Products from sale to customers who only purchase from Amazon's platform. As a result of the size of the market supplied by Amazon, **by not competing to sell Amazon Products on Amazon's websites the production or supply of Amazon Products to consumers is reduced.**

[150] In essence, the plaintiffs allege that S-4 contravenes paragraphs 45(1)(b) and (c) of the Act *because* third parties cannot sell on Amazon's platform, and thereby access customers who only purchase from that platform, unless those third parties agree to the terms of S-4.

[151] Once again, this is a bald assertion. It amounts to stating that a platform access agreement constitutes an agreement to engage in the type of conduct prescribed by paragraphs 45(1)(b) and (c), simply *because* persons who do not wish to sign the agreement cannot sell on the platform and thereby access customers who purchase only from that platform.

[152] There are at least five fundamental problems with this allegation.

[153] First, it fails to provide any material facts whatsoever to support an allegation with respect to the sub-elements of paragraphs 45(1)(b) and (c): see paragraph 35 above.

[154] Second, it is not supported by a plain reading of S-4, which does not reflect any agreement between Amazon and Third Party Sellers (i) to allocate any "sales, territories, customers or markets for the production or supply of" Amazon Products; or (ii) "to fix, maintain, control, prevent, lessen or eliminate the production or supply of" Amazon Products. To reiterate, on its face, S-4 is entirely about the prices at which Third Party Sellers sell *on Amazon's platform*. Its purpose or object is to ensure the most *favourable* pricing for the products sold on its platform. There is nothing explicit or implicit in the terms of S-4 that concerns any allocation of sales, territories, customers or markets for the production of supply of such products; or that otherwise concerns the *production or supply* of those products.

[155] Third, an online platform access agreement between two parties (in this case, Amazon and a Third Party Seller), does not axiomatically become an agreement contemplated by paragraphs 45(1)(b) and (c), simply *because* another party (the **"Other Party"**) does not wish to

sign the agreement, and consequentially cannot access the platform and thereby make its products available to customers on the platform. The fact that customers on the platform are precluded from accessing the Other Party's products is not the result of any agreement that the platform operator has signed with someone else (in this case, a Third Party Seller). It is the result of the refusal of the Other Party to sign a similar agreement. I will observe in passing that the plaintiffs do not allege that Amazon and any Third Party have agreed to preclude or otherwise impede any Other Party from entering into the BSA, including S-4.

[156] Fourth, the plaintiffs do not plead the objective *mens rea* element associated with paragraphs 45(1)(b) and (c). That is to say, they do not plead an objective intent to do anything described in those paragraphs: see paragraphs 35 and 43 above.

[157] Fifth, that requisite objective intent is inconsistent with what the plaintiffs themselves allege to be the "mutual understanding" associated with the agreement, as well as its "goal or object": see paragraph 142 above.

[158] Beyond the foregoing, and having regard to the consumer-friendly language of S-4 discussed at paragraph 135 above, I consider that a reasonable business person who is familiar with online retailing, including on Amazon, would not likely conclude from reading S-4 that it had as its object or purpose anything described in paragraphs 45(1)(b) or (c).

[159] In summary, for all of the foregoing reasons, I find that it is plain and obvious that the plaintiffs' allegation that each of the three impugned versions of S-4 contravened paragraphs 45(1)(b) and (c) has no reasonable prospect of success.

(vi) Section 46

[160] Given my conclusion with respect to the futility of the plaintiffs' claims in relation to section 45, it follows that it is also plain and obvious that their claims with respect to section 46 have no reasonable prospect of success. This is because one of the elements of section 46 is that there be an agreement that, "if entered into in Canada, would have been in contravention of section 45" [emphasis added]: See paragraphs 25 and 36 above.

[161] In any event, the plaintiffs have not provided any material facts with respect to another important element in section 46, namely, the requirement that there be a "directive, instruction, intimation of policy or other communication" to the defendants who carry on business in Canada. At paragraph 26 of their Statement of Claim, the plaintiffs baldly claim that Amazon.com, Inc. directed the other defendants to implement the Alleged Anti-competitive Agreements. At paragraphs 94 and 95, the plaintiffs then make further bald allegations that simply track the language of section 46. These claims fall short of providing sufficient material facts for the purposes of this Motion: see paragraphs 30-33 above.

(e) *Conclusions regarding the allegations in relation to S-4*

[162] For the reasons set forth in parts V.A.(2)(d) above, I find that the plaintiffs' allegations with respect to S-4 do not disclose a reasonable cause of action under sections 45 or 46 of the

Act. In brief, those allegations do not have a reasonable prospect of success because S-4 does not constitute an agreement to do anything contemplated by sections 45 or 46. Stated differently, the object of S-4 has no reasonable prospect of being found to be anything described in paragraphs 45(1)(a), (b) or (c), or by implication, section 46.

[163] Although it *may* be arguable that the MFN Clause in S-4 exercises *a form of* "control" over the prices of Amazon Products sold by Third Party Sellers *on Amazon's platform*, that form of control is not something that was contemplated by Parliament when paragraph 45(1)(a) was enacted in 2010. In other words, it is plain and obvious that this type of "control" is not a type of *actus reus* prescribed by paragraph 45(1)(a). This is because, on a plain reading of S-4 — which is incorporated by reference into the plaintiffs' Statement of Claim (see paragraph 32 above) — S-4 is not a type of agreement prescribed by paragraph 45(1)(a). Such agreements are limited to those that are unambiguously harmful to competition and consumers. They are also known as a "hard-core" or "naked" cartel agreement. S-4 is not such an agreement because its express purpose or object is to provide consumers on Amazon's platform prices that are "at least as favourable" as the most favourable prices at which Third Party Sellers offer or sell Amazon products outside of Amazon's platform. In support of that object, which benefits consumers on Amazon's platform, the second and third versions of S-4 required a Third Party Seller to compensate consumers when it became aware of pricing that did not comply with the MFN Clause: see paragraphs 135-140 above.

[164] Moreover, it is plain and obvious that the plaintiffs do not have a reasonable prospect of success in satisfying the objective *mens rea* element associated with paragraphs 45(1)(a), (b) or

(c), whether in relation to an agreement to control prices or otherwise. In this regard, the plaintiffs do not have a reasonable prospect of success in attempting to demonstrate that a reasonable business person who is familiar with online retailing, including on Amazon, would or should know that S-4 had as its object or purpose one of the prohibited types of conduct prescribed in paragraphs 45(1)(a), (b) or (c), as alleged by the plaintiffs.

(4) Analysis of the Fair Pricing Policy

(a) *Introduction*

[165] Amazon published the Fair Pricing Policy on its website for Third Party Sellers in November 2017. It states as follows:

> Amazon Marketplace Fair Pricing Policy
>
> **Sellers are responsible for setting their own prices on Amazon marketplaces**. In our mission to be Earth's most customer-centric company, we strive to provide our customers with the largest selection, **at the lowest price**, and with the fastest delivery as sellers play an important role.
>
> Amazon regularly monitors the prices of items on our marketplaces, including shipping costs, and compares them with other prices available to our customers**. If we see pricing practices on a marketplace offer that harm customer trust**, Amazon can remove the Featured Offer, remove the offer, suspend the ship option, or in serious or repeated cases, suspending or terminating selling privileges.
>
> Pricing practices that harm customer trust include, but are not limited to:
>
> - Setting a reference price on a product or service that misleads customers;
> - **Setting a price on a product or service that is significantly higher than recent prices offered on or off Amazon**; or
> - Selling multiple units of a product for more per unit than that of a single unit of the same product;

- **Setting a shipping fee on a product that is excessive**. Amazon considers current public carrier rates, reasonable handling charges, as well as buyer perception when determining whether a shipping price violated our fair pricing policy.

  [Emphasis added.]

(b) *The "agreement"*

[166] On its face, the Fair Pricing Policy appears to be a unilateral policy posted by Amazon on its website.

[167] However, the second paragraph on the first page of the BSA explicitly states that, by registering for or using Amazon's services, a Third Party Seller agrees to be bound by the terms of the BSA, "INCLUDING THE SERVICE TERMS AND PROGRAM POLICIES THAT APPLY IN THE COUNTRY FOR WHICH YOU REGISTER." The definitions section at the end of the BSA defines "Program Policies" as including "all terms, conditions, policies, guidelines, rules and other information on the Applicable Amazon Site or on Seller Central." Moreover, section 16 of the BSA, which deals with modifications to the BSA, includes changes that may be made to Program Policies.

[168] Having regard to the foregoing, I am satisfied that the Fair Pricing Policy constitutes an "agreement" for the purposes of sections 45 and 46 of the Act.

(c) *Among "competitors"*

[169] The plaintiffs essentially make the same allegations with respect to this element as they do in connection with S-4. Likewise, Amazon makes the same arguments as discussed at

paragraph 65 in support of its position that the Fair Pricing Policy is not a horizontal agreement, within the meaning of section 45 and as implicitly contemplated by section 46.

[170] For the reasons discussed at paragraphs 66-69 above, I conclude that the plaintiffs have pled sufficient material facts to support their allegation that Amazon is a current competitor of at least some Third Party Sellers, within the meaning of subsection 45(1) of the Act.

[171] For the reasons discussed at paragraphs 71-73, I conclude that the plaintiffs have not pled sufficient facts to support their allegation that Amazon is a *potential* competitor of Third Party Sellers, or their allegation that Third Party Sellers are *potential* competitors of each other.

[172] For the reasons discussed at paragraph 75, it is not necessary to address the plaintiffs' allegation that Third Party Sellers are actual competitors of each other.

(d) *The object and subject matter of the Fair Pricing Policy*

(i) Paragraph 45(1)(a)

[173] The plaintiffs' allegations with respect to the subject matter of the Fair Pricing Policy include the broad allegation that it contravenes each of paragraphs 45(1)(a), (b) and (c). In this regard, the allegations simply repeat the language of those provisions.

[174] The plaintiffs also assert that the Fair Pricing Policy imposes costly penalties on Third Party Sellers if they sell products to consumers on any e-commerce website for a price that is

lower than the price charged on Amazon's platform. They add that Amazon regularly penalizes Third Party Sellers for engaging in this conduct.

[175] As with S-4, the Fair Pricing Policy may be considered to be incorporated into the plaintiffs' statement of claim because it is "central enough to the claim to form an essential element or integral part of the claim itself or its factual matrix": Jensen FCA, at para 52(c), endorsing Jensen FC, at paras 85 and 87. See paragraph 32 above.

[176] Contrary to the plaintiffs' assertion, the Fair Pricing Policy does not impose penalties for simply selling products on any e-commerce website for a price that is lower than the price charged on Amazon's platform. There is nothing explicit or implicit that says or implies any such thing. On a plain reading of that policy, the potential penalties described therein only apply where a Third Party Seller engages in practices on an Amazon marketplace that harm consumer trust, including by "[s]etting a price on a product or service that is significantly higher than recent prices offered on or off Amazon" [emphasis added]. The Plaintiffs fail to plead any material facts whatsoever to support their bald assertion that Amazon regularly penalizes or threatens to penalize Third Party Sellers who simply offer lower prices for their Amazon Products on their own or other retail e-commerce websites.

[177] The plaintiffs then elaborate upon their broad allegation with respect to paragraphs 45(1)(a), (b) and (c), by making essentially the same allegations as discussed at paragraph 117 above. As with S-4, the plaintiffs also allege that the Fair Pricing Policy permits Amazon to *limit* and *restrict* price competition and to shelter from competition the fees it charges to Third Party

Sellers for using its online platform. In addition, the plaintiffs reiterate that the Fair Pricing Policy ensures that Amazon can set anti-competitive fees and creates a floor price under which Amazon products cannot be offered for sale on any e-commerce website.

[178] For the same reasons provided at paragraphs 120-130 and 141-146 in relation to S-4, it is plain and obvious that the foregoing allegations do not plead a reasonable cause of action under paragraph 45(1)(a) in respect of an agreement to "fix", "maintain" or "increase" the price of any product in respect of which Amazon and Third Party Sellers compete.

[179] For greater certainty, the explicit purpose or object of the Fair Pricing Policy is to provide Amazon's customers with "the largest selection, at the lowest price, and with the fastest delivery." It is also to deter pricing practices on Amazon's platform "that harm customer trust", including deterring pricing that is "significantly" higher than recent prices offered on or off Amazon. It is plain and obvious that this purpose or object is not one that is within purview of paragraph 45(1)(a). This is because it is plain and obvious that it is not unambiguously harmful to competition and consumers. It is clearly not a form of "hard-core" or "naked" cartel conduct that Parliament intended to target when it enacted paragraph 45(1)(a) in its current form.

[180] As for the plaintiffs' broad allegation that the Fair Pricing Policy constitutes an agreement to "control" such prices, I acknowledge that the pricing practices identified in that policy *may* arguably be said to constitute a form of "control" in relation to the prices charged by Third Party Sellers on Amazon's platform. However, for the reasons provided at paragraph 134 above, such "control" is not a form of control that is within the purview of paragraph 45(1)(a).

[181] Moreover, insofar as the objective *mens rea* requirement for paragraph 45(1)(a) is concerned, a reasonable business person who is familiar with online retailing, including on Amazon, would not likely conclude from a plain reading of the Fair Pricing Policy that it had as its object or purpose the "control" of prices on *Amazon* or *non-Amazon websites*, or the "fixing", "maintaining" or "increasing" of the prices of Amazon Products sold on such websites, within the meaning of paragraph 45(1)(a): see paragraph 145 above. The plaintiffs do not have a reasonable prospect of success of demonstrating otherwise. Stated differently, such a reasonable business person would not likely know, and could not be expected to know, that Amazon and Third Party Sellers objectively intended to "fix", "maintain", "increase" or "control" prices in the sense contemplated by paragraph 45(1)(a), and as alleged by the plaintiffs. Such a reasonable person would not likely consider the Fair Pricing Policy to be a type of unambiguously harmful, hard-core cartel agreement, contemplated by paragraph 45(1)(a).

[182] Having regard to all of the foregoing, I conclude that it is plain and obvious that the plaintiffs' claims disclose no reasonable cause of action with respect to paragraph 45(1)(a).

(ii) Paragraphs 45(1)(b) and (c)

[183] Insofar as paragraphs 45(1)(b) and (c) are concerned, the plaintiffs' claims are virtually identical to the claims they make with respect to S-4. In this regard, the broad claims that simply track the language of the Act and that are referenced in the first sentence of paragraph 149 above apply to both S-4 and the Fair Pricing Policy. In addition, the plaintiffs' elaborated claims, which are quoted in the remainder of that paragraph, are identical to claims made at paragraph 67 of the Statement of Claim.

[184] For essentially the same reasons provided at paragraphs 150-158 above, I find that it is plain and obvious that the plaintiffs' allegation that the Fair Pricing Policy contravenes paragraphs 45(1)(b) and (c) has no reasonable prospect of success.

[185] For greater certainty, those allegations are not supported by a plain reading of the Fair Pricing Policy, which does not reflect any agreement between Amazon and Third Party Sellers (i) to allocate any "sales, territories, customers or markets for the production or supply of" Amazon Products; or (ii) "to fix, maintain, control, prevent, lessen or eliminate the production or supply of" Amazon Products. On its face, the Fair Pricing Policy is confined to pricing practices on Amazon marketplaces that harm customer trust. Its explicit purpose or object is to deter such practices, including the setting of a price on a product or service that is significantly higher than recent prices offered on or off Amazon's platform. There is nothing explicit or implicit in the terms of the Fair Pricing Policy that concerns any allocation of sales, territories, customers or markets for the production of supply of such products; or that otherwise concerns the *production or supply* of those products.

[186] As with S-4, the Fair Pricing Policy is couched in consumer-friendly language. I consider that a reasonable business person who is familiar with online retailing, including on Amazon, would not likely conclude from reading that policy that it had as its object or purpose anything described in paragraphs 45(1)(b) or (c), as alleged by the plaintiffs.

(iii) Section 46

[187] Given my conclusion with respect to the futility of the plaintiffs' claims in relation to section 45 and the Fair Pricing Policy, it follows that it is also plain and obvious that their claims with respect to section 46 have no reasonable prospect of success: see paragraphs 160-161 above.

(e) *Conclusion regarding the allegations in relation to the Fair Pricing Policy*

[188] For the reasons set forth in parts V.A.(3)(d) above, I find that the plaintiffs' allegations with respect to the Fair Pricing Policy do not disclose a reasonable cause of action under sections 45 or 46 of the Act. In brief, those allegations do not have a reasonable prospect of success because the Fair Pricing Policy does not constitute an agreement to do anything contemplated by sections 45 or 46. Stated differently, it is plain and obvious that the object of the Fair Pricing Policy is not anything that has a reasonable prospect of being found to be an agreement described in paragraphs 45(1)(a), (b) or (c), or by implication, section 46.

[189] Although it *may* be arguable that the Fair Pricing Policy exercises a form of "control" over the prices of Amazon Products sold by Third Party Sellers *on Amazon's platform*, that form of control is not something that was contemplated by Parliament when paragraph 45(1)(a) was enacted in 2010. In other words, it is plain and obvious that this type of "control" is not a type of *actus reus* prescribed by paragraph 45(1)(a). This is because, on a plain reading of the Fair Pricing Policy, which is incorporated by reference into the plaintiffs' Statement of Claim (see paragraph 32 above), that policy is not a type of agreement prescribed by paragraph 45(1)(a). Such agreements are limited to those that are unambiguously harmful to competition and consumers. They are also known as "hard-core" or "naked" cartel agreements. The Fair Pricing

Policy is not such an agreement because its express purpose or object is to deter pricing practices that harm customer trust.

[190] Moreover, it is plain and obvious that the plaintiffs do not have a reasonable prospect of success in satisfying the objective *mens rea* element associated with paragraphs 45(1)(a), (b) or (c), whether in relation to an agreement to "control" prices or otherwise. In this regard, the plaintiffs do not have a reasonable prospect of success in attempting to demonstrate that a reasonable business person who is familiar with online retailing, including on Amazon, would or should know that the Fair Pricing Policy had as its object or purpose one of the prohibited types of conduct prescribed in paragraphs 45(1)(a), (b) or (c).

VI. Conclusion

[191] For the reasons provided in parts V.A.(2)(d) and V.A.(3)(d) above, I find that the plaintiffs' allegations do not disclose a reasonable cause of action. This is because (i) the plaintiffs' Statement of Claim is based on a single cause of action for recovery of damages under paragraph 36(1)(a) of the Act, as a result of conduct contrary to sections 45 and 46 of that legislation; and (ii) it is plain and obvious that the plaintiffs' allegations that the Allegedly Anti-competitive Practices contravene sections 45 and 46 of the Act do not have a reasonable prospect of success.

[192] More specifically, it is plain and obvious that the plaintiffs' allegations that S-4 and the Fair Pricing Policy contravene paragraphs 45(1)(a), (b) and (c), as well as section 46, of the Act, do not have a reasonable prospect of success. Consequently, it is plain and obvious that the

plaintiffs' action under paragraph 36(1)(a) of the Act does not have a reasonable prospect of success.

[193] Given my conclusion that the plaintiffs' allegations do not disclose a reasonable cause of action, it is unnecessary to address the other issues raised in this Motion for an order certifying the plaintiffs' action as a class proceeding, and certain other relief.

[194] Pursuant to Rule 334.39 (reproduced in Annex 1), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding unless certain conditions are met. I find that none of those conditions are met.

[195] In closing, I will simply make two additional observations,

[196] First, I consider it to be plain and obvious that Parliament could not have intended that the "30,000+" Third Party Sellers who agreed to S-4 and the Fair Pricing Policy would thereby become "co-conspirators", as alleged by the Plaintiffs, and become liable to a penalty of 14 years of imprisonment and/or a fine of up to $25 million (or higher, following 2022 amendments to the Act) under section 45 of the Act. It would also be plain and obvious to a reasonable business person who is familiar with online retailing, including on Amazon, that a Third Party Seller would not have any basis whatsoever to apprehend that, by registering to become a seller on Amazon's platform, they would thereby become a criminal co-conspirator and liable to such penalties.

[197] Second, my conclusion regarding the futility of the plaintiffs' claim under paragraph 45(1)(a) would be particularly apparent to the members of the Court who have competition law expertise. I make this observation because earlier this year the Court issued a Notice to the Parties and the Profession entitled: *Pilot Project: Chambers of the Court* to increase transparency and provide greater certainty regarding the manner in which matters in these areas are ordinarily assigned.

ORDER in T-445-20

THIS COURT ORDERS that:

1. This Motion to certify the plaintiffs' action as a class proceeding is dismissed.

2. No costs are awarded.

"Paul S. Crampton"
Chief Justice

ANNEX 1

Rules 334.16(1) & 334.39(1) of the Federal Courts Rules	*Règles 334.16(1) & 334.39(1) des Règles des Cours fédérales*
Certification	**Autorisation**
Conditions	**Conditions**
334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	**a)** les actes de procédure révèlent une cause d'action valable;
(b) there is an identifiable class of two or more persons;	**b)** il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	**c)** les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	**d)** le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
(e) there is a representative plaintiff or applicant who	**e)** il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	**(i)** représenterait de façon équitable et adéquate les intérêts du groupe,
(ii) has prepared a plan for the proceeding that	**(ii)** a élaboré un plan qui propose une méthode

sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

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

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

[…]

efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[…]

Costs

No costs

334.39 (1) Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

(a) the conduct of the party unnecessarily lengthened the duration of the proceeding;

(b) any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence,

Dépens

Sans dépens

334.39 (1) Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :

a) sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;

b) une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par

mistake or excessive caution; or

erreur ou avec trop de circonspection;

(c) exceptional circumstances make it unjust to deprive the successful party of costs.

c) des circonstances exceptionnelles font en sorte qu’il serait injuste d’en priver la partie qui a eu gain de cause.

ANNEX 2

Competition Act, RSC 1985, c C-34	***Loi sur la concurrence, LRC 1985, ch. C-34***
PART IV Special Remedies **Recovery of damages**	**PARTIE IV** Recours spéciaux **Recouvrement de dommages-intérêts**
36 (1) Any person who has suffered loss or damage as a result of	**36 (1)** Toute personne qui a subi une perte ou des dommages par suite :
(a) conduct that is contrary to any provision of Part VI, or	**a)** soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	**b)** soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.
[…]	[…]

PART VI

Offences in Relation to Competition

Conspiracies, agreements or arrangements between competitors

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

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

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

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

Conspiracies, agreements or arrangements regarding employment

(1.1) […]

Penalty

PARTIE VI

Infractions relatives à la concurrence

Complot, accord ou arrangement entre concurrents

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Complot, accord ou arrangement en matière d'emploi

(1.1) […]

Peine

(2) Every person who commits an offence under subsection (1) or (1.1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the court, or to both.

(2) Quiconque commet l'infraction prévue aux paragraphes (1) ou (1.1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende dont le montant est fixé par le tribunal, ou l'une de ces peines.

Evidence of conspiracy, agreement or arrangement

Preuve du complot, de l'accord ou de l'arrangement

(3) In a prosecution under subsection (1) or (1.1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

(3) Dans les poursuites intentées en vertu des paragraphes (1) ou (1.1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable

Defence

Défense

(4) No person shall be convicted of an offence under subsection (1) or (1.1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(4) Nul ne peut être déclaré coupable d'une infraction prévue aux paragraphes (1) ou (1.1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

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

a) il établit, selon la prépondérance des probabilités

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

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

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

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

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

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

[…]

[…]

Definitions

Définitions

(8) The following definitions apply in this section.

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

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

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un

paragraphs (1)(a) to (c). (concurrent)

arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (competitor)

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

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

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

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

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

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

Foreign directives

Directives étrangères

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

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

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.

[…]

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

[…]

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Accords ou arrangements empêchant ou diminuant sensiblement la concurrence

Order

Ordonnance

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order:

90.1 (1) Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

[…]

[…]

Where proceedings commenced under section 45, 49, 76, 79 or 92

Procédures en vertu des articles 45, 49, 76, 79 et 92

(10) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which:

(10) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien :

(a) proceedings have been commenced against that person under section 45 or 49; or

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

(b) an order against that person is sought by the Commissioner under section 76, 79 or 92.

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 79 ou 92.

ANNEX 3

Competition Act, RSC 1985, c C-34 **(as it appeared June 22, 2023)**	***Loi sur la concurrence, LRC 1985, ch. C-34*** **(dans sa version du 22 juin, 2023)**
PART VI	**PARTIE VI**
Offences in Relation to Competition	Infractions relatives à la concurrence
Conspiracies, agreements or arrangements between competitors	**Complot, accord ou arrangement entre concurrents**
45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges:	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :
(a) to fix, maintain, increase or control the price for the supply of the product;	**a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	**b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.
Penalty	**Peine**
(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a	**(2)** Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende

fine not exceeding $25 million, or to both.	maximale de 25 000 000 $, ou l’une de ces peines.

ANNEX 4

Competition Act, RSC 1985, c C-34 **(as it appeared on March 9, 2010)**	***Loi sur la concurrence, LRC 1985, ch. C-34*** **(dans sa version du 9 mars, 2010)**
Conspiracy	**Complot**
45 (1) Every one who conspires, combines, agrees or arranges with another person	**45 (1)** Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :
(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,	**a)** soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;
(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,	**b)** soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;
(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	**c)** soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;
(d) to otherwise restrain or injure competition unduly,	**d)** soit, de toute autre façon, pour restreindre, indûment,

la concurrence ou lui causer un préjudice indu.

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-445-20**
STYLE OF CAUSE:	STEPHANIE DIFEDERICO v. AMAZON.COM, INC. ET AL.
PLACE OF HEARING	TORONTO, ONTARIO
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JUDGMENT AND REASONS ISSUED:	AUGUST 28 , 2023

WRITTEN SUBMISSIONS BY:

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